



# The Honorable G. William and Ariadna Miller INSTITUTE FOR GLOBAL CHALLENGES AND THE LAW

## New Scholarship on International Law from Berkeley Law

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Kenneth A. Bamberger  
Richard M. Buxbaum  
Daniel A. Farber  
Stavros Gadinis  
Andrew Guzman

Kate Jastram  
Katerina Linos  
Prasad Krishnamurthy  
David B. Oppenheimer  
John Yoo

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### KENNETH A. BAMBERGER

**“Privacy in Europe: Initial Data on Governance Choices and Corporate Practices,”** 81 *George Washington Law Review* 1529 (2013) (with Deirdre Mulligan)

Chosen as one of the top articles of 2013 by the Future of Privacy Forum ([www.futureofprivacy.org](http://www.futureofprivacy.org)).

### RICHARD M. BUXBAUM

**“From Paris to London: The Legal History of European Reparation Claims 1946-1953,”** 31 *Berkeley Journal of International Law* (2013)

The umbrella concept of Reparations, including its compensatory as well as restitutionary aspects, regrettably remains as salient today as it was in the 20th century. A fresh look at its history in that century, and how that history shapes today’s discourses, is warranted. It is warranted in particular because the major focus in recent decades has been on the claims of individual victims of various atrocities and injustices, generalized as the development of international human rights law by treaty, statute and judicial decision. One consequence of this development is that the historical primacy of the state both as agent for its subjects and as the principally if not solely responsible actor is ever more contested.

How did this shift from state responsibility and state agency over the past half-century or more occur? Considering the apparent primacy of the state in this context as World War II came to an end, is there already in the war and early postwar period a partial explanation of these later developments? These formulations imply that failures in the inter-state reparations processes of that era played a role in the rise of these alternative processes. Whether that suggestion can be demonstrated in satisfying detail is another matter; but the attempt justifies the following discussion.

### DANIEL A. FARBER

**“Catastrophic Risk, Climate Change, and Disaster Law,”** 16 *Asia Pacific Journal of Environmental Law* (2013)

Disaster law promises to become an increasingly important subject over the course of this century. Climate change will increase the frequency of extreme weather events, while more people and property will be at risk due to population growth, coastal development and economic growth. Depending on the extent of climate change, the risks vary from serious to catastrophic.

In dealing with these increased levels of risk, the entire disaster cycle must be considered, from pre-disaster risk mitigation to emergency response, followed by insurance and compensation, and rebuilding (and then by another potential disaster). This article provides a framework for considering these issues and sets forth five grand challenges for scholars and policymakers. These challenges require improvement in key areas: techniques for planning in the face of uncertainty; property and land-use rules; sensitivity to issues of social justice; the international framework for emergency disaster response; and mechanisms for risk spreading.

### **STAVROS GADINIS**

#### **“From Independence to Politics in Financial Regulation,”** 101 *California Law Review* (2013)

Independent agencies have long dominated the institutional structure of financial regulation. But after the 2007–08 crisis, this Article argues, the independent agency paradigm is under attack. To monitor financial institutions more thoroughly and address future failures more effectively, the United States and other industrialized nations redesigned the framework of financial regulation. Post-2008 laws allocate new powers not to independent bureaucrats, but to elected politicians and their direct appointees.

To document this global paradigm shift, the Article examines the laws of fifteen key jurisdictions for international banking: the United States, the United Kingdom, France, Germany, Japan, Spain, Switzerland, Belgium, Ireland, Italy, Denmark, Canada, Australia, Mexico, and South Korea. This analysis points to a marked increase in the influence of elected politicians over banking. Politicians’ new powers extend not only over emergencies, but also over financial institutions’ regular operations. Politicians are now at the helm of innovative institutional arrangements, typically in the form of regulatory councils that encompass preexisting independent agencies. In these councils, supermajority requirements and veto rights designate politicians as the ultimate decision makers.

The article shows how this paradigm shift resulted from the interplay of factors unique to the 2007–08 crisis and long-run trends. The collapse of institutions in diverse areas of financial activity, including investment banks, insurance companies, and thrifts, created a sense that independent regulators as a class had failed. Concerns about regulatory capture, combined with disillusionment with the markets’ potential to self-correct, further undermined confidence in past paradigms. Developments in financial markets attracted great interest from ordinary Americans, who over the last two decades have increasingly relied on the financial system for their pension savings, housing credit, and other investments. Politicians could not remain as distant from financial regulation as in the past.

