# AC – Trust Kant JF22

## 1AC

### Framework

#### I affirm.

#### The value is justice, which is giving each their due as “is unjust” is the evaluative phrase in the topic.

#### Justice is only possible under a unified rule of law

Waldron 96

Waldron, Jeremy [Professor of Law and Philosophy at the NYU School of Law]. “Kant’s Legal Positivism” Harvard Law Review, May, 1996, Vol. 109, No. 7 (May, 1996), pp. 1535-156

It is certainly not inappropriate to use force to achieve justice. But there is an affront to the idea of justice when force is used by opposing sides, confrontationally and contradictorily, in justice's name. The point of using force in the name of justice is to assure people of that to which they are entitled. But if force is being used to further contradictory ends, then its connection with assurance is ruptured. In such a situation, force is being used simply to represent the vehemence with which competing opinions about justice are held, and this use of force may well be worse than force not being put to the service of justice at all. Hence, there is the need for a single, determinate community position on the matter - one whose enforcement is consistent with the integrity and univocality of justice. Certainly, justice is affronted in another way if the position identified and enforced as that of the community (on, say, testamentary freedom) is morally wrong. But given the inevitable disagreement on that issue and given the symmetry, for all practical purposes, of the rival positions on the matter - each side is sincere, each side thinks that its view captures what is really just, each side believes that the other is objectively mistaken - there is no political way in which the prospect of this substantive affront can be precluded. All we can do, politically, for the sake of the integrity of justice is ensure that force is used to uphold one view and one view only - a view that anyone may readily identify as that of the community, whatever his substantive opinions on the matter. The integrity of justice, then, evokes the concept of positive law and the philosophical doctrine of legal positivism: law must be such that its content and validity can be determined without reproducing the disagreements about rights and justice that it is law's function to supersede.

#### This is a sequencing question- ensuring freedom comes prior to focusing on consequences. Otherwise, it justifies forcing people to act against their will

Ripstein, 9 -- Professor of Law and Philosophy and University Professor at the University of Toronto

[Arthur, "Force and Freedom: Kant’s Legal and Political Philosophy", Harvard University Press, 2009, accessed 1-14-22]

My aim in this chapter is to use the example of traffic laws to cast doubt on the very idea of balancing benefits and burdens, and to defend the idea that state power is only justified to create a system of equal freedom. I will not defend the implausible claim that speed limits or the timing and placement of traffic lights can be deduced from some index of freedom and appropriate facts. As I shall explain, the expectation that any alternative to balancing must aspire to some such claim is itself symptomatic of everything that is wrong with the balancing picture. Nor shall I join Michael Walzer in celebrating the claim that “the car is also the symbol of individual freedom.”11 Instead, I will argue that the state’s entitlement to make traffic rules is rooted in its obligation to provide the conditions of equal freedom.

On the view I will defend, the fundamental rationale for the exercise of the police power is to create a regime of equal private freedom. In order to do so, the state must create and sustain the systematic preconditions both of the exercise of private freedom and of the conditions of its ability to provide them. It can compel citizens to do their part in creating and sustaining a rightful condition. The provision of these conditions is a distinctive case of mandatory cooperation, which is subject to distinctive normative constraints. In providing roads, the state is entitled make people contribute, both positively and negatively, to their provision, and to regulate them based on a variety of considerations. None of this, I will argue, requires any assumptions about the state having any more general power to make life convenient, or to force people to contribute to cooperative arrangements on fair terms. Nor does it depend on the idea that, apart from the state, people have a basic obligation to participate in beneficial practices, or even those practices from which they benefit. I will argue instead that the state’s power reflects the fact that it is a public authority: its entitlement to obligate individual citizens reflects its obligation to act on behalf of the citizens as a collective body. The difficulties faced by the balancing picture are only compounded when it is joined to the common supposition that the state’s entitlement to bind its citizens must be aggregated out of obligations of individual citizens,12 by getting them to do things that they would have had fully formed and concrete obligation to do in the state’s absence.

Kant himself discusses neither one-way streets nor traffic lights, but he offers an account of the irreducibly public nature of mandatory forms of social cooperation, which follow from the role of the state as “supreme proprietor” of the land.13 Kant observes that the state, as supreme proprietor, is charged with the “division” of the land, rather than the “aggregation” of the state’s territory from antecedent private holdings.

I will argue that rather than being the main business of the state, limited only through important interests, questions about the allocation of benefits and burdens arise only within public provision of the preconditions of freedom. If a government must provide something, it must provide that thing fairly, which will normally mean equally. Governments do not have a general power to force people into forms of cooperation either by making some bear burdens for the benefit of others or by making people bear burdens because those same people have received benefits. Both of these ideas—the utilitarian idea that someone can be compelled to contribute whenever others will benefit, and the “principle of fair play” according to which people can be compelled to contribute to practices from which they benefit—are inconsistent with the idea that people are free to determine what their own purposes will be. Neither the benefit to others nor the fact that you yourself receive a benefit is sufficient to compel you to pursue an end that you do not share. However, public provision does not require any such principle.

#### Therefore, the criterion is respect for the rule of law. To clarify, I’m not saying that anything that follows from the rule of law is just. Instead, an action that fails to adhere to rule of law is unjust.

#### Prefer this criterion for 2 additional reasons.

#### First, rule of law is instrumentally necessary for a well-functioning society

Bingham 10

Baron Tom Bingham of Cornhill, KG, PC, FBA, was an eminent British judge who was successively Master of the Rolls, Lord Chief Justice and Senior Law Lord. He was described as the greatest lawyer of his generation, 2010, The Rule of Law, London: Allen Lane.

I think there are really three reasons. First, and most obviously, if you and I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty. This is not because bank robbers habitually consult their solicitors before robbing a branch of the NatWest, but because many crimes are a great deal less obvious than robbery, and most of us are keen to keep on the right side of the law if we can. One important function of the criminal law is to discourage criminal behaviour, and we cannot be discouraged if we do not know, and cannot reasonably easily discover, what it is we should not do. The second reason is rather similar, but not tied to the criminal law. If we are to claim the rights which the civil (that is, non-criminal) law gives us, or to perform the obligations which it imposes on us, it is important to know what our rights or obligations are. Otherwise we cannot claim the rights or perform the obligations. It is not much use being entitled to, for example, a winter fuel allowance if you cannot reasonably easily discover your entitlement, and how you set about claiming it. Equally, you can only perform a duty to recycle different kinds of rubbish in different bags if you know what you are meant to do. The third reason is rather less obvious, but extremely compelling. It is that the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties’ rights and obligations were vague or undecided. This was a point recognized by Lord Mansfield, generally regarded as the father of English commercial law, around 250 years ago when he said: ‘The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.’ In the same vein he said: ‘In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators [meaning investors and businessmen] then know what ground to go upon.’ But this is not an old-fashioned and outdated notion. Alan Greenspan, the former chairman of the Federal Reserve Bank of the United States, when recently asked, informally, what he considered the single most important contributor to economic growth, gave as his considered answer: ‘The rule of law.’ Even more recently, The Economist published an article which said: ‘The rule of law is usually thought of as a political or legal matter ... But in the past ten years the rule of law has become important in economics too ... The rule of law is held to be not only good in itself, because it embodies and encourages a just society, but also as a cause of other good things, notably growth.’ The article went on to acknowledge some dispute among economists about the strength of the connection between the rule of law and economic growth, drawing attention to China as an exception, but did not suggest there was no connection. Given the importance of this principle, we cannot be surprised to find it clearly stated by courts all over the world. In the House of Lords in 1975 Lord Diplock said: ‘The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it.’ He made much the same point a few years later: ‘Elementary justice or, to use the concept often cited by the European Court [the Court of Justice of the European Communities], the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly available.’ The European Court of Human Rights at Strasbourg has spoken to similar effect: [T]he law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case ... a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail . So too the Chief Justice of Australia, listing the practical conclusions held by Australian courts to be required by the principle of the rule of law: ‘the content of the law should be accessible to the public’.

#### Second, a shared intuition of moral theories reflect the idea that justice requires a sovereign

Nagel 5

(Thomas Nagel - University Professor of Philosophy and Law, Emeritus, at New York University, where he taught from 1980 to 2016. His main areas of philosophical interest are legal philosophy, political philosophy, and ethics). “The Problem of Global Justice”, Philosophy & Public Affairs Vol. 33, No. 2 (Spring, 2005), pp. 113-147 (35 pages) Published By: Wiley Philosophy & Public Affairs, NCS, DOA 1/15/22, <https://www.jstor.org/stable/3558011>

It seems to me very difficult to resist Hobbes’s claim about the relation between justice and sovereignty. There is much more to his political theory than this, of course. Among other things, he based political legitimacy and the principles of justice on collective self-interest, rather than on any irreducibly moral premises. And he defended absolute monarchy as the best form of sovereignty. But the relation between justice and sovereignty is a separable question, and Hobbes’s position can be defended in connection with theories of justice and moral evaluation very different from his. What creates the link between justice and sovereignty is something common to a wide range of conceptions of justice: they all depend on the coordinated conduct of large numbers of people, which cannot be achieved without law backed up by a monopoly of force. Hobbes construed the principles of justice, and more broadly the moral law, as a set of rules and practices that would serve everyone’s interest if everyone conformed to them. This collective self-interest cannot be realized by the independent motivation of self-interested individuals unless each of them has the assurance that others will conform if he does. That assurance requires the external incentive provided by the sovereign, who sees to it that individual and collective self-interest coincide. At least among sizable populations, it cannot be provided by voluntary conventions supported solely by the mutual recognition of a common interest. But the same need for assurance is present if one construes the principles of justice differently, and attributes to individuals a non–selfinterested motive that leads them to want to live on fair terms of some kind with other people. Even if justice is taken to include not only collective self-interest but also the elimination of morally arbitrary inequalities, or the protection of rights to liberty, the existence of a just order still depends on consistent patterns of conduct and persisting institutions that have a pervasive effect on the shape of people’s lives. Separate individuals, however attached to such an ideal, have no motive, or even opportunity, to conform to such patterns or institutions on their own, without the assurance that their conduct will in fact be part of a reliable and effective system. The only way to provide that assurance is through some form of law, with centralized authority to determine the rules and a centralized monopoly of the power of enforcement. This is needed even in a community most of whose members are attached to a common ideal of justice, both in order to provide terms of coordination and because it doesn’t take many defectors to make such a system unravel. The kind of all-encompassing collective practice or institution that is capable of being just in the primary sense can exist only under sovereign government. It is only the operation of such a system that one can judge to be just or unjust. According to Hobbes, in the absence of the enabling condition of sovereign power, individuals are famously thrown back on their own resources and led by the legitimate motive of self-preservation to a defensive, distrustful posture of war. They hope for the conditions of peace and justice and support their creation whenever it seems safe to do so, but they cannot pursue justice by themselves. I believe that the situation is structurally not very different for conceptions of justice that are based on much more other-regarding motives. Without the enabling condition of sovereignty to confer stability on just institutions, individuals however morally motivated can only fall back on a pure aspiration for justice that has no practical expression, apart from the willingness to support just institutions should they become possible. The other-regarding motives that support adherence to just institutions when they exist do not provide clear guidance where the enabling conditions for such institutions do not exist, as seems to be true for theworld as a whole. Those motives, even if they make us dissatisfied with our relations to other human beings, are baffled and left without an avenue of expression, except for the expression of moral frustration.

