### Competition

#### Contention 1: Competition

#### Appropriation makes space conflicts inevitable- creates rivalrous competition and congestion

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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 rivalrous 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.

#### Competition and congestion make space war inevitable- only cooperative space governance solves

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[Kuan-Wei Chen; Ram S. Jakhu Acting Director, Institute of Air and Space Law, McGill University; Steven Freeland Emeritus Professor of International Law, Western Sydney University, "Space exploration should aim for peace, collaboration and co-operation, not war and competition," Conversation, 10-11-21, https://theconversation.com/space-exploration-should-aim-for-peace-collaboration-and-co-operation-not-war-and-competition-169317, accessed 1-14-22]

When the Soviet Union launched Sputnik 1 in 1957, it represented humanity’s first significant foray into the cosmos. Our imagination was opened to the wonder and lure of space for human endeavour as science fiction suddenly became science fact. A space arms race? At the time, the prevailing Cold War mentality contributed to suspicion and fear about what it meant to be in space, and resulted in the military roots of space technology and applications. John F. Kennedy famously stated that “if the Soviets control space they can control the earth, as in past centuries the nation that controlled the seas dominated the continents.” The Space Race, as it would become known, was characterized by fierce competition between the Soviet Union and the United States to achieve space superiority. Space technology and applications have evolved rapidly since Sputnik 1. Seven decades of space exploration and use have revolutionized the way the world communicates and greatly enhanced navigation on air, ground and sea. Space science has enabled us to monitor weather patterns, enhance land use and greatly advance our understanding of our own planet and our place in the universe. The desire to counter the space ambitions of others and to achieve superiority in space seems to have re-emerged. Despite the proliferation and commercialization of space activities, and the recognition of space as an essential part of every country’s economic, social and scientific progress, there is an alarming build-up of counter-space capabilities worldwide. Crowded space Even as private citizens can now crew space missions, military strategists are warning the competitive and congested nature of space will lead to an outbreak of conflict in outer space. Simmering tensions on Earth increase the risk that humanity may somehow lurch into an unimaginable space war, destroying economies and critical civilian and military infrastructure that have become so heavily space-dependent. In April, the International Committee of the Red Cross warned the international community that “the human cost of using weapons in outer space that could disrupt, damage, destroy or disable civilian or dual-use space objects is likely to be significant.” If a war in space takes place, the devastation might have long-lasting effects. Preventing colonialism However, despite assertions to the contrary, a space war is not inevitable. A notion that space is the new “warfighting domain” contradicts the six-decade-long understanding that space is a shared area governed by international law, where global interests converge to ensure its exploration and use for the benefit of all countries, irrespective of the degree of their economic or scientific development. The first space-focused UN General Assembly resolution recognized the desire “to avoid the extension of present national rivalries into this new field.” In 1967, a decade after Sputnik 1, diplomats came together during the height of Cold War brinksmanship to conclude the Outer Space Treaty. Today, 111 countries are parties to this phenomenal feat of international diplomacy, which underlines the common interest of all humanity to explore and use outer space “for peaceful purposes.” The treaty also affirms that space, including the moon and celestial bodies, are free to be explored and used by all states “on a basis of equality and in accordance with international law.” Departing from the traditionally reactive nature of international law, the Outer Space Treaty initiated the most significant principle of law for enhancing the common interest of all in space in order to thwart potential colonization ambitions in space. By declaring that outer space “is not subject to national appropriation” by any means, the Treaty established a foundational governance system based on mutual understanding and friendly relations. The race towards peace Since the 1980s, the UN General Assembly has every year passed a resolution on the prevention of an arms race in outer space (PAROS), the latest of which reminds the international community of “the importance and urgency of preventing an arms race” and calling on states to “refrain from actions contrary to that objective.” The prevention of an arms race in outer space is vital yet contemplates and may even legitimize increased military uses of space. A proper emphasis of the humanity of space and the preservation of its safety, stability and sustainability drives the need for peace in outer space. The Outer Space Treaty, and multilateral dialogue at the UN, have for decades provided the anchor to keep space free from conflict. There is no reason why this overarching legal and institutional framework for peace cannot continue to shelter us from irresponsible behaviour in space. The diplomatic language is shifting in this direction, as are initiatives to clarify international law as it applies to the military uses of outer space. Governments, industry stakeholders, civil society and the younger generations all have a role to play in promoting the benefits and common interests of humanity in space, drawing inspiration from the words of the first human in space, Soviet cosmonaut Yuri Gagarin: “There is room in space for everybody.” In an era when humanity is faced with climate change, a global pandemic and the rapid exhaustion of resources, there is no room for assertions of dominance and superiority. Rather, the common interests in peace that we all share are even more important, both on Earth and in outer space.

#### Congestion causes debris

Fabian 19 (Christopher; January 2019; B.S. from the United States Air Force Academy, thesis submitted in partial fulfillment of the requirements for a M.S. from the University of North Dakota, approved by the Faculty Advisory Committee and in coordination with Dr. Michael Dodge, David Kugler, and Brian Urlacher; University of North Dakota Scholarly Commons, “A Neoclassical Realist’s Analysis Of Sino-U.S. Space Policy,” <https://commons.und.edu/theses/2455/>)

b. Defect/Defect The ubiquity of space technology has also yielded the negative externality of overcrowding the space domain. Despite its seemingly unlimited size, there are a limited number of useful earth-centric orbits to optimize terrestrial coverage. It is projected that there are over 300,000 medium sized objects capable of causing catastrophic failure of a satellite upon collision currently in earth’s orbit.159 Of these objects, 20,000 are actively tracked by the comparatively robust space surveillance network (SSN) of the United States Air Force, only 1,000 are active payloads, and even fewer have maneuver capability.160 Recent trends indicate that the problem of orbital congestion will only worsen in the coming decades as the barriers to entry are reduced. Launch service cost is rapidly decreasing due to an increased number of service providers and technology revolutions such as reusable rockets. Also, the miniaturization and simplification of satellite payloads further reduces the cost and infrastructure needed to be a spacefairing nation.161 This is evidenced by the near doubling of state operated satellites from 27 in 2000 to over 50 in 2012, coupled with a near doubling in total space objects from 1997 to 2007.162 The accumulation of space debris is a vital concern to the sustainable development of the space environment due to the increased probability of conjunction between active payloads and all other objects that results from crowded orbits. This increase in collision probability occurs proportionally to the number of objects in a given orbital domain. The tripling of orbital debris projected to occur in the next century, due to routine use and accumulation alone, would cause a tenfold increase in the probability of collision. In the event of a catastrophic collision between two objects, the resulting debris cloud could cause a cascading effect. Each successive collision increases the probability of another occurrence in a given orbit until an instability threshold is reached. At this threshold, debris removal due to decay would be negligible compared to debris created by subsequent collisions. As the propagation of debris continues, the cost of launching a satellite would eventually outweigh the benefits received due to the probability of that asset being destroyed by errant debris, effectively rendering the given orbit unusable. This debris propagation model and the dangers associated with it are colloquially referred to as the Kessler Syndrome. Kessler asserts unstable regions of low earth orbit (LEO) currently exist and that, barring the addition of more debris, a major collision would occur once every 10-20 years. If debris doubles, as it has in the last decade, the collision rate would increase to 2.5 years. Although most models’ time scales are on the order of centuries, it is widely accepted that the current rate of debris accumulation will render critical orbits unusable unless immediate measures are taken to return stability.163 There is near universal acceptance of the danger space debris presents, yet little substantive action has been taken to solve the problem. Current debris accumulation and propagation models show that earth orbiting domains are finite resources. Continued unsustainable development moving forward may preclude future usage, making earth orbits rivalrous goods.164 Furthermore, orbital domains are made a non-excludable good by the OST which states, “Outer space… shall be free for exploration and use by all States without discrimination of any kind.”165 As a non-excludable public good, space succumbs to the tragedy of the commons where the privately beneficial strategy of space utilization differs significantly from the socially optimal strategy promoting orbital stability.166 Understandably, most analysis has focused on solving the problem of orbital instability by addressing the market failure responsible for debris creation. The current reasoning suggests that if actors creating space debris internalize the cost of their actions, a solution can arise. Proposed solutions run the gamut of ideologies from free market tax incentives, to command and control legislation, to restructuring orbital property rights. Scientific solutions have also been proposed, but technological feasibility and cost remain major problems. Furthermore, analogous environments susceptible to the tragedy of the commons have been examined in hopes that they may prove applicable to the problem of orbit instability.167 This analysis is ultimately useful if the problem is to be solved under nominal conditions, but there is an underlying problem that needs to be addressed before any of these proposed solutions can realistically be enacted.

#### That cascades into global nuke war

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Whatever the initial cause, the result may be the same. A satellite destroyed in orbit will break apart into thousands of pieces, each traveling at over 8 km/sec. This virtual shotgun blast, with pellets traveling 20 times faster than a bullet, will quickly spread out, with each pellet now following its own orbit around the Earth. With over 300,000 other pieces of junk already there, the tipping point is crossed and a runaway series of collisions begins. A few orbits later, two of the new debris pieces strike other satellites, causing them to explode into thousands more pieces of debris. The rate of collisions increases, now with more spacecraft being destroyed. Called the "Kessler Effect", after the NASA scientist who first warned of its dangers, these debris objects, now numbering in the millions, cascade around the Earth, destroying every satellite in low Earth orbit. Without an atmosphere to slow them down, thus allowing debris pieces to bum up, most debris (perhaps numbering in the millions) will remain in space for hundreds or thousands of years. Any new satellite will be threatened by destruction as soon as it enters space, effectively rendering many Earth orbits unusable. But what about us on the ground? How will this affect us? Imagine a world that suddenly loses all of its space technology. If you are like most people, then you would probably have a few fleeting thoughts about the Apollo-era missions to the Moon, perhaps a vision of the Space Shuttle launching astronauts into space for a visit to the International Space Station (ISS), or you might fondly recall the "wow" images taken by the orbiting Hubble Space Telescope. In short, you would know that things important to science would be lost, but you would likely not assume that their loss would have any impact on your daily life. Now imagine a world that suddenly loses network and cable television, accurate weather forecasts, Global Positioning System (GPS) navigation, some cellular phone networks, on-time delivery of food and medical supplies via truck and train to stores and hospitals in virtually every community in America, as well as science useful in monitoring such things as climate change and agricultural sustainability. Add to this the [weakening] ~~crippling~~ of the US military who now depend upon spy satellites, space-based communications systems, and GPS to know where their troops and supplies are located at all times and anywhere in the world. The result is a nightmarish world, one step away from nuclear war, economic disaster, and potential mass starvation. This is the world in which we are now perilously close to living. Space satellites now touch our lives in many ways. And, unfortunately, these satellites are extremely vulnerable to risks arising from a half-century of carelessness regarding protecting the space environment around the Earth as well as from potential adversaries such as China, North Korea, and Iran. No government policy has put us at risk. It has not been the result of a conspiracy. No, we are dependent upon them simply because they offer capabilities that are simply unavailable any other way. Individuals, corporations, and governments found ways to use the unique environment of space to provide services, make money, and better defend the country. In fact, only a few space visionaries and futurists could have foreseen where the advent of rocketry and space technology would take us a mere 50 years since those first satellites orbited the Earth. It was the slow progression of capability followed by dependence that puts us at risk. The exploration and use of space began in 1957 with the launch of Sputnik 1 by the Soviet Union. The United States soon followed with Explorer 1. Since then, the nations of the world have launched over 8,000 spacecraft. Of these, several hundred are still providing information and services to the global economy and the world's governments. Over time, nations, corporations, and individuals have grown accustomed to the services these spacecraft provide and many are dependent upon them. Commercial aviation, shipping, emergency services, vehicle fleet tracking, financial transactions, and agriculture are areas of the economy that are increasingly reliant on space. Telestar 1, launched into space in the year of my birth, 1962, relayed the world's first live transatlantic news feed and showed that space satellites can be used to relay television signals, telephone calls, and data. The modern telecommunications age was born. We've come a long way since Telstar; most television networks now distribute most, if not ali, of their programming via satellite. Cable television signals are received by local providers from satellite relays before being sent to our homes and businesses using cables. With 65% of US households relying on cable television and a growing percentage using satellite dishes to receive signals from direct-to-home satellite television providers, a large number of people would be cut off from vital information in an emergency should these satellites be destroyed. And communications satellites relay more than television signals. They serve as hosts to corporate video conferences and convey business, banking, and other commercial information to and from all areas of the planet. The first successful weather satellite was TIROS. Launched in 1960, TIROS operated for only 78 days but it served as the precursor for today's much more long-lived weather satellites, which provide continuous monitoring of weather conditions around the world. Without them, providing accurate weather forecasts for virtually any place on the globe more than a day in advance would be nearly impossible. Figure !.1 shows a satellite image of Hurricane Ivan approaching the Alabama Gulf coast in 2004. Without this type of information, evacuation warnings would have to be given more generally, resulting in needless evacuations and lost economic activity (from areas that avoid landfall) and potentially increasing loss of life in areas that may be unexpectedly hit. The formerly top-secret Corona spy satellites began operation in 1959 and provided critical information about the Soviet Union's military and industrial capabilities to a nervous West in a time of unprecedented paranoia and nuclear risk. With these satellites, US military planners were able to understand and assess the real military threat posed by the Soviet Union. They used information provided by spy satellites to help avert potential military confrontations on numerous occasions. Conversely, the Soviet Union's spy satellites were able to observe the United States and its allies, with similar results. It is nearly impossible to move an army and hide it from multiple eyes in the sky. Satellite information is critical to all aspects of US intelligence and military planning. Spy satellites are used to monitor compliance with international arms treaties and to assess the military activities of countries such as China, Russia, Iran, and North Korea. Figure 1.2 shows the capability of modem unclassified space-based imaging. The capability of the classified systems is presumed to be significantly better, providing much more detail. Losing these satellites would place global militaries on high alert and have them operating, literally, in the blind. Our military would suddenly become vulnerable in other areas as well. GPS, a network of 24-32 satellites in medium-Earth orbit, was developed to provide precise position information to the military, and it is now in common use by individuals and industry. The network, which became fully operational in 1993, allows our armed forces to know their exact locations anywhere in the world. It is used to guide bombs to their targets with unprecedented accuracy, requiring that only one bomb be used to destroy a target that would have previously required perhaps hundreds of bombs to destroy in the pre-GPS world (which, incidentally, has resulted in us reducing our stockpile of non-GPS-guided munitions dramatically). It allows soldiers to navigate in the dark or in adverse weather or sandstorms. Without GPS, our military advantage over potential adversaries would be dramatically reduced or eliminated.

#### 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, 7-5-15, <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.

#### Nuclear war causes extinction- risks are understated

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Current evidence on the consequences of nuclear war

First WHO assessment, 1983

In 1983, the World Health Assembly considered the first report of an international committee of experts on the effects of nuclear war on health and health services. It endorsed the committee's conclusion: "that it is impossible to prepare health services to deal in any systematic way with the catastrophe resulting from nuclear warfare, and that nuclear weapons constitute the greatest immediate threat to the health and welfare of mankind" [6]. The committee's report states: “It is obvious that no health service in any area of the world would be capable of dealing adequately with the hundreds of thousands of people seriously injured by blast, heat or radiation from even a single 1-megaton bomb.” The committee concluded: “… the only approach to the treatment of the health effects of nuclear explosions is primary prevention of such explosions, that is, the primary prevention of atomic war” [7].

New evidence of climate impacts

In the decades since 1983 we have learned much about the multiplicity of impacts of nuclear explosions and war. The evidence grows ever clearer as to the catastrophic effects. The most important new evidence relates to climate impacts. Nuclear weapons are extremely efficient at igniting vast numbers of simultaneous fires over large areas. These would consume all flammable materials and coalesce into massive confluent fires within which no one could survive the > 800 °C heat, intense smoke, and oxygen depletion. Atmospheric scientists estimated that even the relatively small tactical size nuclear weapon exploded on Hiroshima (15 kilotonnes of high explosive equivalent) released about 1000 times as much energy in the fires it ignited as in the explosion itself [8]. In Hiroshima approximately 13 km2 of the city burned completely. Detonation of the largest currently deployed nuclear weapons, up to five megatonnes in size, would result in a confluent megafire more than 45 km in diameter, 1600 km2 in area [9].

Atmosphere and climate effects of regional nuclear war: the example of India–Pakistan

The scenario for regional nuclear war most often studied by atmospheric scientists is a war between India and Pakistan. This possibility is all too realistic, as the two nations have waged war four times since their independence in 1949, and mobilised up to 1,000,000 troops on two other occasions. They possess two of the world's three most rapidly growing nuclear arsenals. Both have policies which create high risks of nuclear escalation in a war between them. Violence erupts across their disputed border in Kashmir almost daily. The most recently updated scenario involves use of 250 nuclear weapons of 15, 50, or 100 kt in size [10]. These constitute less than 2% of the number of nuclear weapons worldwide; and amount to less than 1% of their explosive yield, because the average size of the 13,150 nuclear weapons is 200 kt [11].

Such a war would produce between 83 and 183 million acute casualties in cities across both nations, including 52 to 127 million deaths (depending on the size of the weapons used) [10]. Radioactive contamination, severe social and economic disruption, and people attempting to flee on an unprecedented scale would extend across South Asia and beyond. Such a war would also produce between 16 and 36 million tonnes of black carbon in sooty smoke from burning cities [10]. This smoke would loft quickly into the upper stratosphere and mesosphere, beyond the reach of clouds and precipitation in the lower atmosphere (troposphere). The sun would heat the rising smoke by 50 to 80 °C. The carbon would blanket the Earth for over a decade. It would also reduce global average surface temperatures by 3 to 6 °C, well within the range of minimum temperatures during the peak of the last ice age 20,000 years ago, 3 to 8 °C colder than present. Unevenly distributed temperature declines of 8 to 15 °C would cover much of the large North American and Eurasian land masses.

Global precipitation would also decline by up to 35%, with particular disruption of the South Asian monsoon on which food production for 1.5 billion people critically depends. Scientists expect these drier conditions and colder temperatures to be associated with cold spells and shortened frost-free growing seasons in temperate regions. An unprecedented increase in ultraviolet flux (30–100% increases during summer outside the tropics) would exacerbate these changes [12]. Stratospheric ozone would be extensively depleted, with harmful effects on plant and animal development and health in both aquatic and terrestrial environments. Even a smaller India-Pakistan nuclear war releasing 5 million tonnes of soot would produce peak global ozone loss of 25%, and up to 55% loss at higher latitudes, with recovery taking 12 years and peak increase of 40% in the ultraviolet B wavelengths associated with DNA damage [13]. Most agricultural production would cease in higher latitude regions including Canada, northern areas of Europe, Russia, China, Korea, and Japan [14].

