

**April 2025**

**THOMAS W. MERRILL**

Columbia Law School  
435 W. 116<sup>th</sup> Street  
New York, NY 10027  
212-854-9764; 646-35-3928 (cell)  
e-mail: tmerri@law.columbia.edu

**PROFESSIONAL**

COLUMBIA LAW SCHOOL, New York, N.Y. Charles Evans Hughes Professor of Law (2010- ). Principal courses taught: Property, Administrative Law, Legislation and Regulation.

YALE LAW SCHOOL, New Haven, CT. Professor of Law (2008- 2009).

COLUMBIA LAW SCHOOL, New York, N.Y. Charles Keller Beekman Professor of Law (2003- 2008).

NORTHWESTERN UNIVERSITY SCHOOL OF LAW, Chicago, Illinois. John Paul Stevens Professor of Law (1993-2003); Professor (1986-1993; on leave 1987-1990); Associate Professor (1984-85); Assistant Professor (1981-1984).

U.S. DEPARTMENT OF JUSTICE, Washington, D.C. Deputy Solicitor General (1987-1990).

SIDLEY & AUSTIN, Chicago, Illinois. Counsel (1981-1987, 1990-2005). Previously Associate (1979-81).

Law Clerk to HON. HARRY A. BLACKMUN, Associate Justice, U.S. Supreme Court, 1978-79.

Law Clerk to HON. DAVID L. BAZELON, Chief Judge, United States Court of Appeals, D.C. Circuit, 1977-78.

NATIONAL BANK OF DETROIT, Detroit, Michigan. Investment Analyst, Trust Department, 1973-74.

**EDUCATION**

UNIVERSITY OF CHICAGO LAW SCHOOL, Chicago, Illinois.  
J.D. Cum Laude. Articles Editor, Law Review, 1974-77.

OXFORD UNIVERSITY, Oxford, England. B.A. with First Class Honors, Philosophy, Politics, and Economics, 1971-73.

GRINNELL COLLEGE, Grinnell, Iowa. B.A. in History with Honors, 1967-71.

## **POSITIONS, FELLOWSHIPS AND HONORS**

Fellow, American Law Institute, 2015-present. Co-Reporter, Restatement (Fourth) of Property,

Brigham-Kanner Prize for Property Scholarship, William and Mary Law School, 2013.

Visiting Professor, University of Tel Aviv Law School, Dec. 2010-Jan. 2011.

Roscoe Pound Visiting Professor of Law, Harvard Law School, 2008 (spring).

Robert D. McLean Visiting Professor of Law, Yale Law School, 2007 (fall).

Board of Editors, Foundation Press, 2005-2025.

Fellow, American Academy of Arts and Sciences, 2004 -present.

ABA Section on Administrative Law Award for Distinguished Scholarship, November 2003 (with Kathryn Watts).

Visiting Scholar, University of Chicago Law School, 2003 (winter and spring).

Stephen and Barbara Friedman Visiting Professor of Law, Columbia University, 2002.

Ewald Visiting Professor of Law, University of Virginia, 1999.

Honorary Doctor of Laws, Grinnell College, May 1995.

ABA Section on Administrative Law Award for Distinguished Scholarship, October 1993.

General Motors Corporation, Legal Scholar In Residence, May-August 1990.

Order of the Coif, 1977.

Rhodes Scholarship, 1971-73.

Danforth Fellowship, 1971-77.

Phi Beta Kappa, 1971.

## PUBLICATIONS

### *BOOKS*

**THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE** (Harvard U. Press, 2022).

**PROPERTY: PRINCIPLES AND POLICIES** (Fourth Edition, Foundation Press, 2022) (with Henry E. Smith and Maureen E. Brady). Previous editions (with Henry E. Smith) published in 2007, 2012, and 2017).

**LAKEFRONT: PUBLIC TRUST AND PRIVATE RIGHTS IN CHICAGO** (Cornell U. Press, 2021) (with Joseph D. Kearney).

**OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY** (Oxford U. Press 2010) (with Henry E. Smith).

**PROPERTY: TAKINGS** (Foundation Press, 2002) (with David Dana).

### *BOOK CHAPTERS*

**The Major Questions Doctrine: Right Diagnosis, Wrong Remedy**, in *ESSAYS ON THE LEGITIMACY OF ADMINISTRATIVE LAW* (Hoover Institution, Nov. 2023).

**The Restatement of Property: The Curse of Incompleteness**, in *THE AMERICAN LAW INSTITUTE; A CENTENNIAL HISTORY* (Oxford U. Press, Andrew Gold and Robert W. Gordon eds, 2023).

**Private and Public Law**, in *THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW* (Oxford U. Press, Andrew S. Gold et al. eds 2021).

**The Architecture of Property**, in *RESEARCH HANDBOOK ON PRIVATE LAW THEORY* (Edward Elgar, Hanoch Dagan & Benjamin Zipursky eds. 2020) (with Henry E. Smith).