#### Thus, I affirm that the private appropriation of outer space is unjust because it does not respect the rule of law

### 1

#### Contention 1 is arbitrariness

#### Any act of appropriation is indeterminate absent a common understanding of property found in law

Waldron 96

Waldron, Jeremy [Professor of Law and Philosophy at the NYU School of Law]. “Kant’s Legal Positivism” Harvard Law Review , May, 1996, Vol. 109, No. 7 (May, 1996), pp. 1535-156

The main subject matter of justice and right in Kant's political philosophy is property - the possession and use of external material resources. For Kant, the concept of property, and the allied concepts of empirical and intelligible possession, are amenable to philosophical exposition. (He expounds them in the first seventeen paragraphs of the Metaphysical First Principles of the Doctrine of Right.) I will not bore the reader with the details; it is enough to say that, although the exposition is terribly convoluted, Kant does not indicate that he thinks the complexities of these concepts are the source of the disagreements we are trying to explain. Kant makes pretty clear, however, that the concepts he develops are likely to involve considerable difficulty and controversy in their applications. In a state of nature, to have property along Lockean lines or anything like it, people's rightful holdings would have to be based on a principle such as first occupancy. But occupancy, which Kant interprets to mean "taking control," is quite indeterminate: how do we correlate one's acts of control with an exact extent of land controlled? Besides, the question of how much exactly one comes to own when one takes control of a piece of land will be bound up in part with one's sense of the effect of one's action on others' situations. But it may be unclear how many others there are, or it may be a matter of dispute how many of all the others there are (everywhere) one is supposed to take into account. Inevitably, disputes will also arise about who is (or who was) the first occupant of a piece of land. That prospect is more or less unavoidable, given Kant's account of appropriation. To appropriate X is not only to take X under one's physical control, but to do so in a way such that one's right in X will be violated if, subsequently, another person uses or encroaches upon X even while the initial appropriator is not actually in physical control of X. In the state of nature, however, if one appropriates a piece of land and then wanders off, how is another to know whether the land has already been appropriated or is still available for first occupancy? (This problem is particularly acute in a theory like Kant's that does not insist on any mark of occupancy, such as labor.) Notice that these difficulties of application are not matters on which reason offers no guidance or matters to be settled by arbitrary stipulation, like the rule about which side of the road to drive on. Surely, of two people wrestling for control of a piece of land, one or the other was in fact the first occupant; surely, there is a right answer to the question of whether someone, in violation of the Lockean proviso, has taken more than his share. Moreover, the fact that people think there is a right answer will likely inspire each party to struggle vehemently for his view of the matter; in contrast, nobody fights very hard over questions like which side of the road to drive on. The trouble with the application of acquisition principles is not that, in theory, no right answers exist, but that there is no basis common to the parties for determining which answers are right.

#### No such unified legal system exists for allowing property rights to outer space; therefore, all private appropriation of space is unjust

Tronchetti 7

Fabio Tronchetti (International Institute of Air and Space Law, Leiden University, The Netherlands). “The Non-Appropriation Principle Under Attack: Using Article II of The Outer Space Treaty In Its Defence.” 50 PROC. L. OUTER SPACE 526, 530 (2007). JDN. <https://iislweb.org/docs/Diederiks2007.pdf>

However, it must be said, that nowadays there is a general consensus on the fact that both national appropriation and private property rights are denied under the Outer Space Treaty. Several ways of reasoning have been advanced to support this view. Sters and Tennen affirm that the argument that Article II does not apply to private entities since they are not expressly mentioned fails for the reason that they do not need to be explicitly listed in Article II to be fully subject to the non-appropriation principle8. Private entities are allowed to carry out space activities but, according to Article VI of the Outer Space Treaty, they must be authorized to conduct such activities by the appropriate State of nationality. But if the State is prohibited from engaging in certain conduct, then it lacks the authority to license its nationals or other entities subject to its jurisdiction to engage in that prohibited activity. Jenks argues that “States bear international responsibility for national activities in space; it follows that what is forbidden to a State is not permitted to a chartered company created by a State or to one of its nationals acting as a private adventurer”9. It has been also suggested that the prohibition of national appropriation implies prohibition of private appropriation because the latter cannot exist independently from the former10. In order to exist, indeed, private property requires a superior authority to enforce it, be in the form of a State or some other recognised entity. In outer space, however, this practice of State endorsement is forbidden. Should a State recognise or protect the territorial acquisitions of any of its subjects, this would constitute a form of national appropriation in violation of Article II. Moreover, it is possible to use some historical elements to support the argument that both the acquisition of State sovereignty and the creation of private property rights are forbidden by the words of Article II. During the negotiations of the Outer Space Treaty, the Delegate of Belgium affirmed that his delegation “had taken note of the interpretation of the non-appropriation advanced by several delegations-apparently without contradiction-as covering both the establishment of sovereignty and the creation of titles to property in private law”11. The French Delegate stated that: “…there was reason to be satisfied that three basic principles were affirmed, namely: the prohibition of any claim of sovereignty or property rights in space…”12. The fact that the accessions to the Outer Space Treaty were not accompanied by reservations or interpretations of the meaning of Article II, it is an evidence of the fact that this issue was considered to be settled during the negotiation phase. Thus, summing up, we may say that prohibition of appropriation of outer space and its parts is a rule which is valid for both private and public entity. The theory that private operators are not subject to this rule represents a myth that is not supported by any valid legal argument. Moreover, it can be also added that if any subject was allowed to appropriate parts of outer space, the basic aim of the drafters of the Treaty, namely to prevent a colonial competition in outer space 3 and to create the conditions and premises for an exploration and use of outer space carried out for the benefit of all States, would be betrayed. Therefore, the need to protect the non-appropriative nature of outer space emerges in all its relevance.

#### That links to the framework—ignoring the standing law would violate the rule of law

Waldron 96

Waldron, Jeremy [Professor of Law and Philosophy at the NYU School of Law]. “Kant’s Legal Positivism” Harvard Law Review , May, 1996, Vol. 109, No. 7 (May, 1996), pp. 1535-156

How we think about disagreement on matters of public concern will determine how we think about politics, and - because law is the offspring of politics - how we think about disagreement will determine, in some measure, how we think about law. For example, the members of a community may be divided on the question whether a testator should have the power to exclude a surviving child from the enjoyment of his estate. Imagine that some citizens, celebrating testamentary freedom, say that he should - it is, after all, his property that is passing by his will. Others say that he should not - once he is dead, the importance of respecting his arbitrary freedom diminishes in comparison to the importance of securing the welfare of his dependents. The issue is a political one not simply because the citizens disagree, for we disagree about all sorts of things - for instance, the virtues of the modern novel, the causes of the Punic Wars - on which no political decision is necessary. The issue of testamentary power is a political onebecause those who disagree on the merits nevertheless agree that the community needs to reach some determinate resolution. Testamentary freedom is not something on which we can agree to differ. Or, rather, we can agree to differ in our opinions, but it is necessary, all the same, that we arrive at some position on the issue to be upheld and enforced as the community's position on the testamentary powers of property owners. Because we disagree about which position should stand and be enforced in the name of the community, we need a process - a political process - to determine what that position should be. And we need a practice of recording, respecting, and implementing positions of this sort by individuals and agencies acting in the name of the community - a practice that is resilient in the face of disagreement with the community position on the part of those entrusted with its implementation. If we call the position that is identified as the community's position the law of that community, then the resilience of the practice to which I have just referred is what we mean by the rule of law. Understood in this way, the rule of law is not simply the principle that officials should apply the law even when it disserves their own interests. It is the principle that an official should enforce the law even when it is in his confident opinion unjust, morally wrong, or misguided as a matter of policy. The enactment of the law in question is evidence of the existence of a view different from his own concerning the law's justice, morality, or desirability. In other words, the law's existence, together with the official's own opinion, indicates moral disagreement in the community. The official's failure to implement the law because he believes that it is unjust, or his decision to do something other than what the law requires because he believes that action would be more just, is tantamount to abandoning the very idea of law - namely, the very idea of the community taking a position on an issue on which its members disagree. It is a reversion to the situation in which each person acts on his own judgment and does whatever seems right or just to him. Would this result be such a calamity? It may be, if people's moral judgments are irrational, ill-thought-through, uninformed, or biased. But even assuming that each person does his best to ascertain what is really right or really just, there will still be problems to the extent that different persons arrive (however scrupulously) at different conclusions.

