

Conference on Law & Morality

William & Mary School of Law

Property Law

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Professor Thomas Merrill's teaching and research interests include administrative law, property, and environmental law. Publications include "Agency Rules with the Force of Law: The Original Convention," *Harvard Law Review* (with Kathryn Watts, 2002); "Property: Takings," (with David Dana, 2002); "Chevron's Domain," *Georgetown Law Journal* (with Kristin Hickman, 2001); "Optimal Standardization in the Law of Property: The Numerus Clausus Principle," *Yale Law Journal* (with Henry Smith, 2000); and "The Landscape of Constitutional Property," *Virginia Law Review* (2000). Professor Merrill served as the John Paul Stevens Professor of Law at Northwestern University from 1993-2003. He represented the United States before the U.S. Supreme Court as deputy solicitor general in the Department of Justice from 1987 to 1990.

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Professor Henry Smith teaches property, patent law, natural resources law, contracts, and taxation at Yale Law School. Professor Smith's publications include: "The Language of Property: Form, Context, and Audience" in *Stanford Law Review* (2003), "Exclusion versus Governance: Two Strategies for Delineating Property Rights" in *Journal of Legal Studies* (2002), and "What Happened to Property in Law and Economics?" (with Thomas Merrill) in *Yale Law Journal* (2001) Professor Smith was a Scholar-in-Residence at the University of Virginia School of Law in 1999 and has also been a visiting professor at the University of Chicago Law School. In 2003 he was awarded a Berlin Prize Fellowship by the American Academy in Berlin.

The Morality of Property

Property rights are often contrasted with civil rights or human rights, with the implication being that property rights are of only instrumental or utilitarian significance, whereas civil or human rights have some higher order value. This paper will contest this view, on two grounds. First, although property, human, and civil rights may all be justified on utilitarian grounds, none of these rights can be reduced to case-by-case pragmatics. Second, property rights, no less than civil or human rights, cannot exist unless they are invested with the quality of moral rights. Cumulatively, these observations are consistent with the propositions that property is regarded as a moral right independent of its value in promoting human or civil rights; that the right to property is understood in key contexts to be a simple duty of abstention from interfering with the rights of others; and that the moral right to property is viewed as being distinct from the utilitarian justifications for a system of property rights.