**Jerry Mashaw, the Due Process Revolution, and the Limits of Judicial Power**, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT* (Cambridge U. Press, Nicholas Parillo ed. 2017).

**Ownership and Possession**, in *LAW AND ECONOMICS OF POSSESSION* (Cambridge U. Press, Yun-Chien Chang ed. 2015).

**Property and Fire**, in *WILDFIRE POLICY: LAW AND ECONOMICS PERSPECTIVES* (Resources for the Future, Karen M. Bradshaw and Dean Lueck eds. 2012).

**Private Property and Public Rights**, in *RESEARCH HANDBOOK ON THE ECONOMICS OF*

PROPERTY LAW 75-103 (Edward Elgar, Kenneth Ayotte and Henry E. Smith eds. 2011).

**The Story of *Chevron USA Inc. v. Natural Resources Defense Council, Inc.* (1984): Sometimes Great Cases are Made Not Born**, in STATUTORY INTERPRETATION STORIES 164-194 (Foundation Press, William N. Eskridge, Jr., Philip P. Frickey, Elizabeth Garrett eds., 2011); reprinted in 66 ADMIN. L. REV. 253 (2014).

**Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules**, in FEDERAL PREEMPTION: LAW AND POLITICS 166-193 (American Enterprise Institute, Richard Epstein & Michael Greve eds. 2007).

**Internal Dynamics of Term Limits for Justices**, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 225-48 (Carolina Academic Press, Roger Crampton & Paul Carrington eds. 2006).

**The Story of *Chevron*: the Making of an Accidental Precedent**, in ADMINISTRATIVE LAW STORIES 398-428 (Foundation Press, Peter Strauss, ed. 2006).

**The Story of SWANCC: Federalism and the Politics of Locally Unwanted Land Uses**, in ENVIRONMENTAL LAW STORIES 283-319 (Foundation Press, Richard Lazarus & Oliver Houck, eds. 2005), reprinted in The Environmental Forum, vol. 23 no. 1 (Jan/Feb 2006).

#### ***PRINCIPAL ACADEMIC ARTICLES***

**The Demise of Deference – And the rise of Delegation to Interpret?**, 138 HARV. L. REV. 227 (2024).

***Briggs v. Southwestern Energy Production*: Hydraulic Fracturing and Subsurface Trespass**, 16 J. TORT L. (2023) (with Henry E. Smith).

**Antitrust Rulemaking: The FTC's Delegation Deficit**, 75 ADMIN. L. REV. 277 (2023)

**The New Public Nuisance: Illegitimate and Dysfunctional**, 132 YALE L. J. FORUM 985 (2023).

**The Essential Meaning of the Rule of Law**, 17 J. L., ECON. & POL'Y 673 (2022).

**Re-Reading *Chevron***, 70 DUKE L. J. 1153 (2021).

**Classical Liberal Property and the Question of Institutional Choice**, 50 J. Legal Stud. S9 (2021).

**The Compensation Constraint and the Scope of the Takings Clause**, 96 NOTRE DAME L. REV. 1421 (2021).

**Legitimate Interpretation –Or Legitimate Adjudication?**, 105 CORNELL L. REV. 1395 (2020).

**The Economics of Leasing**, 12 J. LEGAL ANALYSIS 1 (2020).

**Fair and Impartial Adjudication**, 26 GEO. MASON L. REV. 897 (2019).

**Choice of Law in Takings Cases**, 8 BRIGHAM-KANNER PROPERTY RIGHTS J. 45 (2019).

**Interpreting an Unamendable Text**, 71 VAND. L. REV. 547 (2018).

**The Public Trust Doctrine: Some Jurisprudential Variations and Their Implications**, 38 HAW. L. REV. 261 (2016).

**Presidential Administration and the Traditions of Administrative Law**, 115 COLUM. L. REV. 1953 (2015).

**Possession as a Natural Right** (Hayek Lecture), 9 N.Y.U. J. L & LIB. 345 (2015).

**Anticipatory Remedies for Takings**, 128 HARV. L. REV. 1630 (2015).

**Step Zero After *City of Arlington***, 83 FORD. L. REV. 753 (2014).

**Dodd-Frank Orderly Liquidation Authority: Too Big for the Constitution?**, 163 U. PA. L. REV. 165 (2014) (with Margaret L. Merrill).

**Property and the Right to Exclude II**, 3 BRIGHAM-KANNER PROPERTY RIGHTS J. 1 (2014).

**The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination: A Regulatory Strategy**, 98 MINN. L. REV. 145 (2013) (with David M. Schizer); reprinted as condensed in 45 ENV. L. RPTR.10734 (2015).