Radioactive fallout and toxic chemical contamination from destroyed pipelines and industrial and storage sites would affect large areas of agricultural land. Social, economic, transport and trade turmoil would disrupt global distribution of fertiliser, fuel, machinery and equipment, seeds, pesticides, food storage facilities, and transport on which modern agriculture, food stocks, and distribution depend. And the consequence? The climatic changes alone would cause a decline in net primary productivity (NPP) of between 10 and 20% in the oceans and between 15 and 40% on land over multiple years [10]. NPP is the net amount of carbon per square metre per year converted into plant matter after accounting for what plants use for their own respiration. This loss would be comparable to the total current annual human use of food and fibre. Scientists continue to discover new effects that would exacerbate the harm. Recent findings indicate that various nuclear war scenarios could induce an El Niño-like pattern of unprecedented magnitude across the Pacific, with associated reductions in equatorial Pacific phytoplankton productivity of about 40% [15]. Researchers recently identified large and abrupt exacerbations in global ocean acidification as consequences of nuclear conflict including potential inability for marine calcifying organisms like shellfish and corals to maintain their shells or skeletons in a corrosive environment [16].

Devastation of food production

The world is not well prepared to withstand sustained decline in food production of such magnitude. In July 2021, the Food and Agriculture Organisation (FAO) of the United Nations estimated between 720 and 811 million people to be chronically malnourished in 2020, 118 million more than in 2019 [17]. Due to the COVID-19 pandemic, FAO estimated the number of people experiencing moderate or severe food insecurity in 2020 at 2.37 billion, 318 million more than the previous year. Their November 2021 forecast for the 2021–22 year for global cereal stocks is equivalent to 104 days of consumption [18]. We expect more detailed country specific estimates of impacts on food production to be published in coming months. Sustained declines in global food production of such magnitude threaten over 2 billion people with starvation [19]. Epidemics of various infectious diseases would inevitably accompany famine of such unprecedented magnitude, as well as conflict within and between nations over inadequate and diminishing food reserves. The combination would likely exacerbate the human toll substantially.

Human health effects and implications

Immediate localised destruction would cause catastrophic local health impacts. Widespread health impacts would be caused by dispersed radioactive fallout and potentially an electromagnetic pulse from a high-altitude nuclear explosion that would incapacitate all civilian electrical and electronic infrastructure on a continental scale. But the major cause of casualties worldwide from a nuclear war would be from an abrupt onset of a nuclear ice age and resultant mass starvation. The ice age induced starvation findings from even a localised regional nuclear war do not support the commonly claimed theoretical basis for nuclear deterrence of mutually assured destruction. Instead, they characterise nuclear weapons as risking self-assured destruction from what amount to global suicide bombs. Nuclear weapons overwhelmingly endanger the security of all peoples and render meaningless any concept of winning a nuclear war [20]. They have no legitimate or legal military purpose.

The current risk of nuclear war

Risks of a nuclear war are growing [21, 22]. No nuclear-armed state is currently disarming, nor engaged in nuclear disarmament negotiations. First the US, followed by Russia, abrogated hard-won treaties negotiated between them which were fruits of the end of the first Cold War, and which constrained nuclear weapons numbers and types. Together these two countries hold 90% of all nuclear weapons [11]. The treaties include the Anti-Ballistic Missile Treaty, the Intermediate Nuclear Forces Treaty (eliminated short and medium-range nuclear missiles from the Soviet, then from Russian and US arsenals), the Open Skies Treaty (increased nuclear transparency), and the more recent Joint Comprehensive Plan of Action (Iran nuclear deal that provided effective constraints on Iran's nuclear program until the Trump administration abrogated it). Were it not for the incoming Biden administration's quick agreement to extend the New START treaty just two days before it would otherwise have expired, there would be no treaty restraints in force in 2021 on US and Russian nuclear weapons despite an effectively resurgent Cold War.

Modernising and expanding nuclear arsenals at enormous and escalating cost

All nine nuclear-armed states are investing massively in modernising and expanding their nuclear arsenals. Modernisation means new, faster, stealthier, more flexible and accurate capacities. A number can be armed with either conventional or nuclear warheads, indistinguishable until point of impact. These changes lower the overall threshold for use of nuclear weapons [23]. Both Russia and the USA, owning between them 90% of all nuclear weapons, are comprehensively replacing and modernising their warheads, missiles and launch platforms. They are also increasing the role of nuclear weapons in their military policies, and the range of circumstances in which they might be used, including against conventional and cyber attacks [24, 25]. Russia is testing and deploying entirely new types of nuclear weapons including nuclear-powered cruise missiles, hypersonic delivery vehicles atop ballistic missiles, and long-range nuclear torpedoes designed to explode in waters close to cities [25]. The US is producing new nuclear warheads for the first time in three decades, modernising all types of nuclear weapons—ballistic and cruise missiles, bombs delivered by aircraft, and the submarines, ships and aircraft that carry them [24]. It is also upgrading the nuclear weapons it provides to the UK and the nuclear bombs it stations in Belgium, Germany, Italy, Netherlands and Turkey [24].

Current estimates of global spending on development and production of nuclear weapons reached US$72.6 billion in 2020, an increase of $1.4 billion from 2019, even given constraints of the pandemic [26]. The total cost of nuclear weapons programs, including environmental clean-up and legacy costs, is far greater. The US spends the most on military and nuclear weapons: in FY 2021 its nuclear weapons-related costs reached US$74.75 billion [27]. Military spending consumes half of all discretionary US government spending. In the US, nuclear warhead spending is currently at an all-time record high, with projected expenditures over the next three decades of over US$2 trillion to comprehensively refurbish the nuclear arsenal and the facilities that produce nuclear weapons [23]. While Russia's military spending in 2020 ($61.7 billion) was estimated to be only 8% of that of the US ($778 billion) [26], the proportion it spends on nuclear weapons is more than 2.5 times as great as the US [28].

Opportunity costs: weapons versus United Nations and related programs

Such vast expenditures on weapons that create a hazardous legacy even in their production have enormous social, environmental, and public health opportunity costs. Estimates by the Sustainable Development Solutions Network place average total annual investment required between 2019 and 2030 to fully finance achievement of the Sustainable Development Goals (SDGs) agreed by all nations at US$1011 billion [29]. That amounts to about half of annual military expenditures, US$1981 billion in 2020—2.6% higher than in 2019 [26]. That increase occurred despite the COVID-19 pandemic and the associated severe economic downturn, increase in poverty and food insecurity. The combined annual budgets of the World Health Organization (WHO), UNICEF, the United Nations itself, the UN High Commissioner for Refugees, the International Committee of the Red Cross, and the UN Office of Disarmament Affairs amount to less than 30% of direct spending on nuclear weapons [30]. Operating an F-35 nuclear-capable combat aircraft for one-hour costs as much as a nurse earns in a year (OECD average); the cost of one Virginia Class nuclear submarine could fund 9180 fully equipped ambulances; the cost of one Trident II nuclear missile could buy 17 million facemasks [30]. By September 2021, at least one dose of COVID-19 vaccine had reached fewer than 3% of people in low-income countries and the WHO fell short by US$900 million in funds they needed to cover the period till March 2022 for their essential role in ending the acute phase of the pandemic—1.2% of annual direct nuclear weapons spending [31].

Doomsday clock reflects growing insecurity

Leaders of all nuclear-armed states have, in recent years, issued specific nuclear threats, with military leaders confirming their active planning to fight nuclear war [32]. In 2020, the Bulletin of the Atomic Scientists moved its authoritative Doomsday Clock to 100 s to midnight, further forward than it has ever been before, explaining that: "the international security situation is now more dangerous than it has ever been, even at the height of the Cold War." [33] In 2021 the clock hands remained in the same position, as: "the potential to stumble into nuclear war—ever present—has grown." [22] In 2019, the United States intelligence community's annual assessment to Congress of worldwide threats warned that the effects of climate change and environmental degradation increase stress on communities around the world and intensify global instability and the likelihood of conflict, increasing the danger of nuclear war [34]. Over the last decade, the number of armed conflicts has steadily grown, particularly the number of "internationalised intrastate" conflicts—within a state but involving at least one nation (disproportionately nuclear-armed nations) outside the state in conflict [35].

Cyberwarfare increases vulnerability of nuclear arms systems

Another major area of increasing risk of use of nuclear weapons is growing use of cyberwarfare by both states and non-state actors. Attacks on civilian and military nuclear facilities included extensive hacking in December 2020 of the US National Nuclear Security Administration which maintains US nuclear weapons [36]. Complex global systems of early warning, command, control, communications, and intelligence are related to nuclear weapons. They are complex, dispersed, and interlinked—and vulnerable to cyberattack. As General James Cartwright, former head of US Strategic Command stated, it: "might be possible for terrorists to hack into Russian or American command and control systems and launch nuclear missiles, with a high probability of triggering a wider nuclear conflict."[37]

British, French, Russian, and US authorities keep 2000 nuclear warheads on high alert, all mounted on delivery vehicles and ready for use within minutes of a launch order [11]. These warheads are particularly vulnerable to digital sabotage and inadvertent or unauthorised launch. Many states, including China, Iran, Israel, North Korea, Russia, and the US, engage in offensive cyber operations [38]. Buyers may include governments, government proxies, and terrorist organisations. Frequently buyers find tools in a lucrative global black and grey market offering hacking tools, especially 'Zero-day exploits'. These tools exploit software or hardware flaws and vulnerabilities for which no corrective patch yet exists [38]. Government staff, as part of their work, or moonlighting staff, or government contractors can develop offensive digital tools. Individual or organised hackers and cybercriminals, or private for-profit companies can also produce them almost anywhere. Targets of hacking and digital sabotage to date include banking and health systems, Sony Corporation, electricity grids, water treatment facilities, airports, electoral systems, oil company computer systems, uranium enrichment centrifuges, and nuclear power plants. Increasing digital sophistication of nuclear weapons and delivery systems may increase their vulnerability to digital sabotage [38].

#### Appropriation undercuts cooperation- reinforces space as a competitive environment

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[Robert A. Manning, opinion contributor, “The dangers of anarchy in space,” The Hill, 11-29-21, <https://thehill.com/opinion/583317-rethinking-space-the-dangers-of-anarchy-in-the-cosmos>]

I can’t think of a more dramatic illustration of how reckless actions in space put all at grave risk than [Russia’s recent anti-satellite (ASAT)](https://www.washingtonpost.com/politics/2021/11/23/russia-proved-it-can-shoot-down-satellite-does-this-make-space-less-secure/) test blowing up one of its own defunct satellites and creating a cloud of more than 1,500 pieces of space debris. All this reflects a troubling anarchy in the cosmos, a militarization of space, one ill-conceived aspect of unrestrained arms racing, the pathology of this era of great power competition. Space junk is inadvertent, but satellites that can kill or disable satellites and cyber jamming highlight the military risks. The anti-space antics also reveal the mutual vulnerabilities that should spark a rethink of current policies in the interest of self-preservation. The private sector has entered the space business with new technologies enabling the miniaturization of satellites, called Cubesats, some no bigger than a shoebox. [Google, Amazon and Elon Musk’s SpaceX](https://www.cnbc.com/2019/12/14/spacex-oneweb-and-amazon-to-launch-thousands-more-satellites-in-2020s.html) plan to launch some 50,000 such satellites in this decade. These are all at risk from [27,000 pieces of space debris](https://www.nasa.gov/mission_pages/station/news/orbital_debris.html), tracked by the Department of Defense’s impressive Space Surveillance Network (SSN), as well as by some half a million smaller pieces, the size of marbles. With both satellites and debris traveling at roughly 17,000 miles an hour, collisions could be catastrophic. Yet there is a paucity of rules governing behavior in space, which, like sea, air and cyber, are global commons. The 1967 Outer Space Treaty (OST) is the one accord signed by all major space-faring nations, 197 nations in all. They agreed to the principles in the OST, which says: “Exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means. and shall be the province of all mankind.” In the real world, the treaty is sadly outdated by both technology (as ASAT tests demonstrate) and geopolitics, as the U.S., Russia and China plan Moon bases and private sector firms plan to exploit minerals on asteroids, for starters. In this era of populist nationalism and major powers competing for dominance, fashioning new regimes or codes of conduct for space appears highly problematic. But there are arenas of strategic competition and arenas for cooperation. Some would argue for cooperating only with democracies or like-minded actors. There are some areas – like technology sharing – where this makes sense. But nations cooperate, pooling risks and burdens when they perceive that their interests intersect. The threat of space debris to all nations’ vital economic and national security assets in space would seem one such instance. DOD's space surveillance network is the premier mechanism for monitoring space junk. Russia has some orbital monitoring capacity, but few other states do. Moreover, the U.S. already has [space sharing agreements](https://www.stratcom.mil/Media/News/News-Article-View/Article/1825882/100th-space-sharing-agreement-signed-romania-space-agency-joins/) with over 100 nations to provide data and notifications to avoid collisions. The U.S. gave a heads-up to China about such risks during the Obama administration, according to well-placed sources. In addition, private sector firms and start-ups in Japan and Europe are exploring ways of getting rid of space junk. There is money to be made, and I’d hazard a guess that the engineers at [Jeff Bezos](https://thehill.com/people/jeffrey-jeff-bezos)’s Blue Origin and [Elon Musk](https://thehill.com/people/elon-musk)’s Space X might be interested in a public-private partnership6. It would be faster and cheaper if the space-faring states, pooling resources, invited private sector bids for contracts to help rid the lower Earth orbit of dangerous space junk. Share the burden and the benefits.

#### That shreds the potential for sustainable space development

Islam 18

[Mohammad Saiful Islam – Institute for Advanced Judicial Studies, Beijing Institute of Technology; International, “The Sustainable Use of Outer Space: Complications and Legal Challenges to the Peaceful Uses and Benefit of Humankind,” Beijing Law Review, 06-2018, <https://www.scirp.org/journal/paperinformation.aspx?paperid=85201>]

The current situation of use of outer space is so **competitive** to the public and private sectors as well to attain potential benefits in the economic and political field. This aspect indicates that the importance and complexity of space use are increasing to national security and in social, economic and environmental development. From the one side, the increasing of space faring nations, use of outer space by public and private sectors, from the other side, the use of outer space through effective means, environmentally sound as well as use for commercial purposes is a new great challenge to the international community today. Moreover, space law’s simplicity is challenged by the growing, each and every day, different technology as like as newfangled aspect to use of outer space. Another important undertaking is an upholding sustainable use of space for economic, social and environmental development, basically for developing countries. This stressed by general assembly resolution indicated that “The general assembly of UN stresses the importance of promoting effective means of using space technology to assist in the solution of problems of regional or global significance and of strengthening the capabilities of Member States, in particular developing countries, to use the applications of space research for economic, social and cultural development” [(United Nations, 2000)](https://www.scirp.org/journal/paperinformation.aspx?paperid=85201#ref49). The objectives of this research are to make fertile events of present complications of outer space law; to identify the national and international challenges to sustainable uses of outer space; and to attempt to accumulate urgently required development of outer space for peacefully gaining the potential benefits for humankind.

Sustainable development is the **establishing** principle for achieving present human needs without damaging the demands of future generations maintaining integrity and constancy of the natural systems. The modern idea of sustainable development is derived from the Brundtland Report in 1987. Generally considered in modern application and exploration of outer space, fundamental elements are the area must be dedicated to peaceful purposes; and the area must be preserved for future generations [(Heim, 1990)](https://www.scirp.org/journal/paperinformation.aspx?paperid=85201#ref17). It is an **indispensable** and inordinate challenge to confirm uphold the healthy environment and make sure development without destroying the rights of future generations in space. Article IX of The Outer Space Treaty provided, in the exploration and use of outer space, States should pursue studies and conduct exploration of outer space so as to avoid harmful contamination and also adverse changes in the environment of the Earth [(Outer Space Treaty, 1967)](https://www.scirp.org/journal/paperinformation.aspx?paperid=85201#ref35). The issues of what constitutes harmful contamination in Earth’s environment have yet to be interpreted. The legal definition of “adverse” and “harmful” will also modification as Earth, indigenous sciences progress, separately or in concert, with the planetary exploration space sciences [(Robinson, 2005)](https://www.scirp.org/journal/paperinformation.aspx?paperid=85201#ref38). As a result of multifaceted political, economic, scientific, technological, educational, and other global problems, there has been practicing exclusively only international cooperation for sustainable space development among the developed countries [(Noichim, 2005)](https://www.scirp.org/journal/paperinformation.aspx?paperid=85201#ref34). The space faring nations should promote a supportive environment for peaceful and sustainable use of space, decrease environmental effects on Earth and protect the terrestrial environment. We should escape a regime that will ultimately reflect the over-exploitation of resources and environmental havoc [(Fountain, 2002)](https://www.scirp.org/journal/paperinformation.aspx?paperid=85201#ref9).

Adoption of space law treaties and principles at the international level is a foremost landmark in the development of the first era of international space law. Space law treaties and principles arrange a set of rules to ensure the peaceful and sustainable uses of outer space. In the matter of raising space faring nations, implementation of the existing space law is also an abundant challenge. Moreover, some major space faring countries did not ratify some of the treaty and more or less other countries raise the question of the effectiveness of present laws. About the advance notification of space activities, Article XI of the Outer Space Treaty provides, appropriately notify conducting space activities by the space faring State to the United Nations as well as the public together with nature, locations, conduct, general function of the space object and results of such activities [(Outer Space Treaty, 1967)](https://www.scirp.org/journal/paperinformation.aspx?paperid=85201#ref35). The world is now perceiving multiplayer space power, control the use of nuclear weapons and other kinds of weapons in space is excessive undertaking. Article IV delivers, “States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner” [(Outer Space Treaty, 1967)](https://www.scirp.org/journal/paperinformation.aspx?paperid=85201#ref35). This article is one of the most significant provisions on arms control is accompanied by other treaties of arms control. Commercialization of space is widely spread issue in outer space activities and major space faring nations like the U.S. highly promoted commercialization by private and non-governmental sectors. Appropriate administration, supervision and control are a vigorous **concern** for absent of international and national appropriate law. Article VI of the Outer Space Treaty provides that, the activities of non-governmental entities in outer space shall require authorization and provide continuing supervision by way of national legislation or any other means in order to ensure that national activities were carried out in conformity with the provisions of the outer space treaty [(Outer Space Treaty, 1967)](https://www.scirp.org/journal/paperinformation.aspx?paperid=85201#ref35). Preserve environmental balance by decrease adversarial environmental changes. Harmful contamination through the extra environmental matter of the celestial bodies could introduce adverse environmental changes. Article 7.1 of the Moon Agreement states that “States’ Parties shall take measures to prevent the disruption of the existing environmental balance” [(“Moon Agreement”, 1979)](https://www.scirp.org/journal/paperinformation.aspx?paperid=85201#ref31). Article IX of the Outer Space Treaty is required in the exploration and use of outer space “to avoid [its] harmful contamination”. Regarding “the environment of the Earth” treaty required to “avoid adverse changes... resulting from the introduction of extraterrestrial matter and, where necessary shall adopt appropriate measures for this purpose” [(Outer Space Treaty, 1967)](https://www.scirp.org/journal/paperinformation.aspx?paperid=85201#ref35).