#### Alternative theories of property cannot solve the problem of indeterminateness

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[Arthur, "Force and Freedom: Kant’s Legal and Political Philosophy", Harvard University Press, 2009, accessed 1-14-22]

Kant’s understanding of the basic range of public powers is austere in one sense, yet permissive in another. The only powers a state may exercise are ones that fall under various aspects of its duty to create, maintain, and improve a rightful condition, and it may only do so in ways consistent with each citizen’s innate right of humanity. Yet the range of powers that can actually be exercised under that duty seems capacious and openended. The constraint that all powers be derived from the duty to create a rightful condition—parallel to the way that the power of a parent to “manage and develop” the child is derived from the duty to raise the child into a responsible being—is a real constraint, but it does not preclude most of the familiar activities of modern states. Even substantial changes can be understood as falling under the duty: fundamental land reforms that abolish forms of slavery or serfdom are the creation of a rightful condition. Even things that seem less directly related seem easy to accommodate to the Kantian account. We shall see in Chapter 9 that preventing private dependence underwrites a variety of public activities, and also that nothing in Kant’s account precludes overinclusive implementation. Kant makes space for even more state activity when he includes the state’s right to “administer the state’s economy and finances,”67 and still more when he suggests in Theory and Practice that when the supreme power “gives laws that are directed chiefly to happiness (the prosperity of the citizens, increased population and the like), this is not done as the end for which a civil Constitution is established but merely as a means for securing a rightful condition, especially against a people’s external enemies.”68 The only thing that is ruled out is organizing the state around private purposes. The only test imposed by the idea of the original contract is that it be possible to give public grounds of justification for such activities, that is, to relate them to the maintenance of a rightful condition.

The flexibility of the Kantian account on such issues reveals the underlying difference between it and both libertarian and utilitarian/egalitarian accounts. From Kant’s perspective, the apparently intractable disagreement between the two extremes has the classic structure of an antinomy: the disagreements reflect a premise that both sides presuppose. The premise in question is that the purpose of political and legal institutions is to approximate a moral result that is perfectly determinate, even if imperfectly known, independently of them. A version of the same antinomy lurks in disputes between libertarian and utilitarian/egalitarian theories of the morality of property. The Lockean libertarian supposes property rights to be morally complete and fully determinate without reference to political institutions, and regards the state as a remedy to disagreements that, at least in principle, have complete answers. The utilitarian or egalitarian rejects the idea that anyone could have a morally basic right to property, and thinks that rules governing the dominion of particular persons over particular objects can only be designed so as to bring about a morally desirable result that can be described without any reference to anything like rules. As we saw in our discussion of private right, Kant conceives of private rights fundamentally differently. Their structure can be articulated without reference to legal institutions, but they do not apply to particulars outside of a rightful condition. Outside of legal institutions, property cannot be acquired conclusively, property rights cannot be enforced coercively, and disputes about them have no resolution consistent with the equal freedom of the parties. Again, although it can be shown as a general principle of private right that a person who is not party to a contract is not entitled to sue on it, or that a person who was deprived of the use of something to which he or she has no proprietary or possessory right has no claim against the person who damages the thing, in most cases concepts alone will not decide a particular case. Both the Lockean libertarian and a utilitarian/egalitarian see legal rules as trying to match something that is completely determinate without any reference to legal institutions. The Kantian sees legal rules as making determinate something that is morally binding but by itself partially indeterminate.

In the case of public right, the parallel antinomy concerns the use of public power. Although the libertarian insists that public power can only be used in the minimal ways that citizens have actively authorized, and the utilitarian or egalitarian thinks that it can be used to bring about good results (perhaps subject to certain constraints), they share a premise according to which a public authority’s moral role is to bring about specific results that can be specified without any reference to a public authority. For the Lockean libertarian, the result is the protection of private rights to person and property, which are supposed to be fully determinate without reference to institutions charged with enforcing them. For the utilitarian or egalitarian, the morally relevant results are characterized differently and more broadly, whether in terms of welfare, prosperity, or a certain pattern of distribution. The structure of the account, however, is exactly the same: institutions are justified only insofar as they bring about results that can be specified without any reference to them.

The Kantian approach rejects the common premise, and understands public right as requiring institutions in order to give effect to the structural features of a rightful condition. The public purposes are contained in the idea of a rightful condition, but so, too, is the requirement that properly constituted public authorities determine how to implement them. In so doing, public officials have no alternative but to exercise judgment about the significance to attach to competing considerations, subject only to the constraint that they make only laws that the people could impose upon themselves.

### 2

#### Contention 2 is cooperation

#### Appropriation makes space conflicts inevitable because property rights are indeterminate in outer space- that creates rivalrous competition and congestion

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[Hope M., B.A., Smith College; L.L.B., Yale, "The Public Trust Doctrine, Outer Space, and the Global Commons: The to Call Home ET", Syracuse Law Review, Vol. 69, No. 2, 2019, p. 191-262, <https://scholarship.law.georgetown.edu/facpub/2201>, accessed 1-14-22]

III. PROPERTY IN OUTER SPACE

“Space law must take into account private needs and build on private opportunities; to do this, it must embrace the principle of private property.”215

In our legal system, there are three types of property ownership— private, public, and communal.216 Private property usually involves a single owner, either “a legal person like a corporation” or “a natural person.”217 Public property, on the other hand, is owned by the state or its agents, while “common property” usually involves at least two entities who “hold the property in question either as joint tenants or as tenants in common.”218 If neither of these situations is involved, the property may be “characterized as null property, open-to-entry property, or res nullius, and the resources covered by these arrangements are open to use by one and all without restrictions.”219

The debate over the property ownership provisions of the OST and the Moon Treaty is between private and common ownership with commercial interests favoring the first, and those concerned with assuring the sustainability of outer space resources and equitable access to them favoring ownership in common.220 This Part explores these two types of ownership in the context of outer space,221 identifying their benefits and flaws before concluding that considering outer space as common property owned by the citizens of the globe is more closely aligned with overarching international principles of how space should be managed.222

At its heart, the debate about property type is about rights in that property. Property rights, like any other right, are “social artifacts.”223 They are neither fixed nor assumed, and may “vary from one society to another and over time within the same society.”224 They consist of “bundles of rights that can be and often are separated or combined in complex ways.”225 Some forms of property management, like custodial or stewardship management, allow for disaggregating those bundles.226

At a minimum, these bundles include possessory rights or the entitlements of ownership per se, usufructuary rights or rights to make use of property in specified ways, exclusion rights or rights to prevent others from using property without permission, and disposition rights or rights to dispose of property according to the wishes of the owner.227

Some of these rights, such as exclusion rights, the right to prevent access to or use of the property, and disposition or alienation of the property, may be problematic in outer space under international law, as discussed in Part IV.228

Possessory rights, a stick in the property rights bundle, can be “subdivided.”229 Some of the ways this can be done are discussed in Part VI and are worth considering in the context of outer space.230 “[E]ven relatively full bundles of rights are not unlimited or unrestricted.”231 Imagining property regimes of less than full and unimpeded ownership in outer space is conceivable, as is altering the structure of property rights to eliminate or lessen perverse incentives, like competition, from the implementation of those rights.232

For private property rights to emerge out of a common property regime or from null property where there is no ownership, like outer space, “cost-effective technologies for measuring, monitoring, and enclosing private property must emerge” to enable the claiming and transferring of “identifiable units of the resource.”233 If there is no private rights technology or “the distributional cost hurdle is too high, private property rights cannot emerge because the transaction cost wedge is simply too large.”234 Instead, “political or regulatory property rights will emerge.”235 While property rights are continually created and abandoned, depending on economic conditions, the act of defining property “has a high fixed cost element,” such as the cost of establishing and defending boundaries, which can have an effect on the emergence of property rights.236

One of the problems facing the creation of private property rights in outer space is the emergence of technology to define those rights in an area that is without static geographic and political boundaries.237 Another problem is how to grant, let alone enforce, those rights without violating international space law that bans the appropriation of outer space and its resources. So, the presence of potential entrepreneurs eager for the development of that technology, like Bruce Yandle and Andrew Morriss’s cattlemen of yore and the development of barbed wire, may not stimulate its production because its application would conflict with international prohibitions.238

Robert Ellickson suggests that “bottom-up, somewhat ad hoc property systems can [emerge and] reproduce most or all of the benefits of formal property law with a minimum of economic investment, procedure, and social disruption.”239 “Informal governance, like formal regulation, can ‘privatize’ [CPRs]”; Zachery Arnold points to “the ‘lobster gangs’ chronicled by James Acheson” as a “classic example of informal privatization.”240 Elinor Ostrom writes about how communities under the right “sociopolitical conditions” can protect valuable CPRs from over-consumption or damage.241 But, none of these approaches appears appropriate for circumstances in outer space where small groups are unlikely to form around CPRs or where communication among entities will be intermittent at best, making any sharing of informal management approaches unlikely.242 With this as background, the Article describes what space might look like under the two basic property regimes—private ownership and ownership in common.

A. Space Under a Traditional Private Property Regime

Private property is the cornerstone of American ideals and “a foundation of the Constitution as well as its philosophical precepts.”243 Indeed, “private property—and individual ownership specifically—runs throughout the DNA of this Nation.”244 Private property is often considered a driver of our economy because it creates incentives for investments in new technology and resource development, both of which are in play in the development of outer space.245 Property ownership can also encourage people to care about their property, protect adjacent land owners from the external effects of activities undertaken on their property, and assure its sustainability for future generations.246 Selfinterest can motivate a property owner to preserve their property to attract future buyers.247 To Richard Posner, the value of possession lies in its “economic efficiency” because it “tends to allocate resources to those persons best able to use them productively, for they are the people most likely to be willing to incur the costs involved in possession.”248 Possession of property puts the rest of the world on notice of that possession.249 While possession is most commonly understood as physically holding onto an object, a more modern view sees it as a “form of control.”250

But, private property can also “enhance income disparity, exacerbate[] economic tensions among individuals, and consolidate[] power among the one percent.”251 M. Alexander Pearl calls property privatization “a black hole focused solely on centralization of power and economic wealth without regard to the sustainability of an essential resource or the communities that depend upon its continued existence.”252 Hanoch Dagan goes further, quoting Eric Posner and Glen Weyl, by saying,

The key remedy for this predicament is to eradicate the institution of private ownership. Since “private ownership of any asset, except homogenous commodities, may hamper allocative efficiency,” we need to reconstruct markets so they are “competitive by design.” More precisely, we must discard private property and adopt in its stead a regime that partly transfers property’s “two most important ‘sticks’”— the right to use and the right to exclude—”from the possessor to the public at large.”253