From a normative standpoint, politicians’ greater involvement in financial regulation is in line with calls for enhanced presidential control over independent agencies. Scholars have argued that the president’s stamp of approval will increase accountability and boost the legitimacy of hard choices, such as bank bailouts. However, this Article warns that greater political involvement might endanger financial stability. Electoral strategizing can influence politicians’ bailout choices, as incumbents might be particularly sensitive to upheavals as elections approach. Politicians are also under pressure from groups at ideological extremes, which often express a deep distrust of the financial system. In this climate, financial institutions are likely to lobby politicians more intensely. Thus, the risk of a financial catastrophe may now hinge upon considerations that have little to do with the health of the financial system.

#### **“The Financial Stability Board: The New Politics of International Financial Regulation,”** 48 *Texas International Law Journal* (2013)

In response to the 2007-08 financial crisis, the G20 forged the Financial Stability Board, a new international body whose core mission is to promote the regulatory standards that best ensure

the stability and soundness of the financial system. The FSB is an umbrella organization: its membership includes representatives from international standard-setters like the Basel Committee and the International Accounting Standards Board, alongside domestic regulators, such as central banks, and representatives from national finance ministries and treasury departments. The participation of political appointees in the FSB, this Article argues, sets it apart from other international bodies in financial regulation. Through the FSB, elected politicians can shape international financial regulation in ways not available to them in the past. This Article has identified three ways in which the G20 governments intervene in international financial regulation: through promoting specific amendments in international rulemakers' existing standards, through setting entirely new policymaking initiatives, and through intensifying efforts to monitor compliance with international rules at the domestic level. The Article offers extensive evidence from the interaction between the G-20, the FSB, other international bodies and domestic authorities.

### **ANDREW GUZMAN**

***Overheated: The Human Cost of Climate Change***, Oxford University Press (2013)

Deniers of climate change sometimes quip that claims about global warming are more about political science than climate science. They are wrong on the science, but may be right with respect to its political implications. A hotter world, writes Andrew Guzman, will bring unprecedented migrations, famine, war, and disease. It will be a social and political disaster of the first order.

In *Overheated*, Guzman takes climate change out of the realm of scientific abstraction to explore its real-world consequences. He writes not as a scientist, but as an authority on international law and economics. He takes as his starting point a fairly optimistic outcome in the range predicted by scientists: a 2 degree Celsius increase in average global temperatures. Even this modest rise would lead to catastrophic environmental and social problems. Already we can see how it will work: The ten warmest years since 1880 have all occurred since 1998, and one estimate of the annual global death toll caused by climate change is now 300,000. That number might rise to 500,000 by 2030. He shows in vivid detail how climate change is already playing out in the real world. Rising seas will swamp island nations like Maldives; coastal food-producing regions in Bangladesh will be flooded; and millions will be forced to migrate into cities or possibly "climate-refugee camps." Even as seas rise, melting glaciers in the Andes and the Himalayas will deprive millions upon millions of people of fresh water, threatening major cities and further straining food production. Prolonged droughts in the Sahel region of Africa have already helped produce mass violence in Darfur.

**"Doctor Frankenstein's International Organizations,"** 24 *European Journal of International Law* (2014)

In the classic novel, *Frankenstein*, Doctor Frankenstein creates a living creature in the hope of cheating death. The monster turns against Doctor Frankenstein and kills several people, causing the doctor to regret his decision to make the monster in the first place. When states establish an international organization (IO), they create an institution with a life of its own. In doing so, states risk the institution becoming a monster and acting contrary to their interests. In contrast to Frankenstein, however, states are aware of this risk and are able to guard against it. This article explains that much of the existing landscape of international organizations has been formed by the state response to this 'Frankenstein problem'. The effort by states to avoid creating a monster explains, among other things, why there are so many IOs, why they vary so widely in scope, and the manner in which they are permitted (and not permitted) to affect international law and international relations. The article also identifies the four types of activities that IOs are typically allowed to undertake and explains how states choose which activities to place within which organizations. In addition to providing a new analytical perspective on IOs and how states

use them, the article advances the normative argument that states have been too conservative. As if they learned the lessons of Frankenstein too well, states have been reluctant to give IOs the authority necessary to make progress on important global issues. Though there is a trade-off between the preservation of state control over the international system and the creation of effective and productive IOs, states have placed far too much weight on the former and not nearly enough on the latter.