#### Sustainable development solves climate change

Santos 13

[Filipe Durate Santos—Center for Astrophysics and Gravitation, “Space System for Sustainable Development,” Apogeo Spatial, 03-01-2013, <https://apogeospatial.com/space-system-for-sustainable-development/>]

The space environment is being used by more and more State and private sector entities for an increasingly diverse range of outer space activities. The long-term sustainability of these activities is currently in dangerdue to the proliferation of space debris, the growing probability of collisions, and the congestion of orbital positions and radio frequency spectra, particularly in the low-Earth orbit and geostationary orbit environments. However, space activities contribute decisively to the well-being of humanity and to sustainable development. Sustainability is a relatively recent concept introduced in the 1980s and defined by the United Nations World Commission on the Environment and Development in 1987 as “development which meets the needs of the present without compromising the ability of future generations to meet their own needs.” This definition did not satisfy everyone, and other definitions arose. Gradually, it became clear that sustainable development is not a concept of a strictly scientific nature that can be defined without ambiguities; opinions differ on what precisely should count among the human needs for the application of the principle of intergenerational equity. These needs can be categorized into the social, economic, and environmental realms, but the relative importance of the different components is a matter of opinion. Sustainable development is these days a meeting point for the debate about the state of the world and how to respond to the social, economic, environmental, and institutional challenges we are facing. We are still very far from achieving it but we can identify the main drivers of unsustainability, which can be organized into four leading groups. Space systems play a crucial role in addressing the problems raised by these four groups of drivers, which constitute the “square of unsustainability.” See FIGURE 1. Finally, the fourth driver is anthropogenic climate change, mainly due to CO2 emissions from fossil fuel burning and to land use changes, especially deforestation. All four groups of drivers are strongly interconnected and interdependent. To reach some form of sustainable development, these issues must be addressed in ways that are both simultaneous and integrated. The magnitude and difficulty of this task reveal the perilous state the world is in. **Climate change** is one of the **majo**r environmental risks facing humanity in the 21st century. The scientific community has reached a strong consensus that anthropogenic emissions of greenhouse gases are intensifying the natural greenhouse effect in the atmosphere. These emissions are causing a climate change that will very likely intensify during the 21st century. The signs that this climate change is happening are becoming ever more obvious and unequivocal. According to the Intergovernmental Panel on Climate Change (IPCC), the global average surface temperature (land and ocean) has increased by 0.8° C since preindustrial times and by 1.0° C over land alone. In the Arctic, the average surface temperature increase has been higher, about twice the global value. Earth observation from space over the past 50 years has **fundamentally** changed our understanding and knowledge of the Earth system. See FIGURE 5. With increasingly sophisticated space systems, it is now possible to obtain quantitative measurements of temperatures in the atmosphere, concentrations of atmospheric gases, precipitation and wind speed, elevations of land and water, water movement, types of soils, and vegetation cover. In addition, satellite observations yield continually updated knowledge of the state of the atmosphere, helping meteorologists to devise models that project the weather into the future with much improved accuracy compared to pre-satellite forecasts. Seven-day forecasts have more than doubled in accuracy over the past three decades, particularly in the Southern Hemisphere. Satellites have been used to monitor the stratospheric ozone layer, which blocks damaging ultra-violet light from reaching the Earth’s surface, and to monitor atmospheric aerosol loading. Furthermore, they have contributed decisively to improvements in our understanding of the climate system and of climate change, through monitoring of the atmosphere, sea and land surface temperatures, ice sheet floes, Arctic sea ice extension, the El Niño-Southern Oscillation, and Earth’s carbon cycle. Recently, an ensemble of satellite altimetry, interferometry, and gravimetry datasets has been used to conclude that, since 1992, melting of the polar ice sheets has contributed, on average, 0.59 mm to the annual rate of global sea level rise. Extreme precipitation and floods are very likely to become more frequent because of climate change. Floods are just one example of various types of disasters where satellites are very useful for humanitarian relief, rapidly mapping and assessing local emergency situations and reconstruction activities. Space systems are extensively used these days in the management of disasters related to geophysical, meteorological, hydrological and climatic events. The uses of satellites in disaster management are becoming more integral to reducing reaction time and to providing accurate information for rescue and disaster control operations. Satellites are very useful in disasters for communications, remote sensing and mapping. Meteorological and storm warning satellite technology can also help in predicting water-related disasters and in setting up precautionary activities.

#### That causes extinction- resilience fails

Beard et al. 21 [S.J. Beard, Lauren Holt, Asaf Tzachor, Luke Kemp, Shahar Avin, Phil Torres, and Haydn Belfield, \* Centre for the Study of Existential Risk, “Assessing climate change’s contribution to global catastrophic risk,” 2021, *Futures*, Vol. 127, https://doi.org/10.1016/j.futures.2020.102673, Table 1 & Fig. 2 Omitted]

3.1. Climate change and planetary boundaries

While most of the impacts of climate change so far have fallen within the range of what was experienced during the Holocene, the rate of change is faster than in the Holocene and we are now beginning to see climate change push beyond these boundaries. In the latest edition of the planetary boundaries’ framework, climate change is placed in the zone of increasing risk, implying that while this boundary has been breached, there remains some potential for normal functioning and recovery (Steffen et al., 2015). It thus lies between what the authors identify as the ‘safe zone’ and other ‘high risk’ transgressions, such as disruption to the biochemical flows of nitrogen and phosphorus and loss of biosphere integrity.

As part of their discussion of BRIHN Baum and Handoh (2014) note that climate change is the planetary boundary for which the risk to humanity has received most meaningful consideration and they suggest that this attention is deserved. Yet little research attention has been paid to climate change’s extreme or catastrophic effects. Kareiva and Carranza (2018) argue that, despite currently falling outside of the area of high risk, climate change has the clear potential to push humanity across a threshold of irreversible loss by “changing major ocean circulation patterns, causing massive sea-level rise, and increasing the frequency and severity of extreme events… that displace people, and ruin economies.” Even if humanity was resilient to each of these individual impacts, a global catastrophe could occur if these impacts were to occur rapidly and simultaneously.

One scenario that has received comparatively more attention is that of the global climate crossing a tipping point that would trigger environmental feedback loops (such as declining albedo from melting ice or the release of methane from clathrates) and cascading effects (such a shifting rainfall patterns that trigger desertification and soil erosion). After this point, anthropogenic activity may cease to be the main driver of climate change, making it accelerate and become harder to stop (King et al., 2015).

Other scenarios can be discerned from the numerous historical cases in which the modest, usually regional, climatic changes experienced during the Holocene have been implicated in the collapse of previous societies, including the Anasazi, the Tiwanaku, the Akkadians, the Western Roman Empire, the lowland Maya, and dozens of others (Diamond, 2005, Fagan, 2008). These provide a precedent for how a changing climate can trigger or contribute to societal breakdown. At present, our understanding of this phenomena is limited, and the IPCC has labelled its findings as “low confidence” due to a lack of understanding of cause and effect and restrictions in historical data (Klein et al., 2014). Further study and cooperation between archaeologists, historians, climate scientists and global catastrophic risk scholars could overcome some of these limitations by identifying how the impacts of climate change translate into social transformation and collapse, and hence what the impacts of more rapid and extreme climatic changes might be. There is also the potential for larger studies into how global climate variations have coincided with collapse and violence at the regional level (Zhang, Chiyung, Chusheng, Yuanqing, & Fung, 2005; Zhang et al., 2006). However, these need to be interpreted and generalized with care given the differences between pre-industrial and modern societies.

Societies also have a long history of adapting to, and recovering from, climate change induced collapses (McAnany and Yoffee, 2009). However, there are two reasons to be sceptical that such resilience can be easily extrapolated into the future. First, the relatively stable context of the Holocene, with well-functioning, resilient ecosystems, has greatly assisted recovery, while anthropogenic climate change is more rapid, pervasive, global, and severe. Large-scale states did not emerge until the onset of the Holocene (Richerson, Boyd, & Bettinger, 2001), and societies have since remained in a surprisingly narrow climatic niche of roughly 15 mean annual average temperature (Xu, Kohler, Lenton, Svenning, & Scheffer, 2020). A return to agrarian or hunter-gatherer lifestyles could thus have more devastating and long-lasting effects in a world of rapid climate change and ecological disruption (Gowdy, 2020).7 Second, modern human societies may have developed hidden fragilities that amplify the shocks posed by climate change (Mannheim 2020) and the complex, tightly-coupled and interdependent nature of our socio-economic systems makes it more likely that the failure of a few key states or industries due to climate change could cascade into a global collapse (Kemp, 2019).

A third set of plausible scenarios stem from climate change’s broader environmental impacts. Apart from being a planetary boundary of its own, Steffen et al. (2015) point out that climate change is intimately connected with other planetary boundaries (see Table 1). Climate change is thus identified by the authors as one of two ‘core’ boundaries with the potential “to drive the Earth system into a new state should they be substantially and persistently transgressed.” This transformative potential was elaborated on in subsequent work exploring how the world could be pushed towards a ‘Hothouse Earth’ state, even with anthropogenic temperature rises as low as 2 °C (Steffen et al., 2018).

The connection between climate change and biosphere integrity (the survival of complex adaptive ecosystems supporting diverse forms of life) is particularly strong. The IPCC is highly confident that climate change is adversely impacting terrestrial ecosystems, contributing to desertification and land degradation in many areas and changing the range, abundance and seasonality of many plant and animal species (Arneth et al., 2019). Similarly, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) has reported that climate change is restricting the range of nearly half the world’s threatened mammal species and a quarter of threatened birds, with marine, coastal, and arctic ecosystems worst affected (Diaz et al., 2019). According to one estimate, climate change could cause 15–37 % of all species to become ‘committed to extinction’ by mid-century (Thomas et al., 2004).

Disruption to biosphere integrity can have profound economic and social repercussions, ranging from loss of ecosystem services and natural resources to the destruction of traditional knowledge and livelihoods. For instance, desertification, which threatens a quarter of Earth’s land area and a fifth of the population, is already estimated to cost developing nations 4–8 % of their GDP (United Nations, 2011). Many other rapid regime shifts involving loss of biosphere integrity have been observed, including shifts in arid vegetation, freshwater eutrophication, and the collapse of fish populations (Amano et al. 2020). There is a theoretical possibility of still more profound regime shifts at the global level (Rocha, Peterson, Bodin, & Levin, 2018). However, the contribution of loss of biosphere integrity to GCR is yet to be assessed. Kareiva and Carranza (2018) argue that it is unlikely to threaten human civilization, due both to a lack of plausible mechanisms for this threat and the fact that “local and regional biodiversity is often staying the same because species from elsewhere replace local losses.” However, in their classification of GCRs, Avin et al. (2018) suggest the potential for ecological collapse to threaten the safety boundaries of multiple critical systems with diverse spread mechanisms at a range of scales, from the biogeochemical and anatomical to the ecological and sociotechnological. Note that both these studies were conducted for largely conceptual purposes and should not be taken as rigorous analyses of this risk, this topic warrants further investigation.

3.2. Classifying climate change’s contributions to global catastrophic risk

Climate change’s contribution to GCR goes well beyond its impact on the earth system. Taking Avin et al.’s list of critical systems, we note that previous studies have mostly focused on the effects of climate change on physical and biogeochemical systems (e.g. global temperature and sea-level rise) or the lower-level critical systems that are most directly related to human health and survival (e.g. Heath Stress). However, these represent a very limited assessment of risk as it only accounts for climate change as a direct hazard/ threat and our "ontological" vulnerabilities to it. A more comprehensive risk assessment must consider the higher-order critical systems threatened by climate change passively (through a lack of alternatives) and actively (through intentional design).

The probability of a global catastrophe is higher when sociotechnological and environmental systems are tightly coupled, creating a potential for reinforcing feedback loops. If environmental change produces social changes that perpetuate further environmental change, then this could actively work against our efforts at adaptation. When this change has the potential to produce significant harm, via human vulnerabilities and exposure, we describe such loops as ‘global systems death spirals.’ These spirals could produce self-perpetuating catastrophes, whereby the energy and resources required to reverse or adapt to collapse are beyond the means of dwindling human societies. Feedback loops like this could thus create tipping points beyond which returning to anything like present conditions would become extremely difficult. Global systems would shift to very different states in which the prospects for humanity would likely be bleaker.

In the rest of this section, we explore just one potential spiral, between an ecological system (the biosphere) and two sociotechnological systems (the human food and global political systems). We explore each system and its interactions. Fig. 2 illustrates our model of this spiral.

3.2.1. The human food system

Climate change’s impact on biosphere integrity (discussed in the previous section) could harm the human food system due to loss of ecosystem services, disruption of the cycles of water, nitrogen and phosphates, and changes in the dynamics of plant and animal health (B´elanger & Pilling, 2019). Crossing this planetary boundary is already having severe implications for global food security, including loss of soil fertility and insect-mediated pollination (Diaz et al., 2019).

Systems for the production and allocation of food are already enduring significant stress. The sources of stress include climate change, soil erosion, water scarcity, and phosphorus depletion. The natural resource base, arable land and freshwater upon which food production rely are being degraded. While global food productivity and production has increased dramatically over the past century to meet rising demand from an expanding global population and rising standard of living, these constraints and risks are increasing the vulnerability of our global food supply to rapid and global disruptions that could constitute global catastrophes (Baum, Denkenberger, Pearce, Robock, & Winkler, 2015).

Climate change will further reduce food security in at least three interconnected ways. First, it will affect growing conditions, including direct threats to agricultural yields from heat, humidity, and precipitation in many regions; although initially improving conditions in some (Lott, Christidis, & Stott, 2013). Second, it will increase the range of agricultural pests and diseases (Harvell et al., 2002). Third, it will increase the occurrence of extreme weather events that impair the integrity of food production and distribution networks, from production to harvest, post-harvest, transport, storage, and distribution, thereby increasing our vulnerability and exposure to supply shocks (Bailey et al., 2015). The IPCC estimates, with medium confidence, that at around 2 °C of global warming the risk from permafrost degradation and food supply instabilities will be ‘very high’, while at around 3 °C of global warming the risk from vegetation loss, wildfire damage, and dryland water scarcity will also be very high (Arneth et al., 2019). Very few studies have considered the impacts of 4 °C of global warming or more; however, the IPCC highlighted one study finding that any potential agricultural gains from climate change will be lost by this point and there could be a decrease of 19 % in maize yields and 68 % in bean yields in Africa, an 8 % reduction in yields in South Asia, and a substantial negative impact on fisheries by 2050 (Porter et al., 2014). Furthermore, multiple extreme weather events could disrupt food distribution networks (Bailey and Wellesley, 2017).

While there are opportunities to adapt, disruption to the entire global food system cannot be resolved via food aid alone. Indeed, there is the potential for isolationist or heavy-handed responses that would do more harm than good. Given the high degree of interconnectivity and feedback within the global food system, our initial research suggests that any one of these climate change effects could trigger scenarios that would critically undermine the global food system’s ability to meet the minimum nutrition for well-being; making food security for all an unachievable goal, let alone rise to the challenge of continuing to grow (A. Tzachor, 2019, 2020); this would constitute what Kuhlemann (2019) terms a ‘threshold of significance.’

3.2.2. The global political system

Disrupting the global food system can create and exacerbate conflict and state failure (Brinkman & Hendrix, 2011). However, once again, this needs to be seen against the backdrop of a global political system under stress, with climate change as a significant contributing factor. Climate change influences political systems in many ways, from being a locus of activism and a stimulus for reform to driving rising inequality and population displacement (Arneth et al., 2019; Diffenbaugh & Burke, 2019). This is not a new phenomenon, changes in the climate are believed to have contributed to conflict between people and states throughout human history, driven by resource scarcity, population displacement, and inequality (Lee, 2009; Mach et al., 2019). As part of a comprehensive risk assessment of climate change, King et al. (2015) conducted an extensive literature review on climate change and conflict and used this to inform a series of international wargaming exercises. These found that climate change is expected to increase international conflict while highlighting the role that population displacement, state failure, and water and food insecurity would play in this (see also Mach et al., 2019; Natalini, Jones, & Bravo, 2015).

Quantitative studies of the impact of climate change on violence and conflict have provided more mixed results. A survey of empirical studies by Detges (2017) found that there may be multiple differing trends: extreme weather events appear to have more significant effects on violence than do long-term climate trends, while levels of small-scale conflict and interpersonal violence appear to be more affected than large-scale conflicts and international war. Empirical studies also highlight how climate change’s impact on conflict is predominantly as a risk multiplier and intensifier. Thus, climate change may contribute more by increasing our vulnerability to other conflict-inducing factors, such as loss of livelihood, forced migration, environmental change, and food insecurity, than by acting as a direct cause of conflict (Abel, Brottrager, Cuaresma, & Muttarak, 2019; Hsiang, Burke, & Miguel, 2013; Schubert et al., 2008).8

Of particular relevance to GCR is the effect of climate change on the risk of nuclear war (Parthemore, Femia, & Werrell, 2018). However, to our knowledge, this has never been rigorously assessed, although the potential is certainly there. One recent model of the risk of nuclear war highlighted how varied, and common, incidents with the potential to trigger a nuclear exchange are (Baum, de Neufville, & Barrett, 2018). It outlined 14 different causal pathways to an exchange, including the escalation of conventional wars and international crises, human error, and the emergence of new non-state actors. For all but two of these, they identify historical examples of potentially precipitating incidents, with 60 incidents in total (i.e. a little less than one a year). This suggests that the absence of nuclear war was less due to a lack of potential causes, tan the global political system’s ability to defuse them. Thus, the real significance of climate change may be its capacity to undermine this system: the combination of social, political, and environmental disruption, a lingering sense of global injustice, and rising food, water, and energy insecurity could increase the probability that crises escalate or that false alarms are mistaken for genuine emergencies. This topic needs further research.

3.3. The emergence of a global systems death spiral

Yet, we should not conclude that a nuclear exchange is the only, or even most likely, scenario in which political instability might produce a global catastrophe. Conflict and political instability, even of moderate severity, are themselves two of the most significant drivers of biodiversity loss due to breakdowns in monitoring, governance, and (public and private) property rights (Baynham-Herd, Amano, Sutherland, & Donald, 2018). This closes a potentially reinforcing feedback loop between loss of biosphere integrity, food insecurity and political breakdown.

The mechanisms by which these cascading failures might spread include many of the natural, anthropogenic, and replicator effects identified by Avin et al. (2018), making them harder to contain. At the natural level, climate change involves changes to the global atmospheric and biogeochemical systems and poses other naturally spreading harms, like global ecological collapse. At the anthropogenic level, the global interconnectedness of sociotechnological systems means that while small shocks are easier to recover from, larger shocks can be harder to contain and control. Finally, biological and informational replication can also spread the negative impacts of climate change, from vector-borne diseases and invasive species to climate fatalism and dangerous geoengineering technologies.