When the value of a resource is increasing, it is more likely to be privatized so that the entity responsible for developing it can “fully capture the resulting benefits.”254 Indeed, a movement from common to private property occurs when the efficiency gains from private property are more than the costs of creating and maintaining it, such as “the basic costs of exclusion (fences, guards, and so on) and the extra vigilance needed to deter interlopers from absconding with rising-value resources.”255 This balancing of costs and benefits may be irrelevant in outer space, as the costs of establishing private property in the first place would be huge, and the complexity and cost of technological innovations called for in outer space would be magnitudes greater than what is required on Earth.256

1. The Positive and Negative Features of Private Property

Many believe that transporting the concept of private property to space should cause no concern; in fact, they view it positively.257 “By guaranteeing rights in extracted minerals taken from space, private industry could usher all of humanity into a new technological era.”258 Among the advantages of private property ownership in space is the “reduc[tion] of wasteful use” and the right to transfer alienability to others, which “would compensate for positive externalities, thereby creating added incentive to productively develop space.”259 Private property would also enable colonization of celestial bodies like the moon.260

In the absence of private ownership, there is the possibility that “each individual developer will seek to maximize his or her own gain by extracting as much value as quickly as possible without regard to the effect on the communal resource.”261 The President’s Commission on Implementation of U.S. Space Exploration Policy found that although the idea of private property in space is complicated because of national and international legal issues, it was imperative that they be addressed early in the process, “otherwise there will be little significant private sector activity associated with the development of space resources, one of our key goals.”262

For those who seek development of space resources, “a reliable property rights regime will remove impediments to business activities on these bodies and inspire the commercial confidence necessary to attract the enormous investments needed for tourism, settlement, construction, and business development, and for the extraction and utilization of resources.”263 The resources supporting private space mining companies are essentially worthless if the companies have no legal right to the resources they have mined.264 “Without the legal right to use water and hydrogen mined from celestial bodies, and to alienate platinum group elements, the potential profitability of private space expeditions collapses along with the goals of deeper space exploration and settlement.”265 The lack of a stable private property regime in outer space also means that space settlements will not be able “to claim sufficient land to yield enough of the only ‘product’ the settlement can sell profitably enough to guarantee its survival.”266 The strong belief is that unless private property rights in outer space and its resources are recognized, commercial enterprises will be unable to sustain any type of successful commercial activities in outer space.267

The absence of “‘security derived from ownership and sovereign control, [means that] entities that might be interested in the development of space resources will be reluctant to undertake [the] expensive and risky path’ implicit in all space travel”268 without some return on their investment.269 In all likelihood, such a return would be “in the form of the right to exploit limited areas of space and in proceeds from the sale of space resources.”270 This uncertainty arguably leaves a large “legal void, a wasteland of indeterminacy and instability.”271 According to Reinstein, “Unless people and nations are encouraged to exploit the riches of space, humanity will never know their benefit. And the more we are able to exploit, the more humanity stands to benefit. If commercialization is to be successful, space law must encourage investment in outer space development.”272

But, recognition of private property claims by the United States or by any other country could violate Article II of the OST’s prohibition against the national appropriation of space resources, including the surface of celestial objects.273 “[E]ven well-crafted domestic legislation that carefully addresses international law issues would create a significant risk of frustrating the explicit terms of the Outer Space Treaty, the intent and purpose of the treaty, or both.”274 No nation, including the United States, can independently alter the current international legal framework governing activities in outer space.275 And amending the OST to strike the language is unlikely, since the ban against appropriation of property in outer space is a “fundamental tenet of the treaty.”276

Coffey believes that

full ownership rights further [violate] the OST by disregarding the concerns of developing nations. If lunar real estate were put on the market, only the wealthy, developed nations and their citizens would be able to purchase it. If developing nations tried to purchase land later when they could afford it, they would be at a disadvantage because the prime locations are likely to be taken and the land’s current owners could demand whatever price they wanted. This could perpetuate current disparities of wealth and resources on Earth to the [m]oon and outer space.277

This would be in violation of the Treaty’s intent as expressed in Article I that outer space and its resources shall be the “province of all mankind.”278 Ownership of space real estate could also lead to speculative purchases, the goal being not to develop the property, but to hold it until market conditions are more favorable, and then sell it for a large profit— again, leading to the exclusion of poorer nations from the market.279 In all likelihood, the international community would react unfavorably to “a private property regime in outer space” because it would be perceived as benefiting large space-faring nations, like the United States and Russia, “at the expense of nations that do not have such capabilities.”280 But restricting ownership to anything less than fee simple absolute, like a lease or a license,281 means that the rights-holder could not alienate their property in any way, which decreases any significant incentive to acquire the right in the first place.282

2. The Rule of First Possession

The “most extreme proposal” with respect to implementing a property regime in outer space is to apply “first possession rules.”283 Under these rules, a country could claim territory it discovered, and then decide whether “to open up settlement in its new territory to its own citizens or to the international community as a whole.”284 Within its own territory, the discovering nation’s sovereignty “would extend to its outer space territory, where it could govern as it pleased.”285 Such an approach would directly conflict with international space law forbidding countries from appropriating outer space or its resources.286 MacWhorter also worries that a first possession rule in space could devolve into “a space race and colonialism in a situation that requires limitation and prudence,” and would be difficult to sell to other nations, especially non-space faring ones.287 If the rules were applied to commercial enterprises, without a “centralized mechanism for demarcating the property”288—such as a sovereign289—the inevitable result would be disputes among putative property owners, like what happened in the West during the homesteading era.290 Reinstein agrees: “If the rule of ownership was no more than ‘first come, first served,’ with ownership going to the first person to grab a celestial body, an unmitigated land-rush would ensue.”291 But MacWhorter also believes that limited property rights under a first possession rule might be an “appropriate first step,” if, for example, the property claim extended no further than to the claimed materials brought back to Earth.292

Those who are concerned that less technically adept nations would be severely disadvantaged by a property rights regime that is premised “on the ‘right of [first] grab,’ the first-come, first-served theory of property acquisition,” oppose such an approach.293 “By the time space capable nations develop the technological prowess and capital reserves to fund meaningful development of outer space, the earlier space-faring nations [and their citizens], left unchecked, might already have locked up the most accessible and valuable resources.”294 This would carry forward current disparities in global wealth distribution into the “Space Age.”295

The argument against a right of first possession gains salience from the fact that prior wrongs inflicted on less developed countries may be the reason they are not “space-capable.”296 This inequitable situation would persist, as those who profit from private property rules like the right of first possession will have the political ties, money, and understanding of the “rules of the game” to prevent their reform.297 An additional problem with the proposal is its enforceability. The fact that outer space is infinite makes it more difficult to “police” and to enforce the various treaties that apply to it.298 In outer space, “a breaching private party could pursue its interests outside the scope of such an agreement with relative impunity before it was discovered by the relevant international authority.”299

3. Less than Fee Ownership

There are less than fee ownership property regimes that can give the holder of a defeasible fee all the rights of an owner with complete title to the property, except the right to alienate it.300 Thus, “leaseholds, licenses, reversionary interest, easements, and covenants” might work well in outer space without violating international laws.301 There are also three types of defeasible fees that might be useful in outer space.302 “Defeasible fees, unlike fee simple absolute,” might convey property to a company, but are encumbered by an “automatic reversion or right of entry interest.”303 The first of these is a “fee simple subject to condition subsequent.”304 These conditions, “if triggered, would revert the realty back into the control of the multinational community.”305 So to the extent space resources have been appropriated, the withdrawal is not permanent.306

Then there is a “fee simple determinable,” which is like a fee simple subject to condition subsequent, “except that a fee simple determinable creates an automatic reversion to the grantor upon the occurrence of the condition—the grantor need not assert the right of reverter in order to reestablish possession of the property.”307 A third type of defeasible fee is a “fee simple subject to executory limitation[, which] reverts ownership upon the occurrence of a specified event or condition not back to the grantor, but to an heir or third party.”308 In each of these situations, a fee simple is less than absolute because it can revert back to the grantor or a third party if some later condition occurs.309 In the case of development of outer space resources, examples of later changes in circumstances that could revert title to the grantor might be those that damage the resource or make its continued development non-sustainable, or the developer’s violation of international law or any terms regulating or otherwise limiting their actions.

Leases and licenses are additional examples of impermanent types of property transfers.310 While a lease transfers exclusive possession of property from a grantor to a grantee, the transfer is only for a limited period of time; a license does not transfer any property and merely allows one party to use property that is managed and controlled by another party.311 Then there are easements, which “are rights, conveyed with the property.”312 Easements generally allow the property owner who owns the transferred property to continue to make some specified use of it.313 A negative easement, on the other hand, allows the entity that transferred property to prohibit the person who received it from using it in a specified way.314 Covenants are found in property conveyances and may prevent the grantee from using the property in some specific way.315

In each situation, not only is less than a full fee interest in property conveyed, but that interest can be restricted in a multitude of ways.316 In some situations, when the restrictive conditions are not complied with, the property can revert back to its original holder; in other cases, the reversion is automatic if conditions contained in the grant occur.317 But, each situation is predicated on some entity owning or holding the property in question, which would violate the terms of international space law unless the entity was some international authority.318 An international organization could establish specific rules governing activities in outer space, oversee their implementation, and enforce them.319 The International Seabed Authority (ISA), established by UNCLOS, could serve as a model for such an authority.320 The ISA was established in 1994 and since then it has issued new regulations governing exploring and prospecting for marine mineral resources and has contracted with seven nations granting them exclusive fifteen-year prospecting rights.321

However, “[t]here are drawbacks to forming a new international body to oversee the exploitation of space resources.”322 They can be expensive to establish and support.323 Non-spacefaring nations might not want to invest money in a venture which might “freeze them out of the decision-making process and put them at a disadvantage if they someday are able to participate in lunar missions.”324 There are the inevitable questions that arise whenever a new international governing organization is created, such as whether it should be under the authority of the United Nations or be completely independent, and how power should be allocated between spacefaring nations and developing countries without the expertise of money to venture into space.325 Further, there is an underlying equity question about spending money to create a new administrative authority.326 That authority will spend money that might otherwise have helped poorer countries develop the capacity to participate in outer space directly.327

An alternative to creating a new entity and new laws to administer a private property system in outer space is to extend terrestrial property law to outer space.328 Coffey proposes dividing the ISS between participating nations and then allowing each participant nation to apply its law to its assigned portion.329 But, this alternative suffers from some of the same flaws that establishing a centralized authority suffers—namely, it allows the powerful countries to control activities in outer space, specifically access.330 It allows those countries to collectively “set precedent for property rights in space instead of establishing formal international laws that the international community agrees upon.”331 The proposal “disregards the ‘common heritage’ provision of the OST,” because it completely excludes developing nations, who likely are not participants in the ISS, and provides them with no benefits from resources derived from space unless they eventually become technically proficient.332 Allowing countries to dictate any agreement that governs behavior in outer space also presents a risk that a country may be excluded from participation for unrelated reasons, like “diplomatic problems between the nations, unwillingness to share equipment and resources, or pressure from other members.”333

Thus, while establishing a private property regime in outer space might encourage development of celestial resources, it is hard to design a way around the ban against appropriating property and to establish a system that is both workable and protects the interests of less developed countries.

