TODD S. AAGAARD
Villanova University School of Law
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EXPERIENCE

Villanova University School of Law **Villanova, PA**
Associate Professor *2011-Present*
Assistant Professor *2008-2010*
Teach classes in environmental law, property law, administrative law, risk regulation, and energy law. Research interests focus on environmental law and administrative law.

U.S. Department of Justice, Environment & Natural Resources Division **Washington, DC**
Attorney, Appellate Section *1999-2007*
Law Clerk, Policy, Legislation, & Special Litigation Section *Summer 1997*
Briefed and argued civil and criminal cases in federal courts of appeals in the areas of environmental law, natural resources law, Indian law, and administrative law. Drafted merits briefs and certiorari opposition briefs in several Supreme Court matters.

Chambers of Judge Guido Calabresi,
United States Court of Appeals for the Second Circuit **New Haven, CT**
Law Clerk *1998-1999*

EDUCATION

University of Michigan School of Natural Resources and the Environment, M.S., Natural Resources and Environment, 1998

Thesis: *EPA's Regulation of Occupational Health Risks Under TSCA*

University of Michigan Law School, J.D., *magna cum laude*, 1997

Honors: Order of the Coif
Henry M. Bates Memorial Scholarship Award

Activities: *Michigan Law Review*
Editor-in-Chief (1997-98)
Associate Editor (1996-97)
Michigan Journal of Race & Law
Executive Editor (1996-97)
Associate Editor (1995-96)

Pomona College, B.A., Economics and Government/Public Policy Analysis (double concentration), 1992

Honors**:** Vieg Prize in Government
Pomona Scholar, 1990-1992

Thesis**:** *Costly Information and Social Change*

ADDITIONAL EXPERIENCE

Abt Associates Inc. **Bethesda, MD**
Research Assistant *1992-1994*
Conducted economic and risk-based environmental policy analyses under contract to Environmental Protection Agency and World Bank.

PUBLICATIONS

A Functional Approach to Risks and Uncertainties under NEPA, 1 MICH. J. ENVTL. & ADMIN. L. 87 (2012).

The National Environmental Policy Act (NEPA) mandates that federal agencies evaluate the environmental impacts of their proposed actions. This requires agencies to make ex ante predictions about environmental consequences that often involve a significant degree of factual risk or uncertainty. Considerable controversy exists regarding how agencies should address such risks and uncertainties. Current NEPA law adopts a largely ad hoc approach that lacks coherence and analytical rigor. Some environmentalists and legal scholars have called for a greater emphasis on worst-case analysis in environmental planning, especially after the recent Deepwater Horizon Oil Spill in the Gulf of Mexico and the meltdowns at the Fukushima Daiichi nuclear reactors in Japan, both of which involved the eventuation of risks dismissed ex ante as improbable. This Article proposes a functional approach to environmental risks and uncertainties under NEPA as a preferable alternative to both a worst-case analysis requirement and the morass of existing approaches. A functional approach that is sensitive to context and analytically focused is better suited to the complexities of environmental planning. It is consonant with current NEPA law, but also can refine existing law to develop requirements that focus on effectuating NEPA's purposes by producing useful environmental information.

Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities, 29 VA. ENVTL. L.J. 237 (2011).

Lawmakers and scholars alike criticize regulatory overlap on the ground that giving administrative agencies overlapping jurisdiction leads to duplicative or conflicting regulation which is inefficient and unduly burdensome. This Article challenges this orthodox account of regulatory overlap through examination of six case studies in which the Environmental

Protection Agency and the Occupational Safety and Health Administration have managed their jurisdictional overlap so as to create regulatory synergy rather than dysfunction. Although this Article is not the first to argue that regulatory overlap may improve the effectiveness of regulatory programs, the case studies examined here highlight two important aspects of regulatory overlap that existing scholarship has overlooked. First, policy problems that cut across legal fields invite an allocation of authority that vests agencies with overlapping regulatory jurisdictions. Second, regulatory overlap allows agencies to smooth over discontinuities at the interstices of statutes, thereby adding coherence to the law.