Given these numerous spread mechanisms, critical system failures could precipitate global catastrophes. Furthermore, the spiral we have explored is unlikely to be the only set of interlinked systemic disruptions that climate change could initiate (other death spirals could involve bio-insecurity and disease), nor are these the only causal connections between these three systems. Until we understand the nature of such death spirals better, we must act cautiously. We now turn to consider what this would mean.

### Solvency

#### Contention 2: Solvency

#### The appropriation of outer space by private entities is unjust. I advocate that a public trust doctrine is just.

#### PTD is durable, flexible, and solves- deflates the propensity for conflict and encourages sustainable development

Babcock, 19 -- Professor of Law, Georgetown University Law Center

[Hope M., B.A., Smith College; L.L.B., Yale, "The Public Trust Doctrine, Outer Space, and the Global Commons: Time 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.

#### PTDs are empirically best for regulating environmental issues- they can be internationalized, ensure sustainability, AND allow licensing- answers every deficit

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[Joseph Orangias, School of Law, Utrecht University, Utrecht, Netherlands; Tilburg Law School, Tilburg University, Tilburg, Netherlands, "Towards global public trust doctrines: an analysis of the transnationalisation of state stewardship duties," Transnational Legal Theory, Taylor & Francis, 2021, <https://doi.org/10.1080/20414005.2021.2006030>, accessed 1-30-22]

The dominant legal order around the globe is rooted in the Westphalian state sovereignty system.1 Sovereign states are comprised of governments that exercise power over populations within defined territories and enter into relations with other states.2 International law largely centres on and reinforces state sovereignty and territorial jurisdiction.3 The limitations of this order in the era of globalisation and widespread dissatisfaction with it have been well recorded.4 Global issues, such as biodiversity loss, climate change, cybersecurity, pandemics, poverty and war, pervade individual states and are not easily resolvable with territorial jurisdictions.5 The emerging project of global law was thus conceptualised as ‘a world legal order that governs the ambit of justice as it affects humanity as a whole’.6 Alongside national and international law, global law draws on the world's myriad of legal systems and traditions to employ a ‘legal metalanguage’ that can effectively address global issues across national territories.7 This includes the transnationalisation of legal principles and procedures and more effective governance and participation across borders.8 The emergence of global environmental law is evidenced in the transnationalisation of a set of environmental law principles and procedures.9 Under this theoretical framework, this article specifically analyses the transnationalisation of public trust doctrines (PTDs) and asks whether global PTDs10 are emerging in response to global environmental issues.

1.1. Definitions and concepts

PTDs generally provide that certain natural resources within national territories are common, shared property among citizens and should therefore be stewarded in perpetuity by the state.11 Every PTD has been developed in a different legal context and encompasses a different set of natural resources, different stewardship duties and different objectives. This article broadly conceptualises and classifies PTDs as either: (1) formalised PTDs that are inscribed and explicitly named in law; or (2) implicit PTDs that are implied through existing state stewardship duties that create a public trust regime without naming the doctrine as such. Other scholars have used a similar distinction in analysing the ‘direct’ or ‘implied’ application of PTDs.12 The scope of this current article includes analysis of both types of PTDs: formalised and implicit. Moreover, PTDs can also be classified at the level at which they exist: (1) PTDs of international law instruments (international level); (2) PTDs of nation states (national level); or (3) PTDs of sub-national governments (sub-national level). PTDs at the sub-national level require sub-national governments (as defined in the specific nation state) to act as trustees for their specific sub-national populations. This article however focuses its analyses on PTDs at the international and national levels unless otherwise stated.

This article uses a stewardship lens to analyse the duties of states under PTDs. In environmental law scholarship, stewardship has been broadly defined as ‘a general, universal duty to care for the planet’.13 This definition relates to the broader concepts associated with PTDs, such as custodianship and guardianship. Stewardship has also been defined as a ‘duty requiring landowners to carefully manage their land’.14 This more specific definition relates to the practical obligations of PTDs, such as conserving natural resources for citizens. Although stewardship theory outlines various actors that owe stewardship duties, this article specifically analyses state stewardship duties under PTDs. Other lenses have and could be used to analyse PTDs, including in accordance with the varying objectives of different PTDs, such as ensuring that citizens’ public use, commerce, navigation or environmental rights are upheld in the management of natural resources. However, as this article largely focuses on environmental developments of PTDs, environmental stewardship advancing in many states and international law instruments with public trust regimes, a stewardship lens is warranted for this research inquiry which crosses numerous PTDs.

Overtime, PTDs have internationalised through three observed processes, including: (1) states spreading them to other national and/or international legal systems; (2) states applying international environmental law principles that inform PTDs; and (3) states ratifying international law instruments containing public trust regimes.15 However, PTDs and public trust scholarship, including analysis on these processes, have mostly remained limited to individual state territories, and they have not fully investigated how PTDs can address global environmental issues. Thus, this article also explores how PTDs have transnationalised through three observed processes, including: (1) states stewarding natural resources within and beyond their territories; (2) states stewarding natural resources for the benefit of their citizens and all of Earth's current and future inhabitants; and (3) states jointly stewarding natural resources with other states and non-state actors. To the extent that a PTD goes through one or more of these processes, this article considers it to be a global PTD. Analysis of these transnationalisation processes is needed to understand the suitability of using PTDs to hold states accountable for issues that pervade national territories.

1.2. Analytical approach and structure of the article

The analytic approach pursued in this article is primarily conceptual analysis of two types of sources. Conceptual aspects of PTDs are identified in primary sources of public trust regimes (eg laws) and secondary sources (eg literature on public trust regimes) capturing a diverse range of states (ie Australia, Brazil, Canada, Colombia, England, France, India, Pakistan, the Philippines, South Africa, Uganda and the United States). Conceptual analysis is also conducted of key international law instruments (eg international treaties), some of which have near universal application and therefore inform the many states unnamed in this article that have ratified the treaties covered. The presented conceptual analysis aims to inform and provide a conceptual framework for further analysis on and applications of individual PTDs and discussions on public trusteeship across jurisdictions.

Overall, this article contributes a new conceptual framework for analysing and applying PTDs against global environmental issues.16 Section 2 provides a general overview and evaluation of PTDs, including their: (1) origins and legal sources; (2) scopes and objectives; and (3) application to global environmental issues. It is based on a review and synthesis of public trust scholarship, laws and judgments across the sub-national, national and international levels. This section also argues that PTDs can be further adapted to apply to global environmental issues. Section 3 defines and presents examples of the three observed internationalisation processes of PTDs. Public trust scholarship often frames these processes under the pretext of a one-size-fits-all doctrine emerging from England, maturing in the United States and then spreading elsewhere. However, such framing overshadows and discredits pre-existing stewardship systems, particularly Indigenous ones, that constitute implicit PTDs themselves or have informed the formalisation of PTDs.17 This section therefore also offers critical analysis of these internationalisation processes. Section 4 defines and presents examples of the three observed transnationalisation processes of PTDs. As this analysis is more exploratory, understanding the full complexity and impact of each process on individual PTDs requires additional analysis. Finally, Section 5 concludes with remarks on whether these transnationalisation processes are trailblazing global PTDs.

2. Public trust doctrines: background

The core concept of PTDs is that states steward natural resources for the benefit of the public.18 This section provides an overview of how this concept has evolved over time and the different objectives that have motivated it. While some legal systems have formalised their PTDs, most have implicit PTDs whereby existing stewardship duties create public trust regimes without explicitly naming the doctrine (as defined above). This section theorises PTDs with respect to both formalised and implicit PTDs and names specific legal systems when referring to a specific PTD. Moreover, one common feature across PTDs is their adaptability; they have shown to be receptive to new information and applicable to changing elements of the environment and changing value systems. This section therefore argues that the core concept and the adaptability of PTDs make them suitable doctrines to apply to global environmental issues.

2.1. Origins and legal sources

Historians have traced PTDs back to the Roman law concept res communis, to which Justinian proclaimed, ‘By the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea’.19 Natural law thereunto held that the public had communal rights to access and use these natural resources.20 This concept was transplanted into the thirteenth century Spanish code Las Siete Partidas and English Magna Carta, later promoted across Europe and, through European colonialism, subsequently around the globe.21 Spain and England are recorded to have provided levels of protection over natural resources within their territories for public access and use rights. This included easements for certain privately held resources. However, historians have found no evidence that the public ever enforced their rights against state infringements.22 This widely accepted historical narrative suggests that PTDs have developed under the notion of states owning and controlling natural resources within their territories and stewarding them for their citizens.

Up to the 1970s, PTDs were primarily applied as public access and use doctrines.23 The environmental movement, accompanied by a wave of new environmental laws around the globe,24 and Joseph Sax's seminal text contributed to PTDs adapting to also being used as environmental doctrines.25 Sax observed that PTDs apply when a public right that is substantially harmonious with the environment is enforceable against the state.26 Section 2.2 will provide further analysis on the objectives of PTDs in ensuring public access and use and environmental protection in the present day. Although PTDs transitioned into also being tools for environmental protection and started reflecting Indigenous stewardship traditions, this adaptation has been criticised for not embracing Indigenous stewardship systems or those who sustainably stewarded Earth for thousands of years prior to the European colonial project.27 Indigenous environmentalist Winona LaDuke argued that the environmental movement, which included this PTD adaptation, failed to address environmental colonialism. She explained that many Indigenous societies in the conterminous United States ‘see themselves as belonging to [the land] rather than it to them’ and that connections between the land and its occupants are preserved in ‘ceremony, spiritual instruction, naming, travel knowledge and intergenerational residence’.28 Yet PTDs continued to centre on Western notions of states protecting parts of Earth that they owned.29 PTDs can thus be compared and contrasted to the concepts and practices of diverse legal systems and traditions and environmental and social movements.30

Public trust regimes have emerged from various legal sources. The most common include case law, constitutional law, economic law, environmental law, Indigenous law, international law and natural law, and combinations thereof. These regimes arise when such legal sources prescribe states with duties to steward natural resources for beneficiaries.31 PTDs formalise when legal sources expressly name the doctrine; they are implicit when legal sources align legal systems with stewardship duties that form public trust regimes without inscribing the doctrine's name into law. Public trust scholarship often focuses on how PTDs are identified and formalised in case law in common law systems; however, PTDs are not exclusive to common law systems and even PTDs in common law systems have multiple legal sources beyond case law.32 Many constitutions require states to ensure persons have the right to a healthy or protected environment, and many statutes, including from different areas of law, mandate states to protect natural resources for their populations.

Reviewing examples of how specific PTDs have been identified in legal sources offers clarity before moving forward. In South Africa, Section 24(b) of the Constitution provides that ‘everyone has the right to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures’.33 This fundamental right, which scholars refer to as the prima facie origin of South Africa's PTD, illustrates an implicit PTD as it mandates the South African government to protect the environment for its citizens without expressly labelling it a PTD.34 On this basis, South Africa's PTD was later formalised through statutes. For example, the National Water Act indicates:

As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.35

Many legal sources prescribe states with lists of duties, some of which can lead to conflicting obligations, such as to ensure water is ‘protected’ versus ‘developed’, and sometimes this requires governments or judges to make priority decisions. As another example, in Pakistan, Articles 9 and 14 of the Constitution provide the right to life and the inviolability of dignity of man, respectively.36 In the landmark Zia judgment, Pakistan's Supreme Court defined these articles as engulfing environmental rights and recognised the government's duty to ensure life is protected, including by preventing hazards in the environment and pollution of it.37 This provided a conceptual framework that was later used by judiciaries to name and thereby formalise the country's PTD through case law.38 The South African and Pakistani examples illustrate how two PTDs, which were initially implicit and eventually formalised through statutory and case law, are identifiable within the substance of pre-existing constitutional rights. Formalised and implicit PTDs can be similarly traced in other legal systems and sources.39

2.2. Scopes and objectives

PTDs have over time proven to be adaptable doctrines. In transitioning from purely public access and use doctrines to also being environmental ones, many PTDs have substantially changed in both scope and objective. First, the material and geographic scopes of PTDs have widened over the last five decades. Material scopes increasingly encompass more public trust resources.40 Today, air, ecologically fragile lands, forests, minerals, running waters and seashores are the most common public trust resources. Some legal systems include the atmosphere, oceans and even ‘all natural resources’.41 For PTDs with such seemingly indefinite material scopes, some judiciaries have been called upon to clarify the definition of ‘natural resources’ and the materials and substances it encompasses.42 For example, the Supreme Court of India interpreted internet access to be a natural resource held in public trust.43 Strategically invoking PTDs thus has potential to further delineate their material scopes according to new societal developments and changing environments.44 This possibility of continually adapting the natural resources that are covered might lead to problems in analysing the full potential of PTDs; however, such problems would be more theoretical than real, because applying PTDs always coincides with how fundamental rights, laws and/or regulations require states to steward specific natural resources.

The widening of the geographic scopes of PTDs has been much more contentious across legal systems.45 While PTDs of nations inherently apply to public trust resources within their territories, the geographic scopes of PTDs become convoluted when public trust resources are held in private domains therein or when they move or extend beyond national borders. Much case law and public trust scholarship, especially from the United States, ask whether individual property rights trump state stewardship duties and the extent of state powers to regulate privately owned resources.46 Such cases determine how far state duties extend to protecting natural resources within private property. For example, in South Carolina, United States, the state has the exclusive right to control land bordering navigable waters that is below the high water mark for the public benefit.47 In McQueen v SC Coastal Council, the South Carolina Supreme Court concluded that privately-owned land that had reverted to tidelands (ie below the high water mark) due to the forces of nature and the owner's lack of vigilance in protecting it, was public trust property of the state; therefore, the owner was restricted from building the retaining walls needed to develop other parts of his land.48 This provides an example of South Carolina's PTD extending into private property. The political and economic landscapes of specific legal systems determine such private-public delineations. In response to this dilemma, Sax postulated that ‘certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace’.49 Withal, both sides of this debate apparently rely on Western conceptions of ownership of natural resources within national territories.50

The increasing recognition of public trust resources that transcend national territories is pressuring the geographic scopes of PTDs to adapt. Peter Sand provides an example in his analysis of public trusteeship and oceans. He observed that the geographic scopes of some PTDs traditionally required states to steward oceans up to the outer limits of their territorial sea, entailing up to 12 nautical miles from the low-water lines on states’ coasts.51 States have sovereignty over their territorial sea, save the right of innocent passage for vessels.52 More recently, some states have enacted laws that require them to protect oceans at distances beyond their territorial sea.53 For example, France established an ecological protection zone that extended 60 miles beyond its territorial sea, to which several European countries followed;54 Brazil's constitution deemed its territorial waters and the natural resources of its continental shelf and exclusive economic zone to be its property, thereby requiring the state to extend its environmental protections accordingly.55 States have sovereignty over their continental shelf beyond the territorial sea, but only certain sovereign rights within the water column between the outer limits of their territorial sea and within their exclusive economic zone, which entails up to 200 nautical miles from the low-water lines on their coasts.56 This illustrates how certain states have extended the geographic scopes of their PTDs beyond their territories. Section 4 analyses additional examples and their implications on state sovereignty.

The objectives of PTDs have also adapted during this transition. Historical objectives include ensuring that the public has access and use rights of natural resources, including for commerce, fishing and navigation.57 These objectives continue to persist and remain central to public trust litigation and scholarship within certain jurisdictions, like in the United States.58 More recently pursued environmental objectives include: conservation, the equitable distribution of natural resources, sustainable development, pollution protection, recreation and ecology.59 For example, in India in 2009, the Supreme Court recognised that ‘[t]he Indian society has, since time immemorial, been conscious of the necessity of protecting environment and ecology’.60 This public trust judgment, albeit one of many judgments contributing to the development of India's PTD, describes humans harmoniously living with nature and respecting Earth with traditional knowledge. Judiciaries beyond India have also motivated the ecological objective of PTDs with the protection of fundamental rights, whereby states causing or permitting ecological harm was attributed to human rights violations.61 Such environmental objectives are apparent in recent and ongoing public trust litigation, like the Zia judgment introduced in Section 2.1.62 This rise in environmental objectives has run parallel to many states and international law instruments advancing environmental stewardship efforts. However, as introduced in the South African example above, invoking PTDs often requires asking whether the public would benefit more from economic development in exploiting natural resources or more from environmental protection. This balancing act is at the core of much public trust litigation and has been the inquiry of much public trust scholarship.

Additional objectives of PTDs can be explored in other legal developments. One example involves the recognition of Indigenous Peoples as stewards or co-stewards of natural resources. 144 member states of the United Nations General Assembly voted to adopt the Declaration on the Rights of Indigenous Peoples.63 In signing this declaration, states acknowledged the Article 29 right of Indigenous Peoples to conserve and protect the environment and their lands and natural resources.64 Furthermore, 24 states ratified the Indigenous and Tribal Peoples Convention.65 Article 7(4) provides that ‘governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit’.66 State parties with PTDs are thus obliged to cooperate with Indigenous Peoples in their stewardship duties of protecting and preserving such areas. How Article 7(4) of the Convention has been implemented at the national level will be analysed in Section 3.3. For the purposes of this background section, states that implement the Declaration67 and/or the Convention68 should respectively recognise Indigenous Peoples as independent and/or co-operative stewards of their territories. If states implement these international law instruments and honour Indigenous Peoples’ right to self-determination, PTDs could move towards an additional objective of environmental decolonisation.

Overall, PTDs’ changing scopes and objectives demonstrate their adaptability. Robin Kundis Craig argues that PTDs’ adaptability is related to their responsiveness to ‘new information, new articulations of values, and new public and private needs and opportunities’.69 Her theory is supported by the fact that decades of environmental and Indigenous activism, research in environmental sciences and new legislation and litigation foreran PTDs becoming environmental doctrines. For example, numerous environmental laws and regulations were adopted across the United States in the 1960s and 1970s, providing a basis for invoking environmental rights in public trust litigation.70 Redwood National Park was established through legislation in 1968.71 In Sierra Club v US Department of the Interior in 1975, the court reviewed research on damage and threats of damage to this park and recognised the National Park Service's trust duty ‘to conserve scenery and natural and historic objects and wildlife … and to provide for the enjoyment of the same in such manner … as will leave them unimpaired for the enjoyment of future generations’.72 While motivated on the enjoyment of future generations, the court ordered the Secretary of Interior to afford protections to Redwood National Park against the adverse consequences of timbering and land-use practices.73 This demonstrates how research and new legislation helped focus a PTD on environmental protection and not purely on public use or commerce.74 While all PTDs differ, including in their legal sources, scopes and objectives, their common receptiveness to new information, values and needs, as Craig postulates, allows their application to persist through the ever-changing environment.75 Strategically utilising this adaptability offers a unique opportunity to attune diverse legal systems that have PTDs to the same novel global environmental issues.