B. Space Under a Commons Property Regime

This Section discusses what about space makes it more like a commons than private property. Indeed, early space treaties treated space as though it was a commons.334 But, like private property, commons also have negative features that may be problematic in space, and simply declaring something a commons does not dictate the rules under which it should be managed. When various commons management approaches are tried, like the law of first possession under a private property regime, they are also found wanting.335

1. Early Treaties and Analogous Areas of the Globe

Early treaties, such as the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, which “requires space-faring nations to rescue stranded astronauts and wayward objects and return them to the appropriate country,” “envisions space as a commons beyond the possession and control of any one nation or people.”336 So too, the 1972 Convention on International Liability for Damage Caused by Space Objects, which “was established to resolve concerns over financial liability in the event that a spacecraft or other space machine causes damage to other space-based or [e]arth-bound assets,” and the 1975 Convention on Registration of Objects Launched into Outer Space, which “imposes a requirement that states maintain and submit to the [United Nations] thorough records of all objects launched into outer space.”337

Indeed, the 1967 OST “allocates the use of orbital space as if it were a common property resource”338 by declaring outer space an open access resource and banning appropriation by any country.339 Jared Taylor notes that “during the Treaty’s preliminary negotiations, one drafter analogized the absence of property rights in space to the absence of property rights in the ocean.”340 According to Taylor, later treaties, as well as the practices engaged in by spacefaring nations and private companies, “have confirmed the spirit of the Outer Space Treaty: space is a resource from which no nation or private entity can be excluded”341—a true open access commons.342

The 1959 Antarctic Treaty343 established “the foundation for international space law.”344 Like outer space, Antarctica and the oceans “presented a dilemma regarding habitation and defense. No nation occupied these territories and no nation desired a ‘race to own’ without a guarantee of who would emerge victorious.”345 Both the Antarctic Treaty and the Deep Seabed Hard Mineral Resources Act (the “Deep Seabed Act”)346 eschewed the concept of private property as well as the rights of first possession, in part, because the riches of those areas might allow developing nations to share in those riches as opposed to remaining economically marginalized.347 The Deep Seabed Act provides a model for how to regulate activities in a commons, like outer space, which it manages to do without privatizing the marine resource.348 As a result, it is “customary and accepted legal reasoning” to analogize between private ownership rights outside of national sovereignty, like those the Deep Seabed Act granted, and a “land claims recognition law for celestial bodies.”349

“The oceans and Antarctica . . . have much in common with the moon. They can be harsh environments that are difficult to reach to extract minerals [and are resource rich]. They are also designated international areas in which no nation has a sovereign claim.”350 The history of the earth’s oceans is a progression from “the domain of conquering armadas and privateers, when good legal title required as little as arbitrary lines drawn on a map,” to the concept of a “free sea” open to all countries, where no single country could “obstruct the use of that privilege.”351 International space law built on that history of open passage and “free sea.”352 The roots of the idea of granting non-space faring nations right of access can also be found in the 1958 Geneva Convention on the High Seas, which granted “landlocked states the right to sail the oceans by requiring their coastal neighbors to grant free passage over land and through territorial waters.”353 The legal framework of UNCLOS united “a broad spectrum of national and private interests into a shared agreement on the possession and usage of a seemingly borderless area of the global commons,” setting another useful precedent for outer space.354 However, UNCLOS, as a model, is impractical in “the vast reaches of outer space”—space is simply too vast and unlimited.355’

2. Common Property

Common property is property, the rights to which belong to more than one entity.356 Like private property, common property is endemic to life in the United States and always has been, even though many Americans view it ambivalently.357 There is considerable overlap between property held in common and that which is privately owned. Carol Rose suggests that collective, but privately owned property, like a tenancy in common, “has all the hallmarks of individual private property,” and, therefore, should not be seen as “fundamentally problematic or prone to inefficient use.”358 Additionally, the plasticity of the commons, demonstrated by the appearance of new commons, like the “knowledge commons, cultural commons, infrastructure commons, and neighborhood commons,” indicates that the concept might fit in outer space.359

A commons, or CPR, is frequently asserted to resist “privatization and/or commodification of those resources,” making it oppositional to a claim that something is private property.360 Sheila Foster and Christian Iaione’s suggestion that the “language of the ‘commons’” is often used to prevent the enclosure of public urban space “by economic elites,” resonates with the situation in outer space where wealthy countries or private companies want to claim or enclose space that the public owns.361 A claim that something is a commons acknowledges that “it is a shared resource that belongs to all of its inhabitants,”362 like outer space, which is the “province of all mankind.”363

But there are problems with the idea of declaring anything a commons, just like there are problems with declaring something private property. One problem with the commons approach is the inability to exclude members of the commons from using the resource.364 Lacking the right to exclude, a user of CPRs has no incentive to do anything other than fully exploit the commons because if she refrains, her co-users will.365 The result is an “open access resource vulnerable to the tragic conditions of rivalry, overexploitation, and degradation.”366 Another problem is that since under a commons property regime the rights and interests of the present generation dominate those of future generations, there is no assurance that the claims of an unidentified future generation will have any effect on how the commons is managed.367 There are also management difficulties.368 “Under a communal system, one member wishing to preserve the CPR for future generations’ use faces significant—and perhaps insurmountable—transaction costs of negotiating with all members of the community and paying them to use the resource suboptimally.”369 And, exiting a commons when group action causes individual harm, without destroying “social gains from cooperation,” can be difficult.370

There is no one-size-fits-all solution to these problems, and there may be multiple approaches to the development of solutions.371 In the search for solutions, various legal scholars have promoted variations on the concept of a commons, highlighting different features.372 Pearl proposes something he labels the “vital commons,” which includes CPRs that are “essential to human existence,” like air or water, and which may require a different approach to their management.373 Pearl’s vital commons has five key traits:

(1) the benefits of the CPR are internalized by nearly all members of a given massive population; (2) the costs of the CPR’s depletion are externalized among nearly all members of that same massive population; (3) augmentation or depletion of the CPR by one party affects the ability to use the CPR by another party within the same massive population; (4) the CPR itself is necessary for sustenance; and 5) damage or depletion of the CPR is non-remediable or extremely difficult to correct.374

Outer space has most of these traits—the potentially affected population is the entire globe; its resources, as far as is known, are not renewable; and the benefits and costs of development of outer space resources could be widely internalized or externalized.375 Additionally, restoration of any depleted resources in outer space may be difficult, and the impact on any of those resources may be so dire that its overuse and depletion could be “the epitome of apocalypse.”376 Finally, the vastness of outer space makes it difficult to subject it to “local” regulation—i.e., regulation by individual nations, which might opt not to regulate certain activities or to regulate lightly.377

Similar to Garrett Hardin’s open pasture, a major problem with a commons is that, “absent a system that allocates use rights, it is difficult, if not impossible, to restrain the impulse of users to pursue their individual self-interests, even when pursuit of those interests result in the degradation or exhaustion of the resource.”378 This is why, he argued, “‘freedom in the commons’—i.e., the lack of controls on individual behavior and self-interest—ultimately leads to its ruin and hence to the ‘tragedy.’”379 If the amount of use of a CPR or the intensity of that use is too much, then the result can be “congestion” that decreases the values of those resources.380 “Similarly, certain types of uses can create incompatibilities with many ordinary uses and conservation of such spaces, creating the conditions for rivalry or subtractability.”381

The unbounded nature of space and the variety and wealth of its resources is already attracting potential users with competing or conflicting ideas about how space should be used.382 Even if space was regulated, this “magnetic pull” to occupy and develop space may create rivalry among different users, especially if those users are drawn to the same areas of outer space.383 Unless the development of outer space resources is regulated, too many entities vying for the same resource could lead not only to congestion and rivalous behavior,384 but also to accidents and serious conflict—the conditions the space treaties are intended to avoid.385

The way to prevent a tragedy on land held in common is not necessarily its transformation to private property, which is one solution Hardin called for.386 Oran Young says “[i]nstitutional innovation,” like individual transferable quotas, “can create a form of private property and, in the process, alleviate the perverse incentives arising from the condition of non-excludability.”387 Creating public property or, in the alternative, using regulatory controls can also avoid the tragedy to the commons.388 The owners of a commons can also self-regulate to control the adverse effects of non-excludability.389

But as Young notes, while each approach has its plus side, each approach, like privatization, can also have negative effects.390 “Privatization can lead to outcomes that are grossly unfair[, and] [g]overnments [may] lack both the capacity and the will to manage public property well.”391 And common property approaches can lead to nonsustainable use of the property, and “work best in situations where the sense of community is strong and social pressure is capable of controlling behavior effectively”—characteristics uncommon in outer space.392

So, we have learned thus far that (1) the race is on to extract valuable resources from outer space and celestial bodies;393 (2) the international legal framework governing those activities is far from complete, inviting behavior that may be in the economic best interests of the actor, but not necessarily of the globe;394 (3) the international legal principles governing this behavior may be counter-productive when it comes to incentivizing economic behavior, but beneficial non-spacefaring countries;395 and (4) the push to privatize space, which is clearly a global commons, may lead to rivalrous behavior, which could dissolve into military activity and squeeze out poorer countries from the benefits of space, in direct contradiction of the goals of international space law.396

We have also learned that while privatizing open access areas, like outer space, is not necessarily good or necessary to avoid the tragedy of the commons (the over-utilization of common or shared pool resources), the features of a commons make it difficult to avoid that tragedy and to provide for future generations.397 So the solution may lie in crafting new property regimes, perhaps combining the best features of both approaches. It is to that task this Article now turns—the circumstances in which new forms of property might emerge and what they might be.