Environmental Harms, Use Conflicts, and Neutral Baselines in Environmental Law, 60 DUKE L.J. 1505 (2011)

Accounts of environmental law that rely on concepts of environmental harm and environmental protection oversimplify the tremendous variety of uses of environmental resources and the often complex relationships among those uses. Such approaches are analytically unclear and, more importantly, insert hidden normativity into putatively descriptive claims. Instead of thinking about environmental law in terms of preventing environmental harm, environmental problems can be understood more specifically and more meaningfully as disputes over conflicting uses of environmental resources. This Article proposes a use-conflict framework as a means of acquiring a deeper understanding of environmental problems and lawmaking without favoring any particular normative approach. The framework does not itself propose a resolution of any environmental problems but rather describes environmental problems and environmental lawmaking conceptually in a manner that exposes normative claims and attempts to establish some common ground across diverse normative perspectives.

Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy, 95 CORNELL L. REV. 221 (2010)

This Article examines the classification of the law into legal fields, first generally and then by specific examination of the field of environmental law. We classify the law into fields to find and to create patterns, which render the law coherent and understandable. A legal field is a group of situations unified by a pattern or set of patterns that is both common and distinctive to the field. We can conceptualize a legal field as the interaction of four underlying constitutive dimensions of the field: (1) a factual context that gives rise to (2) certain policy tradeoffs, which are in turn resolved by (3) the application of values and interests to produce (4) legal doctrine. An organizational framework for a field identifies the field's common and distinctive patterns, which may arise in any of these underlying constitutive dimensions. The second part of the Article applies this general analytical approach to the field of environmental law, proposing a framework for understanding environmental law as a field of legal study. Two core factual characteristics of environmental problems are, in combination, both common and distinct to environmental law: physical public resources and pervasive interrelatedness. Numerous use demands are placed on these resources, creating conflicts. These use conflicts define the policy tradeoffs that frame environmental lawmaking, forming the basis for a use-conflict framework for conceptualizing environmental lawmaking.

Factual Premises of Statutory Interpretation in Agency Review Cases, 77 GEO. WASH. L. REV. (2009)

This Article examines factual premises of statutory interpretation in agency review cases, and proposes an approach that would better integrate the treatment of such factual premises into the overall structure of administrative law. Courts frequently encounter questions of statutory interpretation that depend on underlying factual background, context, and implications. When they do so, courts generally assume that they retain the authority to decide the factual premises and thereby to answer questions of statutory interpretation that depend on factual premises. This is problematic from a functional standpoint, because courts often lack the information or expertise necessary to assess these underlying facts and thereby to understand the implications of their interpretive options. The article proposes a new approach to premise facts in agency review cases. In particular, it argues that, under existing principles of administrative law, agencies—and not courts—have primary authority to address premise facts. This means, among other things, that agencies are not bound by prior judicial precedent interpreting statutes based on factual premises, and that agencies have the authority to reconsider such premise facts, and the statutory interpretation based on those facts, in subsequent proceedings. This reconsideration process would allow agencies to bring their superior information-gathering and -analyzing capacity to bear on premise facts, thereby improving statutory interpretation.

A Fresh Look at the Responsible Relation Doctrine, 96 J. CRIM. L. & CRIMINOLOGY 1245 (2006)

This Article suggests a rethinking of the responsible relation doctrine, which holds business officials, managers, or supervisors criminally liable for failing to prevent or correct violations that occur within their areas of responsibility and control. The conventional public welfare justification for the doctrine is that it provides added and important deterrence of legal violations that threaten human health and safety. The Article suggests instead that the doctrine is better understood and defended as properly following from traditional criminal law prohibitions on acts of omission, and specifically from the principle that individuals may be criminally liable when their failure to fulfill their employment responsibilities results in a harm that is punishable as a crime. Examined through this lens, the responsible relation doctrine justifiably can be applied much more broadly than it has been to date, in a variety of contexts in which a defendant's employer gives him the responsibility to prevent violations of the law. The Article concludes by discussing some insights into the operation of the responsible relation doctrine that are highlighted by identifying the doctrine as a species of criminal omission, such as that the responsible relation doctrine is not a form of imputed, derivative, or vicarious liability.