2.3. Application to global environmental issues

This sub-section argues that PTDs are suitable doctrines for holding public authorities accountable for global environmental issues for four reasons, as demonstrated using climate change as an example. First, PTDs are receptive to new information.76 Climatology and attribution studies77 have already motivated legislation and litigation that aim to redirect state stewardship duties towards this global issue and towards protecting specific public trust resources, such as the atmosphere.78 Several litigation examples will be explored in Section 4. This reflects when prior evidence on environmental degradation led lawmakers and judiciaries to write new law79 and widen the material scopes of many PTDs.80 Second, applying PTDs in litigation can publicly highlight the adverse impacts of global environmental issues, including impacts on public trust resources and related rights, such as the environmental rights of humans.81 A few landmark public trust cases and their media coverage have already increased public awareness on climate change and coincided with legislatures and administrations developing climate adaptation and mitigation measures.82 Third, judiciaries can use PTDs to further delineate public and private rights according to measures required to combat global environmental issues. Much scholarly debate on this issue has occurred within the United States.83 Although such delineations might empower regulatory states, strengthening environmental protections against issues in the past has proven to enhance public welfare overtime.84 Preventing or reducing climate change would have a similar effect, since stabilising the climate would minimise adverse impacts (mitigation) and uphold related fundamental rights. Moreover, in implementing and enforcing regulations, states indirectly fulfil their stewardship duties by partially transferring their duties to natural or legal persons.85

Lastly, PTDs can be applied to resources that transcend national territories. This presents various challenges but widening the geographic scopes of PTDs is not new and is increasingly done in both national and international legal systems. In a comparison of the geographic scopes of PTDs across sub-national states within the United States, Mary Turnipseed and colleagues noted:

That the doctrine exists only at the state level seems illogical, given the enormous expanse of ocean waters outside of coastal states’ jurisdictions, the large area of terrestrial lands under the jurisdiction of the federal government, and the unequivocal evidence that ecosystem functions and connections cross the artificial boundaries set by state and federal jurisdictions.86

While PTDs developed within national or, in some federations, sub-national territories, territorially-restricting their geographic scopes can hardly be effective or justified within the context of global environmental issues, which pose threats to public trust resources and related human rights.87 However, this understanding has been considered a ‘significant departure from the doctrine as it has been traditionally applied’.88 Section 4 will explore how PTDs are nevertheless transnationalising.

3. The internationalisation of public trust doctrines

PTDs have internationalised over recent decades and now exist in numerous national and international legal systems.89 Table 1 summarises three key observed internationalisation processes: (1) states spreading them to other national and/or international legal systems; (2) states applying international environmental law principles that inform PTDs; and (3) states adopting international law instruments containing public trust regimes. In defining these processes, the following three sub-sections reveal how PTDs have arisen and disseminated across the globe.

Table 1. Processes for internationalising PTDs

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Much public trust scholarship on internationalisation focuses on the formalisation of PTDs and how one legal system's PTD references or builds on another's. Such analytical approaches tend to neglect how PTDs are specific to individual legal systems, including their interrelations to pre-existing stewardship duties, and the more active influences of other legal systems. Natasha Affolder cautions against providing ‘ahistorical, de-contextualised and passive accounts of law's movement’ to avoid the risks of erasing what was present before and simplifying dynamic processes.90 Building on Affolder's warning, this section offers a conceptual framework for critically analysing the internationalisation of PTDs.

3.1. Spreading across legal systems

More and more legal systems have PTDs. This is the result of PTDs developing internal to and/or being transplanted into national and international legal systems. On one hand, some PTDs have formed internally without much external influence. These PTDs have been identified in natural law, influenced by Indigenous stewardship systems and/or expressly or implicitly featured in legislative and judicial sources. For example, as mentioned in Sections 2.1 and 2.2, Justinian and the Supreme Court of India identified the laws of nature as an internal influence on the development of the respective PTDs.91 On the other hand, the movement of PTDs involves them developing with influence from other legal systems. Such external influences have been documented in case law where judiciaries reference foreign public trust judgments, defined by legislatures in constitutions or statutes that are influenced by foreign or international law and/or intervened by colonial or imperial powers into legal systems. This internal-external distinction helps to understand how PTDs develop.

Modern day PTDs are complex and cannot be credited to a single internal or external source. In addition to natural law, a 1976 amendment to the Constitution of India imposed duties on the state to protect and improve the environment and safeguard the country's forests and wild life, and on citizens to protect and improve the natural environment and to have compassion for living creatures.92 This amendment, along with the Brundtland Report and certain international instruments, have since further informed judicial interpretations and developments of India's PTD.93 This includes the Supreme Court citing key principles from the Brundtland report, including the principle of intergenerational equity, the precautionary principle and the polluter pays principles, among others, in a public trust judgment.94 The Brundtland Report provided information on critical global environmental issues and related principles to guide sustainable development in states across the globe. As the development of any given PTD cannot be reduced to a single influence or a single point in time, recognising the complexities of how and under what circumstances PTDs develop, internally and externally, is imperative to understanding their effective applications and shortcomings.

Most public trust scholarship on the movement of PTDs focuses on judiciaries referencing foreign case law. In 2012, Michael Blumm and Rachel Guthrie contributed one of the most comprehensive overviews of this internationalisation process, comparing PTDs in Brazil, Canada, Ecuador, India, Kenya, Nigeria, Pakistan, the Philippines, South Africa, Uganda and the United States.95 The study includes evaluations of how judgments formalising these PTDs reference foreign case law. It frames the PTDs of Canada, India and the United States as being ‘inherited’ from English common law and other PTDs as being derivative of PTD developments in the United States.96 While this account is supported by most scholarship and may be accurate to a certain extent, it does not consider that the chosen states are all former European colonies or settler colonial nations. Thus, to more comprehensively understand the PTDs in these and other legal systems, additional analyses of the colonial or imperial legal contexts, potential doctrinal interventionism and pre-existing Indigenous stewardship systems are required.

How Indigenous stewardship systems of natural resources influence PTDs has received virtually no scholarly attention.97 Studies have analysed partnerships between Indigenous Peoples and settler colonial governments on environmental stewardship projects.98 They found such partnerships to depend on respect for Indigenous self-determination, knowledge and control of knowledge mobilisation, and early involvement, intergenerational involvement and continuous cross-cultural education.99 However, such partnerships are rare as Western-dominated natural resource management actively suppresses traditional knowledge systems.100 These issues are beyond the scope of this article, but Indigenous stewardship practices cannot be fully detached from PTDs until additional research is conducted on: Indigenous and settler colonial government partnerships; Indigenous contributions to or co-operation in the stewardship of public trust resources; and the appropriation of Indigenous stewardship systems or active resistance against them in relation to PTDs within legal systems where Indigenous Peoples practice stewardship.

The PTDs that emerge from national constitutions and statutes may appear to be a purely internal development. However, constitutions and statutes are often influenced by other legal systems. Global constitutionalism, which itself is legal spreading, has led to disparate legal systems adopting a standard set of fundamental rights within their constitutions.101 Some of those rights are commonly used by judiciaries when identifying PTDs in case law and by legislatures when defining PTDs in statute. As described in Section 2.2, constitutions increasingly provide the right to a healthy environment and other environmental rights.102 Therefore, even when PTDs seem to have been internally developed through law, they might have still been influenced by external factors nevertheless and might benefit from critical analysis of how those external factors rest within the culture of the given legal system.

This sub-section has challenged normative accounts of the spreading of PTDs to complicate this dynamic internationalisation process and to recognise the inherent potential of PTDs to be more suitable and effective doctrines moving forward. Current and past scholarship has often been limited to: studying formalised PTDs only; assuming a one-size-fits-all PTD inherited from England or the United States; and assuming a single legal source for PTDs. PTDs are also often implicit doctrines, not solely inherited from Western colonial and imperial nations and not constituted by a single source.103 For example, recognising and supporting Indigenous stewardship systems as integral parts of PTDs may make these doctrines more suitable to fulfilling their objectives; rather than propelling colonial notions of owning parts of Earth, enabling Indigenous stewardship systems may offer more effective strategies for PTDs to protect public trust resources that cannot be owned and according to their traditional contexts.104 For a more comprehensive analysis and to clarify PTDs’ functions and shortcomings, including those that LaDuke pointed out in the larger environmental movement, individual PTDs’ histories, contexts and associations with pre-existing stewardship systems must be studied in future scholarship.

3.2. International environmental law principles

The proliferation of certain international environmental law principles has informed the development of PTDs. The principles of intergenerational equity, prevention and the neighbour are three predominate examples that are discussed in detail in the following paragraphs. In some legal systems, these principles have explicitly been referenced within legal sources that formalised PTDs.105 Whereas in others, they have contributed to the manifestation of the public trust regimes and thereby informed formalised and implicit PTDs.106 Such processes are evident when judiciaries apply PTDs alongside these principles or base their interpretations of PTDs on them, or when international environmental law instruments containing these principles are directly applied or implemented through legislation in national legal systems with public trust regimes. This sub-section demonstrates how these principles have contributed to the internationalisation of PTDs.

First, the principle of intergenerational equity has several links to PTDs.107 Edith Brown Weiss defines this principle as ‘all generations [acting as] partners caring for and using the Earth’ and passing ‘the Earth and our natural and cultural resources on in at least as good condition as we received them’.108 In 1987, the Brundtland Report called on governments to ‘fill major gaps in existing national and international law related to the environment’ and ‘recognise and protect the rights of present and future generations to an environment adequate for their health and well-being’.109 This principle has been integrated into many international law instruments110 and an increasing number of national legal systems, including through constitutions, statute and case law.111 Starting to better align with LaDuke's analysis on preserving connections between the land and its occupants through ‘intergenerational residence’, an increasing number of public trust regimes have had future generations included in their beneficiary components and their application has been guided by the fair distribution of natural resources across generations.112

One example can be found in the Minors Oposa v Factoran judgment.113 The Supreme Court of the Philippines considered whether the Secretary of the Department of Environment and Natural Resources could continue issuing licenses for cutting down trees in the country's forests. The Secretary's mandate included the development, management and conservation of the country's forests.114 However, the youth plaintiffs, which represented a class of everyone living in the Philippines in the present and future, argued that the acts of the Secretary constituted a ‘misappropriation and/or impairment of the natural resource property he holds in trust for the benefit of plaintiff minors and succeeding generations’ and violated their constitutional right to a balanced and healthful ecology.115 They sought the discontinuation of logging licenses on this basis. In balancing environmental protection versus economic development, the Court held that the plaintiffs’ constitutional right prevailed and this included the state's duty to prevent deforestation that would irreversibly disrupt the ecological or environmental balance.116 Further to intergenerational equity featuring within the beneficiary component of the Philippines’ public trust regime, this case also shows that the principle has been used as a benchmark for determining the extent of state stewardship duties under PTDs; it was used to measure the significance of the Secretary's duties in benefitting people even after the living plaintiffs’ time. In other jurisdictions, young generations have advocated a similar link between intergenerational equity and PTDs. This includes recent and ongoing climate change litigation where youth plaintiffs initiate judicial scrutiny of state inactions to protect public trust resources, such as the atmosphere and water, and demand state stewardship.117

PTDs have however traditionally been applied and are still mostly applied to present day beneficiaries. Indeed, some legal systems may not be receptive to decision-making based on future generations and some judiciaries may not recognise future generations as having locus standi. Even in Minors Oposa, the Court noted that intergenerational equity and responsibility was a ‘special and novel element’ of the case and locus standi to sue on behalf of future generations was limited ‘insofar as the right to a balanced and healthful ecology is concerned’.118 Public trust litigation in other legal systems may have different outcomes. Although national and international legal systems with public trust regimes increasingly entail intergenerational equity, PTDs are not synonymous with this principle.

Second, the principle of prevention commonly features in legal sources that define public trust regimes. This principle entails states taking measures against activities or substances that threaten the environment.119 It has become so common that international courts and tribunals even recognise it as customary international law.120 The International Court of Justice concluded that ‘the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory’.121 Although its application under international law pertains to states preventing environmental harm on their territories if it could jeopardise the rights of other states, this still demonstrates the widespread dissemination of this principle and its normative application. This principle is applied more broadly within national legal systems. Regardless, states often apply the principle of prevention to protect public trust resources and sometimes explicitly to fulfil their stewardship duties under PTDs.

Many legal sources of the PTDs analysed and cited in this article include the principle of prevention. For example, the 1995 Ugandan Constitution requires the state to protect natural resources on behalf of the people of Uganda and, in doing so, ‘take all possible measures to prevent or minimise damage and destruction to land, air and water resources resulting from pollution or other causes’.122 Some states have also been held to account in public trust litigation for not sufficiently preventing harm to natural resources.123 In Advocates Coalition for Development and Environment (ACODE) v Attorney General, the High Court of Uganda ruled in favour of advocates challenging a permit that was granted to a sugar company for taking firewood from a forest reserve.124 The plaintiffs argued that that state did not fulfil its public trust duties in protecting the forest and did not consult the local community or conduct a proper study in advance. The Court decided that the permit was null and void and that additional measures, including consultations and an environmental impact assessment, were required to fulfil its stewardship duties.125 The widespread acceptance and application of this international environmental law principle, albeit not a prerequisite, has thus contributed to the development of and complemented existing PTDs.

Lastly, the development of the neighbour principle has also impacted PTDs. This principle traditionally required property owners to ensure their property is not injurious or harmful to communities.126 In the 1930s, it was extended across national territories in the Trail Smelter Arbitration.127 This dispute involved industrial pollution from a factory in British Columbia, Canada harming people and natural resources in nearby Washington, United States. The exploitation of natural resources in one national territory was found to be linked to ensuring the protection of persons and natural resources in a neighbouring territory.128 More recently, as customary international law, the International Court of Justice found that states are ‘obliged to use all the means at [their] disposal in order to avoid activities which take place in [their] territory, or in any area under [their] jurisdiction, causing significant damage to the environment of another State’.129 If one state causes such damage, the neighbour principle provides the state that is being damaged with recourse against the state causing the damage. States with PTDs could arguably be required, under their PTDs, to take legal action against neighbouring states that cause transboundary harm to the public trust resources within their territory. The United States arguably had a duty under its PTD to initiate the Trail Smelter Arbitration against Canada to protect natural resources within its territory for the benefit of its citizens.

Despite the neighbour principle most commonly being applied and theorised against adjacent states, certain international instruments stipulate that it extends beyond so-called neighbours. Principle 2 of the Rio Declaration on Environment and Development, for example, provides that states have ‘the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction’.130 This provides a basis for state responsibility over all activities under their control, regardless of the location, if those activities could cause damage anywhere outside their own territory. More research is needed on states taking judicial action on this basis, particularly in disputes involving the marine environment.131 Nevertheless, this development of the neighbour principle also relates to the transnationalisation of PTDs and will be analysed in Section 4.

3.3. International law instruments

PTDs have also internationalised through international law instruments. Treaties rarely mention the word ‘trust’, yet several draft treaties and negotiations have featured this word and the resulting treaties retained public trust regimes.132 State parties to such treaties have consented to implicit PTDs at the international level, thereby developing, expanding and/or reinforcing their national PTDs through international obligations.133 According to Sand, ‘we seem to have practiced public trusteeship in environmental treaty regimes all along’.134 This sub-section analyses three treaties that contain or inform public trust regimes: (1) the United Nations Convention on the Law of the Sea (LOSC); (2) the Indigenous and Tribal Peoples Convention; and (3) the World Heritage Convention.135 Furthermore, developments in the ongoing drafting and negotiation of the international legally binding instrument under the LOSC on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (ILBI) show that public trusteeship debates persist in international law-making processes, as certain states and civil society actors have advocated for the incorporation of strong state stewardship duties for the benefit of present and future generations.136

First, under Article 192 of the LOSC, 168 states agreed to protect and preserve the marine environment.137 This provision provides the basis of an implicit international public trust regime. Aligning with PTDs that have broad material scopes, it does not list specific public trust resources within the marine environment. It also does not define beneficiaries. However, since this obligation applies across all maritime zones, whether in national jurisdictions or beyond, other LOSC provisions can be consulted for identifying specific natural resources and beneficiaries. Article 117 obliges state parties to conserve the living resources of the high seas for their respective nationals. Article 145 requires measures to be taken to ensure effective protection of the marine environment from harmful effects that may arise from activities on the international seabed. In contrast to these environmental objectives, the LOSC also provides that activities on the international seabed shall be carried out for the ‘healthy development of the world economy’, which again might lead to balancing economic development and environment protection.138 Furthermore, Article 136 defines the international seabed and its resources as the common heritage of humankind, suggesting that state parties are required to protect the international seabed for all humans. For these reasons, this public trust regime also entails transnational components (eg states stewarding natural resources beyond their national territories) that will be further analysed in Section 4.1.

The LOSC contributes to the development, expansion and reinforcement of national PTDs in two predominate ways. On one hand, as explained in Section 2.2, many states have extended the geographic scope of their national PTDs according to the LOSC maritime zones.139 Regardless of such extensions though, state parties that recognise any oceanic resources as public trust resources in their national public trust regimes have the additional stewardship duties found in Article 192 and the others mentioned above. Whether those added obligations are directly applicable or involve national implementation legislation depends on each state party's legal system. This exemplifies international law adding or reinforcing existing national public trust regimes. On the other hand, Article 94 requires state parties to effectively exercise their jurisdiction and control over ships flying their flag. State parties are responsible for ensuring that their obligations under the LOSC are upheld by the vessels they license, including when those vessels are on international waters. This is because licensed vessels essentially take national territory with them onto the sea, whereby they are governed by the rules of their flag state.140 Thus, state parties’ stewardship duties have arguably expanded to encompass the oversight of licensed vessels. The LOSC demonstrates an international law instrument prescribing a common public trust regime to numerous states, including many without defined national PTDs.

Second, building on Section 2.2, Article 7(4) of the Indigenous and Tribal Peoples Convention requires 23 state parties to take measures, in co-operation with Indigenous Peoples, to protect and preserve the environment of the territories they inhabit. For the state parties with PTDs, this obligation alone provides evidence of states agreeing to involve Indigenous Peoples in executing their stewardship duties that involve the territories where Indigenous Peoples live.141 The Indigenous and Tribal Peoples Convention has been implemented directly and through national legislation, invoked in national court proceedings and internationally monitored by the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations (CEACR).142 Ideally, states will not only co-operate with Indigenous Peoples, but also uphold their right to conserve and protect the environment and their lands and natural resources and their right to self-determination.143 The Indigenous and Tribal Peoples Convention's binding nature provides a strong means for state parties to partially open their PTDs to co-operation with Indigenous Peoples and their stewardship systems and to begin the work of integrating environmental decolonisation into public trust regimes. In practice, this depends on the laws, policies and willingness of each state.