#### Space conflicts go nuclear- both fast and probable

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[Laura Grego, an expert in space weapons and security; ballistic missile proliferation, and ballistic missile defense, "Preventing Space War", Union of Concerned Scientists, 07-05-2015 <https://allthingsnuclear.org/lgrego/preventing-space-war>]

So says a very good New York Times editorial “Preventing a Space War” this week. Sounds right, if X-Wing fighters come to mind when you think space conflict. But in reality conflict in space is both more likely than one would think and less likely to be so photogenic. Space as a locus of conflict The Pentagon has known that space could be a flash point at least since the late 1990s when it began including satellites and space weapons in earnest as part of its wargames. The early games revealed some surprises. For example, attacking an adversary’s ground-based anti-satellite weapons before they were used could be the “trip wire” that starts a war: in the one of the first war games, an attack on an enemy’s ground-based lasers was meant to defuse a potential conflict and protect space assets, but instead was interpreted as an act of war and initiated hostilities. The games also revealed that disrupting space-based communication and information flow or “~~blinding~~” could rapidly escalate a war, eventually leading to nuclear weapon exchange. The war games have continued over the years with increased sophistication, but continue to find that conflicts can rapidly escalate and become global when space weapons are involved, and that even minor opponents can create big problems. The report back from the 2012 game, which included NATO partners, said these insights have become “virtually axiomatic.” Participants in the most recent Schriever war games found that when space weapons were introduced in a regional crisis, it escalated quickly and was difficult to stop from spreading. The compressed timelines, the global as well as dual-use nature of space assets, the difficulty of attribution and seeing what is happening, and the inherent vulnerability of satellites all contribute to this problem. Satellite vulnerability & solutions Satellites are valuable but, at least on an individual basis, physically vulnerable. Vulnerable in that they are relatively fragile, as launch mass is at a premium and so protective armor is too expensive, and a large number of low-earth-orbiting satellites are no farther from the earth’s surface than the distance from Boston to Washington, DC.

#### Instead of appropriating outer space, space should be placed into a public trust that manages an open access commons. This principle as a guiding legal doctrine is durable, flexible, and solves- it deflates the propensity for conflict and encourages sustainable development

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[Hope M., B.A., Smith College; L.L.B., Yale, "The Public Trust Doctrine, Outer Space, and the Global Commons: The to Call Home ET", Syracuse Law Review, Vol. 69, No. 2, 2019, p. 191-262, <https://scholarship.law.georgetown.edu/facpub/2201>, accessed 1-14-22]

V. HOW TO MANAGE PROPERTY IN OUTER SPACE

[W]e must accord the highest priority to efforts to solve or avoid the tragedy of the commons, the free rider problem, and the harmful impacts of side effects as they arise in connection with human/environment relations. For the most part, success in this endeavor will depend on our ability both to understand the sources of perverse incentives and to devise systems of rights and rules or, in other words, governance systems capable of altering incentives sufficiently to alleviate problems of this sort.425

The lack of property lines or boundaries in outer space make it difficult to delineate an individual claim to ownership, which could lead to overlapping and conflicting claims of development rights. Assertion of ownership rights over space and its resources conflicts with the ban on appropriation of outer space in the governing treaties and could lead to rivalrous conditions, perhaps even to war. Without a management system that assures equitable access to and sharing of celestial resources, any form of property regime runs the risk of violating the equitable principles that animate the OST and Moon Treaty—that space should be developed for the benefit of all mankind.426

The Article, to this point, has established that outer space is closer to a global commons than it is to private property. Yet, treating space as a global commons, as noted previously, poses a unique management problem: how to design a management approach that protects open access commons resources from overconsumption or damage while still incentivizing the development of those resources. Hardin believed that privatization of property was the best way to achieve efficiency and sustainability, Ellickson argued that informal norms were the best way to achieve “sustainable equilibrium,” and Ostrom promoted “a range of management techniques specific to that community in order to redirect the march towards total exhaustion.”427 While these ideas do not work in isolation for space, they each contribute in some way to a solution.

This Part identifies some management approaches designed to achieve those goals from the right of first possession rule to the application of norms, and evaluates each one for its suitability and ability to meet the dual goals of equitably and sustainably allowing the profitable development of outer space resources, as well as for its efficiency, fairness, cost effectiveness, and ease of implementation and enforcement. One conundrum is that

not only does one size not fit all, but also there are apt to be multiple approaches to the development of solutions. To take a single example, any effort to avoid or alleviate the tragedy of the commons must include the creation of some sort of exclusion mechanism or system for rationing available supplies of the relevant good(s) or service(s) among prospective users. But it turns out that there are distinctive ways to meet this condition under structures of private property, common property, or public property.428

This Part also shows that there are a number of solutions whose effects are comparable in terms of conservation, but are significantly different when criteria like “efficiency, equity, or robustness” are examined.429