Note, *Identifying and Valuing the Injury In Lost Chance Cases*, 96 MICH. L. REV. 1335 (1998)

This Note argues that courts commonly fail to identify precisely the injury in lost chance cases and accordingly have failed to measure damages in a way that accurately compensates the plaintiff's injuries. Lost chance cases are medical malpractice cases in which the injured victim has a preexisting medical condition from which she is unlikely to recover, but the defendant's negligence has reduced further the victim's likelihood of recovering. A majority of courts that allow recovery in lost chance cases have adopted a proportional valuation method that values the plaintiff's damages by multiplying the percentage reduction in the chance of recovery by the total value of the losses the plaintiff suffered. The Note shows that the proportional valuation method improperly commingles the losses suffered by the plaintiff as a result of the lost chance and the losses suffered due to the preexisting condition. The Note advocates an alternative method of damages determination that clearly differentiates between the two categories of loss and gives the jury discretion to assess damages for the lost chance injury based on its evaluation of all the relevant evidence. This Note concludes that the loss of chance doctrine can achieve legitimacy as a valid extension—rather than an ill-fitting alteration—of traditional principles of tort law only by defining in precise terms the losses that constitute the tort injury in lost chance cases and by allowing juries the discretion to assess the value of those losses without undue constraints.

PRESENTATIONS

Adventures in Standing: The Lost Case of Edwards v. First American Financial Corp., Reunion Weekend, Villanova University School of Law, November 3, 2012.

Environmental Law Outside the Canon, Colloquium on Environmental Scholarship, Vermont Law School, October 12, 2012.

Environmental Law Outside the Canon, Junior Environmental Law Scholars Workshop, University of Washington School of Law, July 19, 2012.

Environmental Law Outside the Canon, American University—Washington College of Law, April 13, 2012.

Major Federal Environmental Decisions and NEPA Developments, Pennsylvania Bar Institute Environmental Law Forum, March 29, 2012.

A Functional Approach to Risks and Uncertainties under NEPA, Environmental Law and Policy Program Speaker Series, University of Michigan Law School, March 6, 2012.

The New Fuel Economy Standards: Driving Environmental Law into the Future (host and panel moderator), Villanova University School of Law, February 11, 2012.

The Future of Pennsylvania Electricity Markets (co-organizer and panel moderator), Matthew J. Ryan Law and Public Policy Forum, Villanova University School of Law, November 4, 2011.

Major Federal Environmental Decisions and NEPA Developments, Pennsylvania Bar Institute Environmental Law Forum, April 7, 2011.

Regulatory Overlap and Statutory Discontinuities, University of Cincinnati School of Law, February 4, 2011.

Renewable Energy Development and Wildlife (host and panel moderator), Villanova University School of Law, January 29, 2011.

Regulatory Overlap and Statutory Discontinuities, University of Maryland Law School, October 28, 2010.

Environmental Harms, Use Conflicts, and Neutral Baselines in Environmental Law, Colloquium on Environmental Scholarship, Vermont Law School, October 22, 2010.

A Use Conflict Framework for Environmental Law, Temple University School of Law, November 9, 2009.

'Shale' We Drill? The Legal and Environmental Impacts of Extracting Natural Gas from Marcellus Shale (host and panel moderator), Villanova University School of Law, January 30, 2010.

Recent Environmental Law Scholarship, Appellate Section Retreat, U.S. Department of Justice, Environment & Natural Resources Division, June 2009.

Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy, Boston College Law School, January 16, 2009.

Climate Change and NEPA (host and panel moderator), Villanova University School of Law, October 25, 2008.

Factual Premises of Statutory Interpretation in Agency Review, University of Oregon School of Law, February 2008.

SERVICE

Academic Committee, Chair (2011-Present)
Legal Writing Advisory Committee (2011-Present)
Appointments Committee (2010-2011)
Strategic Planning Committee (2010-2011, 2012-Present)
Dean's Task Force on Administrative Structure (2011)
Clerkship Committee (2008-2011)
Public Interest Programs Committee (2010-2011)
Faculty Advisor, Villanova Environmental Law Journal (2008-Present)
Faculty Advisor, Environmental and Energy Law Society (2010-Present)
Delaware Valley Environmental American Inn of Court (2008-Present)

Graduation Awards Committee (2009-2010)
Dean's Commission on Inclusiveness (2008-2010)
Curriculum Committee (2008-2009)