To explore this development, Brazil is a state party to the Indigenous and Tribal Peoples Convention and has an implicit PTD in its Constitution. Article 225 of the Constitution provides all people with the right to an ecologically balanced environment and prescribes the government with duties to defend and preserve the environment for present and future generations.144 While Article 231 provides the government with the ‘responsibility to delineate [Indigenous] lands and to protect and ensure respect for all [Indigenous] property’, the substance of Article 7(4) of the Indigenous and Tribal Peoples Convention is not present in Brazil's Constitution.145 In 2019, CEACR requested the Brazilian government to indicate how it ensured co-operation with Indigenous Peoples in the protection and preservation of the areas they inhabited in the context of a hydraulic project at the São Francisco River.146 No response has been identified. Although this case suggests potential shortcomings in the enforcement of the Indigenous and Tribal Peoples Convention and that non-compliance may limit how international law impacts a national PTD, it still demonstrates a state consenting to international law, whether the state honours its obligations or not, that impacts how that state is required under law to execute its stewardship duties.

Third, under the World Heritage Convention, 187 states agreed to ensure the conservation and protection of natural areas of outstanding universal value from the point of view of science, conservation and natural beauty.147 State parties can nominate sites within their national territories to be inscribed on the World Heritage List and therefore be covered by the World Heritage Convention.148 Once the World Heritage Committee inscribes such sites onto the list, the host states’ obligations to protect, conserve, present and transmit the site to future generations are triggered.149 This international instrument thus provides another implicit public trust regime with intergenerational equity, despite the fact that the execution of these obligations will naturally differ according to each particular site and how each state party implements the World Heritage Convention within its jurisdiction. Furthermore, many of the listed natural heritage sites contain natural resources that states with PTDs have deemed to be public trust resources.150 In this way, the World Heritage Convention's obligations also embolden the environmental stewardship duties required of state parties that have national PTDs. Moreover, the World Heritage Committee has powers to move sites from the ordinary list to the List of World Heritage in Danger.151 This list currently includes lakes, national parks, rainforests, nature reserves and oceanic reserves that face risks of depletion or disaster, among others. The aim of this list is to further promote and gain additional support for stewarding endangered sites that need major operations.

In exploring the implementation of this international public trust regime, the Australian government adopted the National Parks and Wildlife Conservation Act 1975 to implement the World Heritage Convention.152 In 1978, an energy commission of the Tasmanian government (sub-national government) proposed to build a dam in the Gordon River.153 Due to risks of the proposed dam causing flooding to the connected Franklin River, certain federal government officials opposed the project. They established a national park to surround and protect the rivers, proposed the dam project be moved to another part of the Gordon River and nominated the national park for the World Heritage List.154 While debates on the dam continued in and across the Australian and Tasmanian governments, the World Heritage Committee inscribed the Tasmanian Wilderness, which includes the Franklin and Gordon River areas, as a natural heritage site in 1982 and the federal government adopted the World Heritage Properties Conservation Act 1983.155 On this basis, the federal government sought to stop Tasmania from permitting the dam. This dispute prompted the High Court of Australia, in Commonwealth v Tasmania, to answer defining questions about Australia's legal system and its regard to international law.156 Remaining within the scope of this article, the Court concluded that the federal government validly blocked the dam through its ‘external affairs powers’ to implement its international obligations to protect and conserve the property of Australia.157 Australia's national PTD has been analysed in other cases and literature,158 but this case demonstrates how the World Heritage Convention's regime has disseminated into a national legal system.

This section analysed three processes of internationalising PTDs. The examples provided are non-exhaustive and could include additional examples of legal spreading, international environmental law principles and international law instruments. The complexities of these processes could also be further analysed according their impacts on individual PTDs. However, pulling together these examples provides a conceptual framework for more detailed analysis on individual PTDs later. The principles and instruments covered above have also contributed to the transnationalisation of PTDs in many ways, which will be analysed in Section 4.

4. The transnationalisation of public trust doctrines

Transnationalising PTDs entails extending their application beyond national limitations. Whereas internationalisation involves PTDs spreading into individual legal systems or disseminating into states from international environmental law principles or treaties, transnationalisation is the process of adapting the geographic scopes of PTDs and applying them beyond traditional limitations of the state. Table 2 summarises three key observed transnationalisation processes defined in this section: (1) states stewarding natural resources beyond their national territories; (2) states stewarding natural resources for the benefit of all of Earth's current and future inhabitants; and (3) states jointly stewarding natural resources with other states and non-state actors. These processes are not exclusive; they overlap in several instances. The following sub-sections provide practical examples, albeit non-exhaustive, to explore these processes. They show that and how PTDs are increasingly applied to address global environmental issues. By extending PTDs’ geographic scopes beyond national territories, more effective stewardship can emerge over public trust resources.

Table 2. Processes for transnationalising PTDs.

CSVDisplay Table

Major obstacles arise when adapting PTDs through these processes. States are not always receptive to stewarding public trust resources beyond their territories, nor always willing to accept other states or international bodies stewarding public trust resources within their territories or in areas beyond national jurisdiction. Many global environmental issues are highly politicised, and judiciaries might therefore be reluctant to transnationalise PTDs if other branches of government lack the political consensus or will to do so. The latter obstacle triggers the longstanding argument of judicial overreach.159 According to Sand, such obstacles are present because the wholesale application of PTDs would ‘require States to relinquish some measure of sovereignty’.160 Transnationalising PTDs, as with other legal principles and procedures, is certainly compatible with post-Westphalian concepts, but extending the applications of PTDs is not an automatic requisite to relinquishing sovereignty.161 These processes provide viable solutions for states to reconcile their individual duties and negotiate joint duties to legitimately address global environmental issues. Since these processes are based on the environment's interconnectedness and global ecology, they move PTDs even closer to their environmental objectives.

4.1. States as trustees of natural resources beyond their national territories

PTDs have traditionally prescribed states with stewardship duties over public trust resources within their national territories. With the expanded material scopes of many PTDs, some states now recognise transboundary and/or global public trust resources (ie public trust resources that extend, move or exist beyond national territories).162 Accordingly, the geographic scope of many PTDs are following suit with states applying their stewardship duties beyond their national territories. Building on analysis in Section 3.3, one example of this transnationalisation process involves state parties to the LOSC recognising the international seabed and its resources as the common heritage of humankind.163 This has postured the international seabed and its resources as a global public trust resource of all people. Although Part XI of LOSC enables activities on the international seabed for economic development, Articles 145 and 192 prescribe state parties with duties to protect and preserve the marine environment, including when undertaking activities on the international seabed, thereby establishing the environmental objective of this public trust regime. Article 139 goes further to define responsibility and liability schemes for state parties and international organisations that fail to comply with their obligations when carrying out activities on the international seabed.

Moreover, state parties delegated certain stewardship duties to the International Seabed Authority (the Authority).164 The Authority has a mandate to oversee activities on the international seabed and, to a more limited extent, coastal states’ extended continental shelves, including to adopt rules, regulations and procedures that prevent, reduce and control pollution and other hazards to the marine environment and interference with its ecological balance and prevent damage to the flora and fauna of the marine environment.165 Thus, in addition to their obligations under Articles 145 and 192, state parties also have stewardship duties over the international seabed as ipso facto members of the Authority, whereby they are called on to participate in organising and controlling activities on the international seabed with a view to administer its resources.166 This example of transnationalisation does not necessarily relinquish state sovereignty in requiring states to steward beyond their national territories or in delegating stewardship duties to the Authority, since states never had sovereignty or ownership over this global public trust resource to begin with.

Concluding the international legally binding instrument under the LOSC on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (ILBI) will further define how state stewardship duties apply in marine areas beyond national jurisdiction.167 States have debated on whether to include stewardship in the final treaty text as means to prevent biodiversity loss. The preamble currently expresses states’ intentions ‘to act as stewards of the ocean in areas beyond national jurisdiction on behalf of present and future generations’.168 The draft ILBI's implicit PTD would further internationalise and further transnationalise public trusteeship over oceans by obliging state parties to steward biodiversity beyond their national territories. Furthermore, it would entail the objectives of global marine ecology and, with many Pacific Island states promoting stewardship in negotiations, potentially environmental decolonisation with the opportunity to empower and support Indigenous stewardship systems of the Pacific and elsewhere.169 Additionally, states are debating on the inclusion of state stewardship duties within environmental impact assessment requirements and whether stewardship duties for marine genetic resources should be delegated to flag states or a new institutional body.170 It is uncertain how States will conclude the treaty, but the mere fact that stewardship is a pillar of the ILBI is evidence of states’ increased willingness to identify additional public trust resources (ie biodiversity and marine genetic resources) and to agree to stewardship duties beyond their national territories.171 Moreover, the strong dispute settlement mechanism under the LOSC provides procedural rights for states to ensure the public trust regimes under the LOSC and potentially the ILBI are upheld.

Oceans management is just one area with growing consensus amongst states to extend the material and geographic scopes of PTDs to address global environmental issues. This transnationalisation process also features in climate change litigation pertaining to atmospheric public trust resources, including in the case covered in Section 4.2, and terrestrial public trust resources, such as in international assistance projects covered in Section 4.3.

4.2. States as trustees for beneficiaries beyond their citizens

Traditionally, the core concept of PTDs has been for states to steward natural resources for the benefit of their citizens. Recent developments show that certain PTDs have transnationalised by encompassing more beneficiaries, including, most remarkably, all of Earth's current and future inhabitants. In Colombia, for example, the Supreme Court of Justice transnationalised Colombia's PTD in the landmark judgment Future Generations v Ministry of Environment and Others.172 Twenty-five Indigenous and non-Indigenous youth plaintiffs sued the Ministry of Environment and three corporations for not reducing deforestation in the Colombian Amazon Rainforest and greenhouse gas emissions. The plaintiffs claimed that the state's failure to fulfil its related constitutional and legislative duties and international commitments under the Paris Agreement led to violations of their fundamental rights.173 The Court recognised that the Colombian Amazon Rainforest's natural resources ‘are shared by all inhabitants of Planet Earth, and by their descendants or future generations who do not yet have a physical hold of them’.174

Colombia's PTD is implicit in provisions of the Constitution of 1991.175 The state has duties to protect its cultural and natural assets.176 To guarantee the right to a healthy environment, it must protect the environment's diversity and integrity, conserve ecologically important areas and foster education to achieve those ends.177 It must plan the handling and use of natural resources to guarantee sustainable development, conservation, restoration or replacement.178 The state also has duties to monitor the protection of public space and its common use and interest, which have priority over individual interests.179 In applying these duties to the Colombian Amazon Rainforest, one of the planet's most biodiverse ecosystems and considered to be a ‘lung of the world’, the Court identified the universal value of natural resources in the Colombian Amazon Rainforest and motivated its judgment on stewardship of these natural resources as benefiting not just the plaintiffs, but all of Earth's current and future inhabitants.180 The Court thereby applied the intergenerational equity principle in determining the extent of the state stewardship duties over its duty to guarantee sustainable development through the use of the rainforest's natural resources. This transnationalisation process is even more apparent in the Court's interpretation of Colombia's implicit PTD within the context of the ‘global ecological public order’.181

This judgment elicits several questions on procedural rights and remedies. The Court progressively granted the youth plaintiffs locus standi for their novel climate change claim.182 The Court's five injunctions required the Presidency, Ministries of Environment and Agriculture and corporations, in coordination with the youth plaintiffs, affected communities and interested public, to develop action plans, mitigate deforestation and construct an Intergenerational Pact for the Life of the Colombian Amazon.183 This granted the youth plaintiffs, including Indigenous youth, additional rights in the execution of the orders. As a state party to the Indigenous and Tribal Peoples Convention, this coordination requirement could contribute to Colombia's Article 7(4) obligations to co-operate with Indigenous Peoples to protect the land they inhabit. The Court also recognised the Amazon Rainforest itself as a subject of rights.184 However, it remains unclear as to whether all Earth's inhabitants and nature itself would have locus standi to hold Colombia accountable in future cases.185

Beyond Colombia, transnational procedural rights of and remedies for non-citizens might be provided in national or international law. For example, the Aarhus Convention has a Compliance Committee that can be used to ensure parties comply with their obligation to provide the public with access to justice and information and participation rights in environmental decision-making.186 This and several other treaties under the aegis of the United Nations Economic Commission for Europe require or encourage parties to ensure that citizens of neighbouring countries have the same rights in environmental decision-making as their own citizens. To better understand how transboundary procedural rights relate to PTDs, additional transnationalisation research is warranted on states that have PTDs and that are parties to such instruments.

The transnationalisation process analysed in Future Generations arguably did not relinquish Colombia's sovereignty any more than the government did in ratifying its Constitution, Law 1753 of 2015 or the Paris Agreement. Rather, it shows the decisive role that judiciaries play in evaluating existing state stewardship duties against the law and information on global climate change. It also adapted the objectives of Colombia's PTD to include global ecology, climate justice and environmental decolonisation. The latter two are evidenced in the remedies for young and future generations, including Indigenous ones. Beyond Colombia, numerous national and international public trust regimes have similarly transnationalised or could through case law, legislation and international law instruments. For example, the draft ILBI, as mentioned in Section 4.1, is currently written to require states to steward resources for the benefit of all humanity, present and future.187

4.3. Joint trusteeship between multiple states and states and non-state actors

PTDs have traditionally required states to solely steward public trust resources within their national territories. With many public trust resources and beneficiaries now transcending states’ territories and citizens, effectively applying PTDs requires stewardship from two or more states. Joint public trust regimes have increased with states assisting other states to steward public trust resources and working alongside each other and non-state actors for this purpose. Parties to the World Heritage Convention, for example, have assisted other parties in stewarding natural heritage sites that contain public trust resources.188 Although sites are in national territories and the World Heritage Convention posits sites as state property, the World Heritage Fund's International Assistance programme facilitates states in supporting other states’ stewardship duties. States have donated funds for capacity-building, restoration and support for other states to nominate natural heritage sites. When recipient states have PTDs and sites containing public trust resources, these donations contribute to them fulfilling their stewardship duties under PTDs.189 Donor states are not always physically involved in stewarding the subjected public trust resources, but their financial and technical assistance enable recipient states to do so.190 Moreover, the International Assistance Panel plays a critical role in facilitating these projects and is therefore also a stewardship partner.

This transnationalisation process can also be identified elsewhere. In climate change litigation, national judiciaries have recognised individual states’ duties as inseparable from international, collective efforts to address climate change.191 In Asghar Leghari v Federation of Pakistan, for example, the Lahore High Court found that Pakistan did not implement its climate change policies and therefore did not fulfil its duties to steward the atmosphere, which is a recognised public trust resource in Pakistan.192 The Court reviewed the government's commitments, including to ‘seek international collaboration in funding the management and conservation of natural resources in the global perspective’.193 Conceivably, the Court considered Pakistan's stewardship duties as integral to the international community's efforts to combat climate change. A national court cannot prescribe stewardship duties to third states, but this judicial ideology transnationalised Pakistan's PTD by positioning it as one component of collective stewardship efforts to address a global environmental issue.

Building on Section 4, oceans management provides another example with LOSC state parties working with the Authority and each other through the Authority to jointly steward the common heritage of humankind. The Authority has powers to oversee activities on the international seabed; however, in the Assembly of the Authority, member states set the agenda and make decisions.194 Furthermore, the general obligations of state parties to protect and preserve the marine environment also applies to the international seabed.195 State parties thus work with the Authority and each other to jointly steward the common heritage of humankind beyond their national territories. These three examples illustrate how international commitments of joint stewardship and judicial interpretations are transnationalising implicit and formalised PTDs, at least for donor and beneficiary country of the World Heritage Fund's International Assistance programme, in Pakistani jurisprudence and for all states with PTDs that are parties to the LOSC.

5. Conclusion: towards global public trust doctrines

The Westphalian state sovereignty system maintains a legal order that inclines PTDs to be fixed to national territories. This order's limitations create obstacles for PTDs to adequately respond to global environmental issues. The project of global law, however, calls for humanity to recognise its common problems across national borders and collectively generate effective responses.196 Global environmental law is gradually emerging through the transnationalisation of environmental law principles and procedures, providing a basis for the world's disparate and diverse legal systems to more collectively and comprehensively address widespread issues. In some instances, this provides procedural rights for states, civil society and/or individuals to ensure those principles and procedures are upheld across borders.197 The widespread existence of public trust regimes warrants analysis regarding if and how PTDs can be applied to address global environmental issues.

PTDs have internationalised by states spreading them to national and international legal systems, states commonly applying related international environmental law principles and states consenting to public trust regimes in international law instruments. In addition to PTDs’ traditional limitations, public trust scholarship on these internationalisation processes has often reduced PTDs to patrimony of England and the United States; this has arguably contributed to the shortcomings of PTDs. Further investigations on the complexities of individual PTDs, including their histories, legal contexts and relations to pre-existing and local stewardship duties, may provide insights into the shortcomings of PTDs and solutions for overcoming these.198 PTDs in settler colonial nations, for example, need to be critically analysed against Indigenous stewardship systems: Indigenous stewardship systems may have centrally influenced these PTDs’ development (ie through the appropriation of and/or resistance to Indigenous stewardship systems), and Indigenous Peoples have proven track records and specialised knowledge in successfully stewarding natural resources over extended periods of time. Furthermore, comparative analysis on how multiple PTDs address the same global environmental issue will provide evidence on the individual and joint functions of public trust regimes and their effective uses.

The transnationalisation of PTDs is advancing, both nationally and internationally. States are widening PTDs’ material and geographic scopes, including by recognising public trust resources beyond their national territories and stewarding for beneficiaries beyond their citizens. The selected transnationalisation examples provided in Section 4 illustrate the burgeoning legal metalanguage of global PTDs. Prior public trust scholarship concluded that states are reluctant to transnationalise PTDs due to a perceived relinquishment of sovereignty; however, despite global PTDs being compatible with post-Westphalian concepts, Section 4 has shown that this is not a requisite.199 Transnationalising PTDs essentially requires states to reconcile their individual and joint stewardship duties, which they themselves consent to through lawmaking and/or ratifying or acceding to treaties, in order to protect natural resources against global environmental issues. PTDs’ common feature of adaptability, including their receptiveness to new information and application to novel environmental issues, enables states to recalibrate their PTDs accordingly, if needed.

#### Licensing is goldilocks- it balances between sustainable space development and incentives- AND property rights aren’t key- litany of terrestrial examples prove

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[Morgan Sterling Saletta, and Kevin Orrman-Rossiter, PhD candidate, History & Philosophy of Science, The University of Melbourne, "Can space mining benefit all of humanity?: The resource fund and citizen's dividend model of Alaska, the ‘last frontier’," Space Policy, Vol. 43, p. 1-6, <https://doi.org/10.1016/j.spacepol.2018.02.002>, accessed 1-25-22]

1. The ‘final frontier’, utopian ideals and pragmatic governance: is it possible to balance commercial space exploitation, profit motives, and benefits to all of humanity?

In 1903, Konstantin Tsiolkovsky suggested that exploiting asteroid resources [1] would be key to conquering what Gene Roddenberry and his fellow producers later called the ‘final frontier’ [2]. While the idea of asteroid mining thus predates the space age, the prospect of a space economy fuelled in part by the exploitation of asteroids, the moon and other celestial bodies is increasingly technologically and financially feasible.