A. Hybrid Governance Hybrid forms of governance are a way of managing property.430 An example of a hybrid governance regime is a “nested governance system,” in which one form of governance, self- or local governance, is nested in a larger, “centralized governance regime.”431 In this management scenario, the public authority, which acts as a designer and mediator of these co-designed systems, becomes a “collaborative institutional ecosystem [of] manager[s]” enabling “the networks, actions and reactions of others in the ecosystem [to be] independent and free [while] nested within the local government, consistent with a polycentric system.”432 Elected officials “assist, collaborate, and provide technical guidance (data, legal advice, communication strategy, design strategies, sustainability models, etc.) to enable themselves to manage, mediate, and coordinate the ecosystem.”433 The public official becomes a manager who enables and supports “parts of the ecosystem to allow it to ‘nest’ within the larger policy of the city.”434 Arnold calls this nested system of governance a “spatially hybrid property regime.”435 Given the different levels of government that might be involved in outer space— international, national, and even local—nested hybridity might become a reality. Another hybrid form of governing property, particularly commons, which contains separate, yet overlapping power centers is called “subsidiarity.”436 “Subsidiarity is the idea that power should be shared with ‘the lowest practicable tier of social organization, public or private.’”437 It is based on the impression that “governments look for allies at different hierarchical levels to facilitate the initiatives of proactive citizens who, individually or in groups, are willing to take direct care of the commons.”438 Space-faring nations could involve subunits of government in the actual management of space, like states, provinces, and towns, as well as special interest groups that might benefit from the development of space, like universities or space development enterprises.439 Foster and Iaione use horizontal subsidiarity as a means of engaging an active urban citizenry in maintaining the city for the collective welfare of its citizens.440 However, there is no reason to limit the principle’s application to the urban environment. Indeed, the goal of reorienting “public authorities away from the central state to an active citizenry willing to cooperatively govern common resources” seems equally useful in outer space where there are similar sub-governing units.441 Indeed, to the extent this approach breaks the tie between the space development industry and government and the industry’s push to realize the principle of first possession, subsidiarity as a management principle may hold some merit, if adjusted to meet the physical circumstances of outer space.442 And a nested system of governance or subsidiarity could involve interested parties in governance providing for more local resolution of conflicts, if and when there are regulations to apply. B. Application of the Right of First Possession Property Rule As noted previously, the space industry favors allowing ownership of property in outer space because it enables them to profit from their investment in the development of space resources and counter balances the risks of each venture they undertake.443 They argue that “[o]wnership rights would also provide incentives for expeditions to make the initial treks to the moon”444 and “would allow a free market to develop in property rights” on celestial bodies like asteroids or the moon.445 Critical to protecting those investments is the right of first possession.446 But, as also discussed earlier, “full ownership” of property in outer space, like the surface of an asteroid or the moon, violates Article II of the Outer Space Treaty, making any implementing rule a nullity.447 One approach around the ban, allowing application of the principle, might be to create “a real property rights system based on jurisdictional sovereignty” distinguishing “between absolute territorial sovereignty and functional or jurisdictional sovereignty.”448 An essential part of this proposal is to permit “private entities to occupy locations on a first-come, first-served basis so long as the occupation does not interfere with the activities of other entities.”449 The proposal “would permit private property rights in outer space once a private entity made effective use of the property for a period of one year, and continued to use the property in a peaceful way that allowed for free and open use of outer space.”450 The genesis of this proposal, according to Andrew Brehm, are the Homestead Acts, “which similarly encouraged private exploration and settlement in new frontiers.”451 The key elements of this proposal are the non-interference requirement and the diligence requirement.452 But, eventually, the land transferred to the homesteader, which was the incentive for undertaking the hard work in the first place.453 Other scholars have advocated using the General Mining Law of 1872 (GML).454 The GML not only gave the first discoverer of a valuable mineral the exclusive right to develop it, but also to the land around the discovery.455 Ownership of the land remained in the United States until the discovering entity perfected its claim, at which point the land transferred to the miner.456 At that point, the proposal runs afoul of the OST ban, just like using the Homestead Act as a model.457 Another reason the models will not work in outer space is that the United States originally owned the land before it was transferred to a private entity.458 As no sovereign owns land in outer space, there is no sovereign to transfer anything to anybody.459 Therefore, the right of first possession rule under any approach cannot get over the non-appropriation hurdle of the international space treaties, regardless of any other attributes they may have, and is unworkable. C. Establish Exclusive Economic Zones (EEZ) Like Those Under UNCLOS One approach that has captured the attention of some space law scholars is the idea of establishing development or enterprise zones on celestial bodies.460 Under this approach, existing organizations could allocate areas on celestial bodies for the construction of installations by different countries “with the understanding that a certain exclusive economic zone would radiate from that location.”461 Nations could then allow activities to occur in those zones and regulate them.462 “Alternatively, an international organization could divide celestial bodies into shares for each country to presently or eventually exploit, as opposed to a system of arising economic zones.”463 The EEZ proposal is not that different from traditional Euclidian zoning to the extent it “separates incompatible land uses and excludes harmful ones to avoid negative spillovers” from the co-location of conflicting uses.464 Zoning can also be used to “control the kind of users allowed to consume the commons by excluding those who are likely to take out more than what might be considered their fair share of the commons and leave everyone worse off, at least fiscally.”465 Separating incompatible land uses and excluding those who might over-consume the commons might be a useful approach in outer space, if the obstacles to creating it can be overcome, which they cannot. The fact that the proposal assures development rights for countries creates several problems. First, creating an exclusive zone from which some entities are excluded in all likelihood would “directly interfere with the free exploration and use principles in Article I of the Outer Space Treaty.”466 Second, the proposal’s administration requires the presence of an international organization, with its attendant problems.467 Third, given the difficulty tracking asteroids, monitoring and enforcing what happens within these zones may be very difficult.468 Fourth, depending on the perceived fairness of the zones and the allocation process, the proposal could lead to “discord” among various countries causing the possible dissolution of whatever civility norms had been established among spacefaring nations.469 The zoning proposals to date have focused on single uses, principally mining.470 It is possible, however, that as conditions on the moon, for example, become more useful for other uses, such as a place from which to launch ventures into deeper outer space or for extracting water for use in situ or elsewhere, there may be more than one activity occurring in a single zone. One way to avoid one activity interfering with the use by another is the use of “performance zoning,” an idea Lee Anne Fennell proposed to allow for the agglomeration of beneficial uses to produce positive impacts within the zone as well as beneficial spillover impacts.471 Another is to adopt the idea of “poolism,” the “co-production of goods” and adoption of “sharing practices” in a single space, like in a city.472 For such an idea to work, there would have to be a system of assembling uses in a single area of a celestial body, perhaps through performance zoning, and then occupants of that zone would have to be willing and able to collaborate.473 Assuming those obstacles can be surmounted, it is not clear how either of these approaches will overcome the exclusion problems associated with any proposal that excludes some users. D. Lotteries or Tradable Credits Having a lottery or an auction of “ownership rights,” or establishing a system of tradable credits like under the Clean Air Act’s acid rain provision, 474 or under the prior appropriation doctrine for allocating use rights to a quantity of water, might be ways to lessen the equitable problems with the prior proposals, none of which is sensitive to the interests of non-developed countries.475 While an auction theoretically would open up the market in development rights to others than the large spacefaring nations, in practice one would expect that only they would be able to effectively bid on and then secure those rights.476 However, the idea of tradable credits might work.477 Under an outer space trading system, participant nations, “regardless of [their] space-faring capacity, would be allocated a certain number of lunar mining credits. The credits would allow the holder to mine a certain tonnage of natural resources on the moon during a given period.”478 The credits could apply to the amount of the resource a participant was allowed to mine, regardless of location, or could be tied to a particular plot of land on a celestial body.479 Participants could buy and sell their credits to other participants.480 The openness of the process would create an incentive for all countries, regardless of their “spacefaring capacities.”481 Two additional features make this an appealing approach. The first of these, “tonnage limits,” will encourage countries to “make careful choices in where and what to mine,” assuring that valuable resources will still be there for countries that begin mining later, like developing nations.482 The other, a sunset provision, should prevent hoarding and speculative purchases.483 The approach “would allow developing nations to benefit from space exploration and exploitation fairly, without giving them control over an international regime.”484 Another advantage, other than determining the amount of allocable credits, is that there would be no need for an international central authority, because participants will run the market.485 Coffey proposes linking the concept of tradable permits to an exclusive economic zone so that “[w]hen a nation exercises its credits on land, that land will become the exclusive economic zone of that nation,” but would allow others to pass through the zone “as long as they do not disturb it or take resources from it.”486 However, her approach comes close to conflicting with the prohibition against appropriating celestial resources. Yet, there are potential problems even with this promising approach. For example, there is still a need for some international organization to allocate mining credits and to determine the methodology for any allocation, especially how to assure that non-spacefaring nations benefit in some way.487 Some form of international oversight will be needed to “ensure that nations adhere to the rules and do not exceed their allotted tonnage.”488 There is an unresolved question whether commercial mining enterprises would be able to buy credits not only from their own country, but from other countries.489 Then, there is the question of whether space resources may legally be considered personal property, requiring a new international agreement to clarify that “celestial resources may legally belong to those who extract them.”490 Tradable credits would also need to be anchored by a permit, again raising the need for an administering agency.491 To prevent over-consumption of permitted resources, a “timelimited” permit based on something like the prior appropriation doctrine giving the first appropriator superior rights over any later appropriator might be a way to curb over-consumption, but might disadvantage nonspacefaring countries who would come later to the market.492 Therefore, tradable development credits—absent Coffey’s modification—is largely consistent with international law, and could assure equitable distribution of the benefits of space development as well as provide sufficient incentives for development of these resources. However, the approach may be too administratively encumbered and difficult to enforce to be worth adopting. E. Norms as a Management Approach493 Norms are social rules that are promulgated and enforced by the community to which they apply.494 They come from communities and not from an outside organization or governmental entity.495 They provide “social meaning” for individuals in specific communities and thus provide the framework or understandings that guide personal behavior.496 They function as nonlegal rules or obligations that certain individuals feel compelled to follow despite the lack of formal legal sanctions, whether because defiance would subject them to sanctions from others (typically in the form of disapproval, lowered esteem, or even ostracism) or because they would feel guilty for failing to conform to the norm (a so-called internalized norm).497 Concern about esteem is especially important in close-knit groups, which makes norms unlikely to have any effect on the disparate entities that might engage in developing outer space.498 However, if conditions were appropriate for the activation of norms in outer space, it is conceivable that a norm favoring an equitable distribution of space resources could arise. Ellickson’s study of Shasta County, California, demonstrates how norms that originate within a close-knit community can efficiently manage a CPR.499 His theory revolves around the baseline rule that “property rights—be they communal or individual—should be clear and well-known among community members.”500 Besides the absence of any close-knit community in outer space, the fact that property rules in outer space are neither clear nor well known would seem to undercut the application of norms as a management tool in that environment.501 Thus, norms work as a means of controlling individual behavior when individuals see themselves as part of a particular group.502 When this happens, individuals identify with and assimilate the group norm, replacing individual behavior with “group-guided behavior.”503 To the extent that “[i]nformal norms and private ordering seek to identify circumstances that combine the benefits of the unmanaged commons— freedom—with the benefits of privatization—efficiency,” they offer “an appealing degree of autonomy, efficiency, and freedom.”504 But, as in the case of the users of Pearl’s “Ogallala Aquifer,” there is no “close-knit group” of actors in outer space, “no shared workday affairs[,] . . . and the population of users is too large to enable each to sanction the other.”505 Hence, norms as a management approach in outer space, while consistent with international law, inexpensive to administer, implement, and enforce, and capable of responding to inequitable situations, seem unlikely to take hold in that environment.

F. The Public Trust Doctrine (PTD) as a Gap Filling, Place-Holding Management Approach506

The PTD offers both an approach for managing an open access commons and a gap-filling tool until a regulatory regime is adopted.507 The doctrine is based on the idea that the “sovereign holds certain common properties in trust in perpetuity for the free and unimpeded use of the general public.”508 The public’s right to access and use trust resources is never lost, and neither the government nor private individuals can alienate or otherwise adversely affect those resources unless for a comparable public purpose.509 The resources the doctrine protects “have long been part of a ‘taxonomy of property’ [that recognizes] the division of natural wealth into private and public property.”510

“The doctrine places on governments ‘an affirmative, ongoing duty to safeguard the long-term preservation of those resources for the benefit of the general public,’”511 thus limiting the sovereign’s power on behalf of both present and future individuals.512 It directs the government to manage trust resources for public benefit, not private gain.513 It applies to private as well as public resources and is used to preserve the public’s access to CPRs.514 Government agencies have the non-rescindable power to revoke uses of trust resources that are inconsistent with the doctrine.515 This effectively places a permanent easement over trust resources that burdens their ownership with an overriding public interest in the preservation of those resources.516 However, trust resources can be alienated in favor of private ownership, if the alienation will still serve the public’s interest in those resources and not interfere with trust uses of the remaining land.517 The PTD, therefore, protects the “people’s common heritage,”518 just as Article 11 of the Moon Treaty protects outer space as part of the common heritage of mankind.519

The doctrine also appears to be infinitely malleable. Original uses of the doctrine were restricted to only that “aspect of the public domain below the low-water mark on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence,”520 and covered only traditional uses of those lands, like fishing and navigation.521 Over time, the scope and application of the doctrine broadened to protect more public resources and different uses.522 Thus, the doctrine expanded to protect new trust resources, such as dry sand beaches, inland lakes, groundwater, dry riverbeds, and wildlife,523 and passive uses of those resources, like scientific study.524 The original link to navigable water and tidelands disappeared.525 Supporters of the doctrine successfully advocated that it be applied to “wildlife, parks, cemeteries, and even works of fine art,”526 while arguing more recently its application to the atmosphere.527

A doctrine that imposes a perpetual duty on the sovereign to preserve trust resources, prevents their alienation for private benefit, assures public access to them, and can be invoked by anyone seems particularly useful as a management tool in outer space.528 The fact that public access to trust resources is so central to the doctrine makes it reflective, not contradictory, of international space law’s bar against appropriation of outer space and of the principle of space being the “province of all mankind.”529 It avoids the problems of alienation and exclusion associated with any of the management approaches associated with some form of private property and requires neither the creation of a new administrative authority nor the presence of a close-knit group of like-minded people.530 Members of the public, both rich and poor, can invoke and enforce the doctrine as easily as the sovereign.531 It is cost effective to the extent that no separate apparatus is required to implement it, and the doctrine has shown itself to be highly adaptable and innovative as different needs arise.532 It could also fill the gap in international law with respect to managing celestial property. Therefore, of all the management approaches studied here, the PTD seems the most suited to keep order in space until a regulatory regime is imposed.