**“Expropriatory and Non-Expropriatory Takings Under International Investment Law,”** 10 *Transnational Dispute Management Journal* (2013) (with Jan Dalhuisen)

The question of expropriation is at the heart of modern foreign investment law, yet remains an area of great uncertainty and ambiguity. Neither treaty law nor existing jurisprudence provides clarity on the questions of when government action amounts to an expropriation or what to do if does.

This article provides a framework for approaching questions of expropriation that helps understand the key questions that must be addressed by investment tribunals or, for that matter, host countries and investors. We begin with the neutral category of takings, meaning any government action that negatively affects that value of an investment. We argue that a taking that is more than *de minimis* is an expropriation unless it promotes public welfare (which we also term “super public purpose”) or is incidental to normal government activity. These we call non-expropriatory takings. Whether the taking is an expropriation or not, we must next ask if it is lawful. As is well known, an expropriation is lawful if it is made for a public purpose, is non-discriminatory, satisfies due process, and if the required compensation is paid. Whether lawful or not, the taking must not violate the fair and equitable obligation. We also investigate when non-expropriatory taking are lawful. Finally, the Article considers the compensation owed (if any) under each of the four categories constructed above: a lawful expropriation, an unlawful expropriation, an unlawful non-expropriatory taking, and even a lawful nonexpropriatory taking.

Our approach to questions of expropriation cannot offer a simple and obvious result in every dispute. No discussion of the topic could do so. It does, however, guide the analysis and identifies the key questions that must be answered in order to determine the legal implications of a governmental taking. In so doing, it aims at offering a more coherent view of the international investment law of expropriation.

#### **KATE JASTRAM**

**“Warm world, cold reception: Climate change, national security and forced migration,”** *Vermont Journal of Environmental Law* (forthcoming 2014)

U.S. national security concerns are deeply embedded in our laws and policies regarding refugees and migrants. While refugee and human rights law frame the issue as threats to people from climate change, a national security perspective requires us to face the uncomfortable question of threats from people due to climate change. There is a need to identify responses to climate change-related forced migration that are attuned to national security concerns, as well as to the human rights of the migrants themselves. In attempting this balance, the paper proceeds in three parts. Section one sketches the basic international legal framework for the cross-border movements of people, in order to contextualize the challenges involved in expanding this framework to include those displaced by climate change. Section two shifts the focus to internally displaced persons, a fast evolving area of the law and a potential point of entry for nations such as the U.S. who wish to assist people closer to their own homes. Section three discusses the international and domestic law tools available to U.S. policymakers in planning for and responding to climate refugees.

## KATERINA LINOS

***The Democratic Foundations of Policy Diffusion: How Health, Family and Employment Laws Spread Across Countries*** (Oxford University Press, 2013)

Winner of the International Studies' Association Alger Chadwick Prize as the best book of 2013 on international organization and multilateralism.

**"Human Rights Backsliding,"** *California Law Review* (forthcoming 2014) (with Andrew Guzman)

**"Modeling Domestic Politics in International Law Scholarship,"** *Chicago Journal of International Law* (forthcoming 2014) (with Jerome Hsiang)

## PRASAD KRISHNAMURTHY

**"Public Distribution System Reforms and Consumption in Chhattisgarh: A Comparative Empirical Analysis,"** 49 *Economic and Political Weekly* (2014) (with Vikram Pathania and Sharad Tandon)

Chhattisgarh's public distribution system reforms have been lauded as a model for the National Food Security Act, and as one that other states can emulate. Previous research has shown that PDS rice consumption increased in Chhattisgarh following reforms by the Raman Singh government, which began in 2004. However, one-third of PDS rice consumption growth in Chhattisgarh took place before 2004. This finding suggests that the pre-2004 reforms to fair price shop ownership and state procurement by the Ajit Jogi government contributed to PDS consumption growth. Our findings suggest that sustained reforms, when coupled with political and social will, can improve PDS access, and that improvements may not be substantial or sustained in the absence of these factors.