In situ resource exploitation is often cited as a crucial part of ambitious plans underway by the steadily increasing number of spacefaring nations and commercial, entrepreneurial ventures in space-plans that include orbital outposts and hotels, space based solar power stations [3] and manned and/or robotic missions to the Moon and Mars in the coming decades. Resources from the Moon, Mars and asteroids have been proposed for use in human space exploration to produce propellants, water for life support, structural materials, radiation shielding and heat shields [1,4]. While competing and evolving visions for space exploration and political, budgetary and economic realities make the future of such plans uncertain, there are many indications that resource exploitation of near Earth objects (NEOs), the moon or other celestial bodies is rapidly becoming feasible [5].

Additionally, the mining of celestial bodies, including NEOs, has frequently been presented, both in specialist literature and in popular media as a way to solve terrestrial shortages of precious metals, semiconducting materials and rare elements such as Helium-3. Because of its proximity and composition, the moon is an attractive starting point for resource prospecting [6]. On the other hand, NEOs have received particular attention because they may be richer in some desired raw materials, especially metals, than the surface of the moon, while also having a much weaker gravity well [[7], [8], [9], [10]]. Public scientists and science communicators such as Neil deGrasse Tyson have promoted asteroid mining both as a way to solve conflicts over terrestrial resources while enriching humanity as well as providing the technologies necessary to detect and deflect asteroids that threaten Earth [11]. The popular founding manifesto for asteroid mining, John S. Lewis' Mining the Sky (1997) estimated that mining asteroids for valuable metals could provide trillions of dollars of precious metals [12], though such claims, oft repeated, should be regarded sceptically in absence of detailed and sophisticated economic modelling.

Some studies have optimistically suggested that profit making ‘space mining’ ventures could be undertaken with little or no government funding [8]. This does not, however, reflect that which has already been invested in research, surveys and mapping of celestial bodies and the development of space technology by governments (including public/private partnerships), or the necessary technological developments likely to emerge from future missions by NASA and other Space Agencies. NASA's use of Space Act Agreements to engage in public-private partnerships such as that with SpaceX and Orbital ATK is part of a broad reshaping of the aerospace industry that will see increased privatization and commercial activities in space and new forms of Public-Private Partnerships (PPPs) which may also play a role in space resource exploitation [13]. As greater numbers of actors, with complex relationships to stakeholders, including national governments, become active in outer space, the need to insure peaceful interactions, one of the primary goals of the OST, will be increasingly important.

Advocates of space exploration argue that human exploration (and utilization) of space has and will benefit all of humanity. Indeed, the rhetoric of space exploration has been, since at least the time of Konstantin Tsiolkovsky, imbued with both techno-utopian and religious overtones by many of its advocates, many of whom speak in prophetic terms of a space faring human destiny [[14], [15], [16], [17]]. The influence of the ‘Spaceship Earth’ metaphor [18], Apollo era Earth-rise photographs and what Frank White has called the “overview effect” [19] have been cited by numerous environmentalists as having an influence on the developing environmental movement of the 1970's as well as offering humanity a vision of the Earth absent the political divisions seen on maps.1

Others take a more pragmatic approach, arguing that while space programs have already benefitted much of humanity, access to these benefits remains uneven and challenges remain for the future in this regard [20]. Advocates of the privatization and commercialization of space also often frame their advocacy in terms of the benefits to mankind and humanity as a whole [21], and there have been attempts to outline frameworks for the exploitation of resources in space which both provide for private entrepreneurship and profit making while also benefiting mankind as a whole [22]. Peter Diamandis, co-founder of the asteroid prospecting and mining company Space Resources, has recently cited Tsiolkovsky's famous words “Earth is the cradle of humanity but one cannot live in the cradle forever [23],” in advocating a moral duty to explore and colonize space and expounding on the many riches of outer space which will drive this project, end terrestrial conflicts over resources, and enrich humanity [24].

Unsurprisingly, there is a ‘Silicon Valley’ venture capitalist marketing spin in the discourse surrounding the prospect of commercial resource exploitation in space, characterized by appeals to the mythos of the Wild West, gold rushes and with not infrequent echoes of Manifest Destiny. While companies and entrepreneurs justifiably intend to enrich their investors, claims that this will in turn enrich humanity more generally sound suspiciously like trickle-down economics [25]. Private enterprise and the profit motive certainly have an increasingly crucial place in space exploration, and the current authors support commercial endeavors in space, but space is not the Wild West frontier of Frederick Jackson Turner [26], with ‘free’ land for the taking-it is an international commons regulated by the Outer Space Treaty as ‘the common province of all mankind [27].” Thus, we argue that in a very real and legal sense, the sky belongs to everyone. Indeed, the current authors follow Virgiliu Pop [28] and others [29] in the view that outer space is a res publica internationalis, or res communis, as is the atmosphere, much of the oceans and the sea floor.

Is it possible to create a ‘balanced’ framework for the exploitation of outer space which encourages private enterprise while also tangibly accruing benefits to all humanity by a means more certain than vague platitudes and promises? Certainly, the need to create a stable framework for space exploration and resource exploitation has been highlighted by many authors [30]. However, underlying the many different approaches to space exploration and exploitation at the international, national and subnational levels are various and often divergent political, economic, philosophical and ideological visions of property, the commons, and the appropriation of natural resources [31,32] with important implications for humanity's future in space and how the benefits of such a future will accrue and be apportioned.

In considerations of future regimes governing outer space, it is common to look to analogous terrestrial examples of 'global commons' management such as the UN Convention on the Law of the Seas (UNCLOS) and the Antarctica Treaty System (ATS) for inspiration [22]. While acknowledging the importance of these treaty systems as potential models, the current authors suggest that to establish a balanced, pragmatic framework for the exploitation of outer space, other terrestrial resource regimes can provide useful models and mechanisms that can enrich these discussions.

In what follows, the present authors will briefly examine current debates with regard to the exploitation of outer space and the current corpus juris spatialis embodied in the Outer Space Treaty. It is our view that to achieve a balanced regime for the exploitation of outer space, building on the existing treaty system, policy makers, space agencies and would-be space mining entrepreneurs must be willing both to carefully examine existing terrestrial regimes of resource exploitation of public lands and global commons. The authors then examine one potential, and largely overlooked, terrestrial model of resource exploitation from Alaska, frequently referred to as the ‘last frontier’.

The Alaska Permanent Fund, a type of Natural Resource Fund, is thus explored as a successful terrestrial example that encourages profit driven resource exploration and exploitation by commercial entities while also accruing tangible and sustainable benefits directly to residents of Alaska. Adapted to the ‘final frontier’ of outer space, the Alaska Permanent Fund and its citizen's dividend provide one possible model for building a balanced economic and legal framework with a purpose to encourage commercial enterprises, whether private or public, while simultaneously accruing tangible, quantifiable benefits to all of humanity, in keeping with the visionary ideals fitting for a human future in space.

2. The Outer Space Treaty, property rights and the exploitation of outer space

The Outer Space Treaty (OST) came into force in 1967 and, having been ratified by all the major space faring governments as well as some 100 other nations, the Outer Space Treaty serves as the basis for international space law, the current corpus juris spatialis. The treaty declares the exploration and use of outer space shall be for, “the benefit and in the interests of all countries [27]” and that outer space, as mentioned previously, “shall be the province of all mankind [27]”.

With the increased commercialization of space, and the entrance of new actors, both national and private, the OST has come under increased scrutiny, with calls to expand, modify, and even to abrogate it [35,36]. Issues surrounding the mining of celestial bodies have received particular attention and debate [37]. Of particular concern is the matter of exploitation licences and property rights [38]. The OST expressly forbids the “national appropriation by claims of sovereignty, by means of use or occupation, or by other means” [27] of outer space and celestial bodies. This is frequently interpreted to mean that the OST denies private property claims in outer space, some authors and individuals [[39], [40], [41]] have argued that appropriation by non-national entities is allowed.

The Outer Space Treaty, and its terrestrial analogues, UN Convention on the Law of the Seas (UNCLOS) and the Antarctica Treaty System (ATS) are ‘global commons regimes', though the terminology governing these commons differs and juridical concepts such as “common heritage of humanity” found in UNCLOS (and the Moon Treaty of 1979) and the “common province of mankind” found in the Outer Space Treaty have been interpreted in various manners.

Due in part to these varying wordings, interpretations and attendant uncertainties, the need for a more comprehensive framework governing the environmental, ethical, and commercial aspects of space exploration, exploitation and colonization has been highlighted by many authors [30,33,34].

Some advocates for the commercial exploitation of space claim that the absence of property rights is a barrier to such ventures, and in particular to the mining of celestial bodies such as the Moon or near earth asteroids [35]. Some have gone so far as to suggest an abrogation of the OST in favor of a treaty that allows something like fee-simple ownership and what might best be called a California gold rush approach to outer space resource exploitation [[36], [37], [38]]. Advocates of this approach would give something like fee-simple ownership of outer space resources on a ‘first in time, first in right’ basis with no clear licensing regime for such activities [39]. In recent US law, Title IV of H.R. 2262- the U.S. Commercial Space Launch Competitiveness Act, grants ownership of asteroid resources to entities obtaining them but attempts to walk a fine line between this approach and international treaty obligations. It does not grant ownership of asteroid themselves, and explicitly states that resource exploitation must be in accordance with federal laws and existing treaty obligations, i.e. the OST [40]. How such eventual exploitation occurs, and under what precise national and international regulatory and licensing regimes, is thus still a matter for the future to decide.

On the other hand, it has also been suggested that modifications and additions to the OST based on terrestrial models will provide sufficient guarantee of the right to make profits from the exploitation of outer space resources. Henry Hertzfeld and Frans von der Dunk argue the current regime does not pose a problem for exploitation rights and that terrestrial models would allow private ventures the right to reasonable returns on investment from resource exploitation in space [41].

Furthermore, in addition to important, and possibly irreconcilable, differences between a California gold rush style approach and the OST [42], arguments suggesting fee-simple or similar ownership is necessary for profitable private outer space resource exploitation simply do not stand in the face of contrary evidence from numerous terrestrial examples. These include offshore oil drilling, mining, timber and grazing operations in the United States and internationally which are regularly and profitably undertaken without ownership [43]. Thus P. M. Sterns and L. I. Tennen argue that the current international regime does provide an adequate framework for commercial development in space, that fee-simple ownership is unnecessary and:

“those who advocate the renunciation and abandonment of the non-appropriation principle are either seeking to increase their own bottom line by disingenuous and deceptive constructs, or lack an appropriate appreciation and respect for international processes [[44], p. 2439]”.

Thus, claims that a lack of private property rights in outer space will be a deterrent to commercial resource exploitation ventures in space do not reflect an adequate reflection and analysis of the manner in which current terrestrial practices might be extended into outer space without abrogating the current treaty regime. Nor would a system based on fee simple ownership be likely to tangibly benefit more than a small proportion of the world's population. Instead, the eventual wealth from exploiting celestial bodies would be concentrated in the hands of a few, exacerbating rather than alleviating existing problems for humanity and global sustainable development.

The Outer Space Treaty has provided an effective legal framework for the exploration of outer space for over 50 years. Based on the history of treaty regimes governing other international spaces, UNCLOS and the ATS, it seems likely that, in future, additional protocols and agreements will be layered onto the OST and that calls to abrogate and to negotiate a wholly new treaty system are unlikely to succeed. While low participation in the Moon Agreement, also known as the Moon Treaty of 1979, which has not been ratified by either the United States, Russia, or China, has raised questions of legitimacy, it has recently been argued that the Moon Treaty may receive renewed interest in the international community. René Lefeber argues that, far from stifling commercial ventures, the Moon Agreement “provides the best available option for mankind, states and industry to develop space mineral resources in a harmonious way [[5], p. 47]”, and that, as resource exploitation in outer space now seems likely, the need to elaborate an international regime to prevent conflict over resources may bring other parties to ratify, accede to, or sign the treaty.

Ultimately, some form of international governance of outer space as a global commons [45] building on the OST and the current corpus juris spatialis seems both more likely and more desirable than an abrogation of the OST and its replacement with an entirely new treaty regime. Thus, an international regime built upon this existing regime will need to be constructed which takes a balanced approach to space exploration, development and exploitation and which encourages entrepreneurial development but also moves beyond vague utopian platitudes to real and concrete benefits for all of humanity.

3. Terrestrial models of resource leasing

Within such an international regime, how might the exploitation of outer space resources be regulated and managed in a balance manner, benefiting humanity while also encouraging commercial ventures? The details will certainly emerge after extensive long-term negotiations, but one option is that nations might negotiate something like the International Seabed Authority that could, in the context of outer space resource exploitation, collect royalties on production and impose necessary fees as needed [22].

Terrestrial mining operations provide numerous examples whereby companies pay both for licences and additional royalties on production to exploit publicly/state owned resources within national territories; this is, in fact, business-as-usual for companies engaging in mineral and other natural resource exploitation. In the United States, the royalty rate on production of onshore oil and gas from Federal lands is 12.5%, with money split between the federal Treasury and the state of origin. While federal rates are low- Texas for example charges 25%, though most states charge between 16 and 19%, the billions of dollars in royalties is one of the Federal government's largest source of non-tax revenue [46].

The potential wealth generated from the exploitation of space resources on the Moon, NEA's or Mars are difficult to assess, and may be truly astronomical. However, oft repeated claims that metals in asteroids are worth tens of billions of dollars for every inhabitant of Earth should be treated sceptically in absence of detailed economic models [12,47]. Nevertheless, wealth generation from resource exploitation in space has the potential of benefiting humanity as a whole, but also of exasperating the already vastly unequal wealth of the world. It is for this reason that the question of ownership in outer space is one that needs to be decided internationally.

The establishment of an international organisation with the right to ‘lease’ asteroids or other extra-terrestrial sites of resource extraction (i.e. the Moon) and to charge royalties on production is a pragmatic approach, based on business-as-usual terrestrial practise, which would balance the concerns of commercial and profit-making entities while potentially providing benefits to all of humankind, the rightful owners in common of these resources. For the sake of argument and using the speculative estimates previously mentioned, if an asteroid were to yield 1 trillion dollars' worth of metals or other resources, the royalty on that production, based on the current U.S. Federal rate of 12.5% would be 125 billion dollars. Licences and royalties on production are business-as-usual around the world, including in the United States, Australia, and other advanced economies. They would thus seem to be a relatively unproblematic means of providing a fair share of benefits to humanity from eventual space resource exploitation, while providing needed legal clarity to would be commercial ventures concerned about returns on investment.

How should the eventual revenues produced from such royalties be managed and apportioned? This is no minor question. Indeed, it is sometimes held that the low participation level in the Moon Treaty is largely due opposition within developed countries to redistributionist interpretations of the common heritage of mankind principle explicitly embodied in the text of Moon Treaty. In simplistic terms this has sometimes been seen as a conflict between socialist and capitalist interpretations of the underlying principle of common heritage; or in less politically laden terms of efficient versus equitable use of resources [48]. Significantly then, a way forward which minimizes or overcomes conflicts over questions of how revenue from the eventual leasing of resource exploitation rights and royalties on production in outer space is both desirable and necessary.

There are undoubtedly many possible ways to achieve this end, portions of the revenues could, for example, be apportioned to national governments based on population size, nor need all benefits be measured purely in monetary terms. Nevertheless, in what follows, the authors offer for consideration one possible mechanism for apportioning benefits from space resource exploitation which has hitherto been largely overlooked both with regard to resource exploitation of outer space, as well as with regard to global commons more generally. Such a hypothetical system would also be largely consistent with the provisions of the Moon Treaty, an important issue should greater participation in the Moon Treaty result from a growing recognition of need for an international framework to prevent conflicts over access to and exploitation of resources in space [5].

4. The Alaska Permanent Fund and citizens dividends-the ‘last frontier’ as a model for the ‘final frontier’

In exploring how a pragmatic system might be created by which the exploitation of outer space benefits all of humanity, it is prudent to thoroughly examine terrestrial models which might provide a model and/or mechanism for such a regime. Alaska, sometimes known as the ‘last frontier’, provides a unique example, in the form of the Alaska Permanent Fund, of a democratic, market-based and economically viable model that can inform efforts to establish an international regime for an eventual exploitation of the ‘high frontier’ that benefits all of humanity while also encouraging profit-making ventures and insures, as René Lefeber [5] has argued, that the mechanism for sharing benefits with humanity also provide preferential treatment of investors as motors of human expansion into space.

The Alaska Permanent Fund is an example of a natural resource fund (NRF), one type of public trust fund of which nationally controlled sovereign wealth funds are but one, albeit well known, example. NRF's are financed with revenues from the sale of mineral, gas or oil resources or by royalties collected from leasing arrangements. While natural resource funds and sovereign wealth funds have proliferated since 2000, they are not new, with trillions of dollars invested in such funds globally. The oldest continually operating fund is the Texas Permanent University Fund founded in 1876. Such funds, the majority of which are NRF's, are now in use by many nation states as well as sub-national entities including the U.S states of Alaska, Wyoming, Texas and Alabama. The new millennium has seen proliferation of natural resource funds, with some 34 created since 2000 [49].

The well-established and accelerating trend of creating these types of funds provides a clear method to manage the revenue from the leasing of outer space resources consistent both with the needs of profit driven commercial entities and with the OST. In short, the authors propose that the eventual creation of an international space resource fund, managed, for example, under the aegis of the World Bank or similar institution might provide a pragmatic and market-based mechanism by which benefits of space resource exploitation could accrue to all of humanity without stifling commercial and entrepreneurial ventures. The question remains, however, what to do with the returns on such a potential investment fund. Here again, the Alaska Permanent Fund (APF) offers a unique and time-tested mechanism. To understand its origins, and potential appeal for an outer space resource exploitation management regime, some historical and political context is needed.

The Alaska Permanent Fund was proposed by then Governor Jay Hammond and established in 1976 by a constitutional amendment with the purpose of investing a portion of the royalty payments from oil production on state owned land. The purpose of the fund was twofold: to create a sustainable investment fund with the revenues from a depleting non-renewable resource, but also to limit the ability of politicians to spend these revenues on wasteful projects. Indeed, it is important to note that while the APF is considered a model in terms of its transparency, in some countries resource funds have undermined the public interest and contributed to nepotism and corruption [49].

The creation of the Alaska Permanent Fund was motivated by libertarian principles rather than 'socialist' ideology. In 1977 Gov. Hammond proposed that a portion of the investment proceeds be payed as dividends to all Alaskan residents as part of his “Alaska, Inc.” plan [50]. This is a unique feature of the APF- although many states have created wealth funds for various purposes, none pays a dividend to all residents, regardless of age. Indeed, the fund is a unique and democratic experiment in “intergenerational transfer of wealth and in the redistribution of public funds back to the private sector [[51], p. 139].” Many, if not most, Alaskans view the dividend as their right as shareholders in the natural resources of the state [52]. In keeping with the desire to shield the Fund from politicians, the establishment of an independent trust corporation and a mandated ‘prudent investor' policy (adopted in 1980) means that the Fund is insulated from political pressure to invest in pet projects, and the dividend has created a vested and personal interest on the part of Alaskan residents in the health of the fund [50].