However, the doctrine provides no incentives for development of trust resources; rather, it might be used to limit or curtail that development, making it an imperfect, perhaps even counter-productive solution by itself to the extent that such development might be beneficial.533 Modifying the doctrine to allow limited use of private property management approaches, like tradable development claims, might buffer that effect—a form of overlapping hybridity between one type of property, a commons, and a management regime from another, private property, enabled by application of the PTD.

CONCLUSION

“Only a legal system that accommodates both the human need for resources and the necessary preservation of mankind’s common heritage can fulfill these criteria.”534

The future is now with regard to the development of outer space and its resources—it is no longer a question of whether humans will engage in these activities, but how soon they will. Technically advanced countries and private commercial enterprises are probing outer space and preparing for landing on an asteroid or the moon to extract their resources.535 Speculators are selling deeds to the moon’s surface and preparing to exploit the tourism potential that space offers.536 But, the legal framework for managing these initiatives is almost nonexistent.537 International treaties came into being before all this activity began in earnest and national laws that might apply are stunted by jurisdictional quandaries like the absence of national boundaries in outer space.538 Thus, there is an urgency to figure out how to control what happens in outer space before its resources are irreparably damaged or permanently monopolized by powerful countries and individuals.

In the absence of regulation, much of the current debate centers on what property regime should be applied in outer space.539 The assumption is that by only allowing private property rights in space, countries and commercial enterprises will undertake the risks and costs of space development.540 However, unless international space law changes, it may prevent this from happening. If it changes, strong management controls will be necessary to prevent destruction or over-consumption of celestial resources, as well as monopolization and competitive behavior by participants, which could lead to hostilities and inequities.

This Article examines various private property regimes, including those of less than full fee ownership, to see if any would avoid the conflict with the international prohibition on appropriation of outer space and its resources. It concludes that none will because each retains the right to exclude and each is insensitive to the treaties’ equity concerns. In contrast, considering outer space to be common is consistent with international space law in both respects.

Hypothesizing that private property in outer space may yet prevail, this Article investigates different private property management approaches, such as the right of first possession, lotteries, and tradable development rights, to see if any would be cost effective, easy to implement and equitable, and would also prevent over-consumption, monopolization or the slide into rivalrous behavior. The Article concludes that each comes up short in some respect. Social norms as a management tool for property held in common, although compliant with international law, are also not up to the task. Instead, although ancient, the PTD, with its malleability, easy and cost-effective implementation and enforcement, non-consumption principle, and consistency with the goals that animate international space treaties, seems best suited to the task of protecting the public’s interests in the global commons that is outer space as it has done for centuries in Earth-bound commons. But, as its principal terrestrial use has been to protect trust resources from development, the doctrine needs some modification to encourage development of celestial resources. Hence, this Article suggests that modifying the PTD to allow the application of private property management tools, like tradable development rights, will not only allow development, but also will assure that when it happens, it will not be just profitable for a few, but will also be sustainable and equitable.

## Non-Ownership Counterplan

### Top Level

#### Perm Do both—shields the link to the net benefit

#### The counterplan avoids the DA, which means straight turns to the DA impact turn the counterplan

#### PTD in other areas exists now and thumps the link to the net benefit. These cards are decades old and the impact shoulda been triggered already.

#### They didn’t read spillover evidence and there’s no ecosystem in space, so there’s zero contextual link. These Adler cards are all from the policy topic on water resources. Do your own research and stop stealing from the policy wiki.

## Rule of Law DA

### Analytic

#### I’ll explicitly concede that PTD fails and destroys separation of powers—I’m just going for the internal link turn. Court constraints on the executive are bad and destroy heg.

### Internal Link Turn

#### Court deference to the military is key to crisis time flexibility; that solves national security threats—specifically terror and prolif

Yoo, 2012:

John, Harvard University, B.A. Yale Law School, J.D. Law professor at Berkeley, former official in the United States Department of Justice, “War Powers Belong to the President,” <http://www.abajournal.com/magazine/article/war_powers_belong_to_the_president>

The most important of the president’s powers are commander in chief and chief executive. As Alexander Hamilton wrote in Federalist 74, “The direction of war implies the direction of the common strength, and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.” Presidents should conduct war, he wrote, because they could act with “decision, activity, secrecy and dispatch.” In perhaps his most famous words, Hamilton wrote: “Energy in the executive is a leading character in the definition of good government. ... It is essential to the protection of the community against foreign attacks.” The framers realized the obvious. Foreign affairs are unpredictable and involve the highest of stakes, making them unsuitable to regulation by pre-existing legislation. Instead, they can demand swift, decisive action—sometimes under pressured or even emergency circumstances—that is best carried out by a branch of government that does not suffer from multiple vetoes or is delayed by disagreements. Congress is too large and unwieldy to take the swift and decisive action required in wartime. Our framers replaced the Articles of Confederation, which had failed in the management of foreign relations because they had no single executive, with the Constitution’s single president for precisely this reason. Even when it has access to the same intelligence as the executive branch, Congress’ loose, decentralized structure would paralyze American policy while foreign threats grow. Congress has no political incentive to mount and see through its own wartime policy. Members of Congress, who are interested in keeping their seats at the next election, do not want to take stands on controversial issues where the future is uncertain. They will avoid like the plague any vote that will anger large segments of the electorate. They prefer that the president take the political risks and be held accountable for failure. Congress’ track record when it has opposed presidential leadership has not been a happy one. Perhaps the most telling example was the Senate’s rejection of the Treaty of Versailles at the end of World War I. Congress’ isolationist urge kept the United States out of Europe at a time when democracies fell and fascism grew in their place. Even as Europe and Asia plunged into war, Congress passed the Neutrality Acts designed to keep the United States out of the conflict. President Franklin Roosevelt violated those laws to help the Allies and draw the nation into war against the Axis. While pro-Congress critics worry about a president’s foreign adventurism, the real threat to our national security may come from inaction and isolationism. Many point to the Vietnam War as an example of the faults of the “imperial presidency.” Vietnam, however, could not have continued without the consistent support of Congress in raising a large military and paying for hostilities. And Vietnam ushered in a period of congressional dominance that witnessed American setbacks in the Cold War and the passage of the ineffectual War Powers Resolution. Congress passed the resolution in 1973 over President Richard Nixon’s veto, and no president, Republican or Democrat, George W. Bush or Obama, has ever accepted the constitutionality of its 60-day limit on the use of troops abroad. No federal court has ever upheld the resolution. Even Congress has never enforced it. Despite the record of practice and the Constitution’s institutional design, critics nevertheless argue for a radical remaking of the American way of war. They typically base their claim on Article I, Section 8, of the Constitution, which gives Congress the power to “declare war.” But these observers read the 18th century constitutional text through a modern lens by interpreting “declare war” to mean “start war.” When the Constitution was written, however, a declaration of war served diplomatic notice about a change in legal relations between nations. It had little to do with launching hostilities. In the century before the Constitution, for example, Great Britain—where the framers got the idea of the declare-war power—fought numerous major conflicts but declared war only once beforehand. Our Constitution sets out specific procedures for passing laws, appointing officers and making treaties. There are none for waging war because the framers expected the president and Congress to struggle over war through the national political process. In fact, other parts of the Constitution, properly read, support this reading. Article I, Section 10, for example, declares that the states shall not “engage” in war “without the consent of Congress” unless “actually invaded, or in such imminent danger as will not admit of delay.” This provision creates exactly the limits desired by anti-war critics, complete with an exception for self-defense. If the framers had wanted to require congressional permission before the president could wage war, they simply could have repeated this provision and applied it to the executive. Presidents, of course, do not have complete freedom to take the nation to war. Congress has ample powers to control presidential policy, if it wants to. Only Congress can raise the military, which gives it the power to block, delay or modify war plans. Before 1945, for example, the United States had such a small peacetime military that presidents who started a war would have to go hat in hand to Congress to build an army to fight it. Since World War II, it has been Congress that has authorized and funded our large standing military, one primarily designed to conduct offensive, not defensive, operations (as we learned all too tragically on 9/11) and to swiftly project power worldwide. If Congress wanted to discourage presidential initiative in war, it could build a smaller, less offensive-minded military. Congress’ check on the presidency lies not just in the long-term raising of the military. It can also block any immediate armed conflict through the power of the purse. If Congress feels it has been misled in authorizing war, or it disagrees with the president’s decisions, all it need do is cut off funds, either all at once or gradually. It can reduce the size of the military, shrink or eliminate units, or freeze supplies. Using the power of the purse does not even require affirmative congressional action. Congress can just sit on its hands and refuse to pass a law funding the latest presidential adventure, and the war will end quickly. Even the Kosovo war, which lasted little more than two months and involved no ground troops, required special funding legislation. The framers expected Congress’ power of the purse to serve as the primary check on presidential war. During the 1788 Virginia ratifying convention, Patrick Henry attacked the Constitution for failing to limit executive militarism. James Madison responded: “The sword is in the hands of the British king; the purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist.” Congress ended America’s involvement in Vietnam by cutting off all funds for the war. Our Constitution has succeeded because it favors swift presidential action in war, later checked by Congress’ funding power. If a president continues to wage war without congressional authorization, as in Libya, Kosovo or Korea, it is only because Congress has chosen not to exercise its easy check. We should not confuse a desire to escape political responsibility for a defect in the Constitution. A radical change in the system for making war might appease critics of presidential power. But it could also seriously threaten American national security. In order to forestall another 9/11 attack, or to take advantage of a window of opportunity to strike terrorists or rogue nations, the executive branch needs flexibility. It is not hard to think of situations where congressional consent cannot be obtained in time to act. Time for congressional deliberation, which leads only to passivity and isolation and not smarter decisions, will come at the price of speed and secrecy. The Constitution creates a presidency that can respond forcefully to prevent serious threats to our national security. Presidents can take the initiative and Congress can use its funding power to check them. Instead of demanding a legalistic process to begin war, the framers left war to politics. As we confront the new challenges of terrorism, rogue nations and WMD proliferation, now is not the time to introduce sweeping, untested changes in the way we make war.