## DAVID B. OPPENHEIMER

***Comparative Equality and Anti-Discrimination Law: Cases, Codes, Constitutions and Commentary*** (Foundation Press) (with Teaching Manual) (with Sheila R. Foster and Sora Y. Han)

This casebook explores equality and anti-discrimination law from a comparative approach, comparing the United States with legal systems in Europe, Asia, Africa and Latin America; comparing race discrimination with discrimination based on sex/gender, religion, ethnicity, sexual orientation and disability; and comparing employment discrimination with reproductive rights, same-sex marriage, secularism, hate speech, affirmative action and federalism.

**"Religiosity and Same-Sex Marriage in the United States and Europe,"** *Berkeley Journal of International Law* (Fall 2013 issue, to be published in spring 2014) (with Alvaro Oliveira and Aaron Blumenthal)

In the United States and Europe there has been a remarkable change in the legal recognition of same-sex relationships over the past two decades. Twenty years ago, no nation recognized same-sex marriage. Today (Fall 2013) in the United States, thirteen states and the District of Columbia permit same-sex couples to marry, while another six provide varying legal recognition of same-sex relationships, such as partnerships and civil unions. In Europe, nine nations permit same-sex marriage, and an additional thirteen nations provide varying levels of recognition to same-sex couples.

Support for same-sex marriage has been linked to age, political party, and education. In this paper, we examine the relationship between religiosity (defined as belief in God and importance of religion in a person's life) and support for same-sex marriage. We caution that correlation is not causation, but find that in the United States and Western Europe, there is a strong correlation, while in Eastern Europe there is not.

In the United States, the correlation is remarkably strong. The most religious states (the highest quartile of States in religiosity) all have constitutional bans of same-sex marriage. Of the twelve states in the lowest religiosity quartile, eight permit same-sex marriage, while three more provide some legal



recognition of same-sex relationships. In Western Europe, the correlation is not quite as strong, but some of the exceptions can probably be explained by temporary mismatches between popular support and political leadership. In Eastern Europe, however, the correlation is weak, with low religiosity often combined with low support for same-sex marriage. We suspect that this is a result of the legacy of communism, and its suppression of religion.

## **JOHN YOO**

**“Lincoln at War,”** 38 *Vermont Law Review* (2014)

This year presents an opportune moment to reexamine President Abraham Lincoln’s approach to executive power. This year’s 150th Civil War anniversaries are inextricably tied to Lincoln’s exercise of his office. The Emancipation Proclamation and the Gettysburg Address drew deeply on Lincoln’s broad vision of the President’s commander-in-chief and executive powers in wartime. A century-and-a-half later, our political system continues to struggle over the constitutional questions that vexed Lincoln. Just as Lincoln had to navigate conflicts between the executive and legislative powers to win the Civil War, President Obama and his immediate predecessors have confronted the same questions in fighting a very different conflict today.

Lincoln laid the foundations of his Presidency on a vigorous and dynamic view of his right to advance an alternative vision of the Constitution. If Lincoln and the Republican Party had accepted the supremacy of the judiciary’s interpretation of the Constitution, Dred Scott would have foreclosed their core position that the federal government should stop the spread of slavery. Likewise, Lincoln’s Presidency could not have achieved its successes without a proactive exercise of his constitutional powers. A passive attitude that conceded to Congress the leading role in setting policy, or one that waited on the Supreme Court to decide matters, would have led to a sun-dered nation or military disaster. Lincoln became America’s savior because he preserved the Union, freed the slaves, and launched a new birth of freedom. He set in motion a political, social, and economic revolution, but one that had the conservative goal of restoring the nation’s constitutional system of government. He could have achieved none of this without a broad vision of his office.

***Point of Attack: War and Law for the 21st Century*** (Oxford University Press, 2014)

The world today is overwhelmed by wars between nations and within nations, wars that have dominated American politics for quite some time. *Point of Attack* calls for a new understanding of the grounds for war. In this book John Yoo argues that the new threats to international security come not from war between the great powers, but from the internal collapse of states, terrorist groups, the spread of weapons of mass destruction, and destabilizing regional powers. In *Point of Attack* he rejects the widely-accepted framework built on the U.N. Charter and replaces it with a new system consisting of defensive, pre-emptive, or preventive measures to encourage wars that advance global welfare. Yoo concludes with an analysis of the Afghanistan and Iraq wars, failed states, and the current challenges posed by Libya, Syria, North Korea, and Iran.