The APF is now worth some 63 billion dollars and recent payments from the Alaska Permanent Fund Dividend (APFD) to each Alaskan resident have ranged from $2072 (US) in 2015 to $1100 in 2017 [53,54]. As the size of the dividends has generally grown over time and become an expected component of household budgets, there is active political support for the APFD across the political spectrum with active proponents including former Governor Sarah Palin.

By investing the revenue from resource leasing rights in the global commons of outer space, and paying a ‘citizens’ dividend’ to all eligible residents of Earth, a hypothetical 'outer space resource fund' modelled on the APF could create a vested public and international interest in its management. By bypassing national governments and paying a dividend directly and equally to all eligible individuals (for example, adults over the age of 18) such an approach could help prevent the potential mismanagement by politicians of funds from leasing outer space resources. Most importantly, such a system would provide a framework encouraging commercial exploitation of outer space by ensuring legal clarity while simultaneously ensuring that the exploitation of “the common province of all mankind” [27] accrues tangible benefit to all of humanity. Such a system would also be consistent with the Moon Treaty should it gain renewed interest and increased participation by space faring nations. By accruing tangible benefits equally to all eligible human beings directly, a properly adapted Alaska Permanent Fund and citizen's dividend model applied to outer space resource licensing fees offers one possible means with which to ensure future benefits from resource exploitation in outer space accrue to all of humanity-indeed such a model might very well be applicable to analogous terrestrial commons such as the Sea Floor and Antarctica.

While the technological challenges in creating a payment system for all eligible members of the Earth's population are significant, they are probably less than the technological challenges in successfully mining asteroids or other celestial bodies. Technological innovations such as mobile banking are rapidly penetrating the developing world [55,56] and represent one way that challenges to creating and distributing a ‘space dividend’ to all eligible members of the Earth's population could be overcome.

Alternatively, as previously mentioned, the international community might implement a system in which royalties on production from outer space resource exploitation were apportioned to national governments rather than to individual citizens. That such an approach might be pragmatically more acceptable in the current international environment neither means that this will necessarily be the case in the future, nor should it preclude the serious discussion of alternatives such as we have outlined here from informing the discussion concerning the elaboration of future international regimes for managing the exploitation of resources in outer space.

Furthermore, because even moderate dividends by developed countries standards would be proportionally much more significant in developing nations, such dividends, whether payed to nation states or to individual citizens, could be instrumental in achieving some of the most urgent goals of sustainable global development, goals embodied in the UN's Sustainable Development Goals [57].

5. Conclusion

Astronomers often point out that we share the same sky [58], and in many ways this sentiment is enshrined in the Outer Space Treaty. Providing a framework for the exploitation of space resources that balances international, national and commercial interests while also benefitting all of humanity is both achievable and desirable. Policy makers and academics should thoroughly explore terrestrial examples, including business-as-usual practices of royalties on production as well as more unusual models such as the APF for possible mechanisms and frameworks to further the goal of achieving an international regime that balances the many national, international, commercial and hybrid public/private interests in outer space while minimizing the risks of conflicts between actors, including nation states and commercial or other interests acting as nation state proxies. The exploitation of outer space resources may be a reality in the next 50 years. The resource fund model, built on royalties on production and with a system for the distribution of benefits, of which the citizen's dividend mechanism of the Alaska Permanent Fund is but one example, provides one possible pathway, worth wider discussion and consideration, to build an international regime for space exploration and exploitation that encourages entrepreneurial ventures while tangibly and truly benefiting all of humanity.

#### Cooperative space development is more efficient

Raclin 86

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It must be recognized that more than half of the countries constituting the United Nations won independence within the last twenty years. These countries reject the traditional method of obtaining sovereignty and benefits through simple occupation of territory. 9 2 They seek to develop industrially quite quickly, hoping to establish a new international economic order in which developed countries are called upon to assist developing countries in a modernization campaign.193 Unless the United States seeks to withdraw from the numerous international organizations governed by one-nation-one-vote systems - a move which would render its terrestrial activities extremely difficult - the United States must now recognize, at least to some extent, developing countries' demands to have a voice in the development and exploitation of Antarctic and outer space resources. 194

From a purely practical standpoint, unilateral action by the United States to explore and exploit lunar and other resources would be extremely inefficient. Such an undertaking would require duplicative research and development, construction, transportation, and management efforts and activities that could be shared more profitably among numerous countries. As the United States has recognized the practicality of shared efforts regarding its plan to share the construction of the space station with Japan, Canada, and the European Space Agency, 195 so will the world's countries undoubtedly find it advantageous to unify in order to explore outer space. The early establishment of a predictable method of sharing the benefits of extraterrestrial resource development also will lessen the likelihood that inefficient "get-it-while-you-can" activities will characterize development efforts.

Finally, adoption of an international accord to regulate commercial activities in outer space and to allocate the benefits of such activities in a predictable manner would appear to be a prerequisite to financing these activities. Banks and investors will be reluctant to lend funds to any mining entrepreneur or consortium that did not have the uncontested, or at least predictable, right to the benefits of the resources it plans to develop or prospect. Similarly, it cannot be expected that an entrepreneur will take on the significant risks associated with extraterrestrial mining activities if its ability to obtain the benefits of those activities is open to question. Indeed, were the United States to fail to adopt a regime governing extraterrestrial resource exploration, it must be anticipated that entrepreneurs might seek the protection of parties to such a convention. Thus, the failure of the United States to secure such an agreement may result in the United States losing its ability to participate in such activities. 196

### Framing

#### Contention 3: Framing

#### The standard is maximizing expected wellbeing. That best recognizes the equal moral weight of all which accords everyone their due

#### Extinction outweighs- indicts reflect cognitive biases

Leigh, 21 -- Member of the Australian House of Representatives, former professor of economics at the Australian National University

[Andrew, author of several books, including Randomistas: How Radical Researchers Are Changing Our World and (with Joshua Gans) Innovation + Equality: How to Create a Future That Is More “Star Trek” Than “Terminator” (MIT Press), "What's the Worst That Could Happen? Existential Risk and Extreme Politics", MIT Press, 2021, <https://mitpress.mit.edu/books/whats-worst-could-happen>, accessed 2-3-22]

Imagine a world in which each person’s days are filled with beauty, meaning, and commitment—doing deep work, spending plenty of time with friends and family, savoring delicious food, and enjoying exotic holidays. Suppose that everyone can live in perfect health for more than a century. In this world, people are secure in their neighborhoods, without the need to fear for their property or safety.

Now imagine that humanity uses this opportunity to expand our knowledge and wisdom—exploring the frontiers of science and the humanities. Suppose we reshaped careers so that everyone could experience a sense of flow in their job and take a break from work when they wished. Imagine that we solve the problem of commuting—effectively stretching the day so that people can enjoy more leisure, work, or sleep. Think how much better the world would be if we could make a lasting impact on mental illness through better treatments for depression, anxiety, and addiction. Suppose that cancer has been cured, obesity has a simple treatment, and even the common cold has been vanquished.

Think how much more beautiful we could make the spaces around us. To live in an apartment designed by Antoni Gaudí, stroll in a park designed by Martha Schwartz, or enjoy the sculptures of Teresita Fernández is a pleasure reserved for a fortunate few in today’s world. But imagine how much joy it would bring us to live in a world where all our living spaces were conceived by extraordinary designers and constructed by master craftspeople.

Such a world may seem closer to the heavenly paradise offered by the world’s great religions than to our lives on earth. Attaining it is a pipe dream for our generation. Indeed, there is little chance we could attain it in the twenty-first or even twenty-second century. Yet this future is probable if humans can survive for another thousand years. And it is almost certain if humans can survive for ten thousand years. After all, the past ten thousand years has seen humans progress from foraging nomads to digitally connected urbanites, and the pace of change is accelerating, with each century more innovative than the previous one.1

But we have to get there first.

In 1947, a group of concerned scientists created the “Doomsday Clock”—symbolizing how close humans are to Armageddon. Initially, the clock was arbitrarily set at seven minutes to midnight.2 Two years later, when the Soviet Union tested its first nuclear bomb, the clock was moved to three minutes to midnight. With the signing of the partial atomic test ban treaty in 1963, it was moved back to twelve minutes to midnight. Over the years, the Doomsday Clock has been moved forward and backward twenty-four times. In January 2020, it was moved to one minute and twenty seconds to midnight. These scientists estimate that the world is closer to destruction now than at any other time.

The catastrophic risks that threaten our species have been the focus of so many movies that you could run a disaster film festival. We’ve seen movies featuring natural pandemics (Outbreak, Carriers, and Contagion), bioterrorism (12 Monkeys, V for Vendetta, and 28 Days Later), asteroid strikes (Deep Impact, Armageddon, and Judgment Day), nuclear war (Dr. Strangelove, On the Beach, and The Day After), artificial intelligence (Avengers: The Age of Ultron, The Matrix, and Terminator), and climate change (Waterworld, Mad Max: Fury Road, and Blade Runner 2049).

These dangers have had us on the edge of our movie seats, but they haven’t gotten most people off the couch to act. You’re more likely to get robbed if you leave your wallet on a park bench than if you leave your home unlocked. But it doesn’t follow that an unattended wallet is a bigger risk than an unlocked house. Losing everything of value in your house is unlikely to occur, but horribly upsetting if it does.

The same psychological mistake applies to public policy. Policy makers sweat the details of programs to regulate stock markets or build stadiums. But we rarely devote as much attention to reducing long-term risks. Policy deals largely in the world of immediate certainties, not distant hazards.

How likely is it that humanity could end? Experts working on catastrophic risk have estimated the chances of disaster for a wide range of the hazards that our species faces. Adding up the threats, philosopher Toby Ord estimates the odds that humanity could become extinct over the next century at one in six, with an out-of-control superintelligence, bioterrorism, and totalitarianism among the largest risks. He argues that most of the risks have arisen because technology has advanced more rapidly than safeguards to keep it in check. To encapsulate the situation facing humanity, Ord titled his book The Precipice.

A one in six chance of going the way of dodos and dinosaurs effectively means we are playing a game of Russian roulette with humanity’s future. Six chambers. One bullet. Even the most foolhardy soldier usually finds an excuse not to play Russian roulette. And that’s when just their own life is at stake. In considering extinction risk, we’re contemplating not one fatality but the death of billions or possibly trillions of people—not to mention countless animals.

It can seem impossible to imagine our species becoming extinct due to a catastrophe such as nuclear war, asteroids, or a pandemic. But in reality, the danger surpasses plenty of perils we already worry about. One way to put catastrophic risk into perspective is to compare it with more familiar risks. If extinction risk poses a one in six risk to our species over the next century, then it means that it is far more hazardous than many everyday risks. Specifically, it suggests that the typical US resident is fifteen times more likely to die from a catastrophic risk—such as nuclear war or bioterrorism—than in car crash.3

Extinction risk outstrips other dangers too. Ask people about their greatest fears, and you’ll get answers like “street violence,” “snakes,” “heights,” and “terrorism.”4 But in reality, these are much less hazardous than catastrophic risks. People in the United States are 31 times more likely to die from a catastrophic risk than from homicide. Catastrophic risk is 3,519 times likelier to kill than falls from a height, and 6,194 times more likely to kill than venomous plants and animals. If you have ever worried about any of these threats, you should be more fearful about catastrophic risk. Extinction risks aren’t just more dangerous than any of them; they are more hazardous than all of them put together. Catastrophic risk poses a greater danger to the life of the typical US resident than car accidents, murder, drowning, high falls, electrocution, and rattlesnakes put together.

A one in six risk is just the danger in a single century. Suppose that the risk of extinction remains at one in six for each century. That means there’s a five in six chance humanity makes it to the end of the twenty-first century, but less than an even chance we survive to the end of the twenty-fourth century. The odds that we survive all the way to the year 3000 are just one in six. In other words, if we continue playing Russian roulette once a century, it’s probable that we blow our brains out before the millennium is halfway through, and there’s only a small chance that we make it to the end of the millennium.

Part of the reason humans undervalue the future is that it’s hard to get our heads around the idea that our genetic code could live on for millions of years. At present, the best estimates are that our species, Homo sapiens, evolved around three hundred thousand years ago.5 That means we have existed for about ten thousand generations. But we have another one billion years before the increasing heat of our sun brings most plant life to an end.6 That’s plenty of time to figure out how to become an interstellar species and move to a more suitable solar system. Humans could live to enjoy another thirty million generations on earth.

Thinking about the mind-boggling scale of these numbers, I’m reminded of the Total Perspective Vortex machine, created by Douglas Adams in The Restaurant at the End of the Universe. Anyone brave enough to enter sees a scale model of the entire universe, with an arrow indicating their current position. As a result, their brain explodes. As Adams reflects, the machine proves that “if life is going to exist in a universe of this size, then the one thing it cannot afford to have is a sense of proportion.”

Still, let’s try. Imagine your ancestors a hundred generations ago. They are your great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-great-grandparents. These people lived around 1000 BCE, at the start of the Iron Age. They might have been part of Homeric Greece, ancient Egypt, Vedic age India, the preclassic Maya, or Zhou Dynasty China.

Contemplate for a moment about what the hundred generations between our Iron Age ancestors and today have achieved. They built the Taj Mahal and Sistine Chapel, the Angkor Wat and Empire State Building. Thanks to them, we can relish the poetry of Maya Angelou, novels of Leo Tolstoy, and music of Ludwig van Beethoven. An abundance of inventions has delivered us delicious food, homes that are comfortable year-round, and technology that provides online access to a bottomless well of entertainment. If time machines existed, we might pop in to visit our great100 grandparents, but few would volunteer to stay in the Iron Age.

Yet humanity is really just getting started. If things go well, it’s ten thousand generations down, thirty million to go. Imagine what those future generations could do, and how much time they have to enjoy. Here’s one way to think about what it means to have thirty million generations ahead. Suppose humanity’s potential time on the planet was shrunk down to a single eighty-year life span. In that event, we would now be a newborn baby—just nine days old. Homo sapiens is a mere 0.03 percent through all we could experience on earth.

We won’t meet most of those who follow us on the planet, but we should cherish future generations all the same. If you value humanity’s past achievements—the Aztec and Roman civilizations, art of the Renaissance, and breakthroughs of the Industrial Revolution—then the generations to come are just as worthy. This is what political philosopher Edmund Burke meant when he described society as “a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.”7 To appreciate the past is akin to admiring the achievements of distant places. Like geography, history helps us better understand the way of the world.

Politicians like me like to speak fondly about looking after “our children and our grandchildren.” But it usually stops after a generation or two. Policy pays little heed to the many generations that will follow. For my own part, it took a coronavirus-induced shutdown to have the time to spend reflecting deeply about the long term. This book had been rattling around in my head for years, but it was only when all my meetings, events, and travel were canceled that I had the time to write it. Pandemics are one of the threats to humanity that I’ll discuss in this book, but in this instance, it provided a chance to reflect on the long term.

It’s tempting to ignore the distant future. It’s easier to love the grandchildren whom we hug than the great-great-great-grandchildren whom we’ll never get to smile on. But that doesn’t make those far-flung generations any less important. Via my wife, our children can trace their lineage to Benjamin Franklin, but I’m more excited about the potential achievements of the generations yet to be born.

For companies and governments, a major impediment to long-term thinking is the idea of discounting the future. When investing money, this is a reasonable approach. A dollar in a decade’s time is less valuable than a dollar today for the simple reason that a dollar today could be invested and earn a real return. Share markets have good and bad years, but based on returns from the past 120 years, someone who put $1,000 into the US stock market for an average year could expect it to be worth $1,065 after twelve months (accounting for dividends and inflation).8 Approximating these returns, when governments contemplate making investments, they often apply a discount rate of around 5 percent, while companies use rates that are higher still.9

When it comes to growing your greenbacks, this makes perfect sense. If Kanesha offered you $1,000 today, and Jane offered you $1,000 in a year’s time, most of us would think that Kanesha was making the more generous offer. Kanesha’s cash can be put to productive use and would be worth more than Jane’s when the year is out.

But what if we’re talking about Kanesha and Jane themselves? Suppose Kanesha is alive today, and Jane is yet to be born. When discounting is applied to lives, it suggests that Kanesha’s life today is worth twice as much as Jane’s life in fifteen years’ time. It implies that Kanesha today is worth 132 times as much as Jane in a century’s time. So if we’re spending money to keep them safe, a 5 percent discount rate indicates that we should spend more than a hundred times as much to protect Kanesha today than to protect Jane in a century’s time.

The further we stretch the time period, the more ridiculous the results become. Discounting at a rate of 5 percent implies that Christopher Columbus is worth more than all eight billion people on the planet today.10 Naturally, it also implies that your life is worth more than eight billion lives in five hundred years’ time. Even if you value the hug of a loved one over the unseen successes of next century’s generations, is it fair to ruthlessly dismiss the distant future? Discounting is the enemy of the long term.

As philosopher Will MacAskill points out, there is something morally repugnant about concluding that the happiness of those who will be alive in the 2100s is inconsequential simply because they live in the future. MacAskill coined the term “presentism” to refer to prejudice against people who are yet unborn.11 Just like racism, sexism, or other forms of bigotry, he argues that mistreating those who live a long way in the future is unfair. To discriminate in favor of Kanesha against unborn Jane is a form of presentism. If you traveled back in time to the 1500s and met someone who claimed that they were worth more than everyone alive in the 2000s, you’d rightly regard them as an egomaniac. Isn’t it equally narcissistic to ignore the happiness of people in the 2500s?

Some have contended that we should favor the living over the unborn for the same reason that philanthropy favors the downtrodden over the wealthy. If incomes rise over time, the argument goes, then asking today’s citizens to help those in the future is like taking from the poor to give to the rich.12 But this reasoning ignores the fact that we are talking about the survival of future generations. Theoretical riches won’t do them any good if they are practically dead—or if planetary apocalypse snuffs out their chance to be born. Similarly, it misses the possibility that future pandemics, wars, or climate disasters could make coming generations significantly poorer.13

Insights from behavioral science help explain why humans aren’t good at understanding extinction risk.14 Our thinking about dangers is skewed by an “availability bias”: a tendency to focus on familiar risks. Like the traders who failed to forecast the collapse of the securitized housing debt market, we are lousy at judging the probability of rare but catastrophic events. Most important, our instincts fail us as the magnitudes grow larger. In research titled “The More Who Die, the Less We Care,” psychologists Paul Slovic and Daniel Västfjäll argue that we become numb to suffering as the body count grows.15 Humans’ compassionate instincts are aroused by stories, not statistics. Indeed, one study found that people were more likely to donate to help a single victim than they were to assist eight victims. This may help explain why the international community has been so slow to respond to genocide, including recent incidents in Rwanda, Darfur, and Myanmar. As artificial intelligence researcher Eliezer Yudkowsky notes, human neurotransmitters are unable to feel sorrow that is thousands of times stronger than a single funeral.16 The problem is starker still when it comes to extinction risk. Our emotional brains cannot multiply by billions.