**The Property Strategy**, 160 U. PA. L. REV. 2061 (2012).

**Making Coasean Property More Coasean**, 54 J. L. & ECON. S77 (2011) (with Henry E. Smith).

**Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law**, 111 COLUM. L. REV. 939 (2011).

**Is Public Nuisance a Tort?** 4 J. TORT L. ISSUE 2, Article 4 (B.E. Press, 2011).

***Melms v. Pabst Brewing Co.* and the Doctrine of Waste in American Property Law**, 94 MARQUETTE L. REV. 1055 (2011).

**The Disposing Power of the Legislature**, 110 COLUM. L. REV. 452 (2010).

**Accession and Original Ownership**, 1 J. LEGAL ANALYSIS (2009).

**Preemption and Institutional Choice**, 102 NW. U. L. REV. 727 (2008).

**The Morality of Property**, 48 WM & MARY L. REV. 569 (2007) (with Henry E. Smith).

**The Accardi Principle**, 74 GEO. WASH. L. REV. 569 (2006).

**Originalism, Stare Decisis and the Promotion of Judicial Restraint**, 22 CONST. COMM. 271-88 (2005).

***Marbury v. Madison* as the First Great Administrative Law Decision**, 37 JOHN MARSHALL L. REV. 481 (2004).

**Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation**, 104 COLUM. L. REV. 2097 (2004).

**The Origins of the American Public Trust Doctrine: What Really Happened in *Illinois Central***, 71 U. CHI. L. REV. 799 (2004) (with Joseph D. Kearney).

**The Making of the Second Rehnquist Court: A Preliminary Analysis** (Childress Lecture), 47 ST. LOUIS U. L.J. 569 (2003).

**The *Mead* Doctrine: Rules and Standards, Meta-Rules and Meta-Standards**, 54 ADMIN. L. REV. 807 (2002).

**Agency Rules with the Force of Law: The Original Convention**, 116 HARV. L. REV. 467 (2002) (with Kathryn Tongue Watts).

**What Happened to Property in Law and Economics?**, 111 YALE L. J. 357 (2001) (with Henry Smith).

**The Property/Contract Interface**, 101 COLUM. L. REV. 773 (2001) (with Henry Smith).

***Chevron's* Domain**, 89 GEO. L. J. 833 (2001) (with Kristin Hickman).

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**Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle**, 110 YALE L. J. 1 (2000) (with Henry Smith).

**The Influence of Amicus Curiae Briefs on the Supreme Court**, 148 U. PA. L. REV. 743 (2000) (with Joseph D. Kearney).

**Explaining Market Mechanisms**, 2000 U. ILL. L. REV. 275.

**The Great Transformation of Regulated Industries Law**, 98 COLUM. L. REV. 1323 (1998) (with Joseph D. Kearney).

**Property and the Right to Exclude**, 77 NEB. L. REV. 730 (1998).

**Capture Theory and the Courts: 1967-1983**, 72 CHICAGO-KENT L. REV. 1039 (1997).

**Golden Rules for Transboundary Pollution**, 46 DUKE L. J. 931 (1997).

***Dolan v. City of Tigard*: Constitutional Rights as Public Goods**, 72 DENVER U. L. REV. 859 (1995).

**Textualism and the Future of the *Chevron* Doctrine**, 72 WASH. U. L. REV. 351 (1994).

**Judicial Opinions as Binding Law and as Explanations for Judgments**, 15 CARDOZO L. REV. 43 (1993).

**Judicial Deference to Executive Precedent**, 101 YALE L. J. 969 (1992).

**The Constitutional Principle of Separation of Powers**, 1991 SUPREME COURT REV. 225.

**Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant**, 34 UCLA L. REV. 1083 (1987) (with Victor Goldberg and Daniel Unumb).

**The Economics of Public Use**, 72 CORNELL L. REV. 61 (1986).

**Property Rules, Liability Rules, and Adverse Possession**, 79 NW. U. L. REV. 1122 (1985).

**The Common Law Powers of Federal Courts**, 52 U. CHI. L. REV. 1 (1985).

**Trespass, Nuisance, and the Costs of Determining Property Rights**, 14 J. LEGAL STUD. 13 (1985).

#### ***OTHER SELECT WRITINGS***

**Big Property**, 105 CORNELL LAW REV. (2024) (review of Yun-chien Chang, PROPERTY LAW: COMPARATIVE, EMPIRICAL AND ECONOMIC ANALYSIS (2023)).

**Chevron's Ghost Rides Again**, 103 BU L. REV. 1717 (2023) (response essay).

**Judge Williams on Administrative Law**, 16 N.Y.U. J. L. & LIBERTY 8 (2022).

**Public Nuisance as Risk Regulation**, 17 J. L., ECON. & POL'Y 347 (2022).

**The Eagle Theory**, 9 BRIGHAM-KANNER PROPERTY RGTS. J. 17 (2020).

**Formalization, Possession, and Ownership**, 6 BRIGHAM-KANNER PROPERTY RIGHTS J. 113 (2017).

**Property and Sovereignty, Information and Audience**, 18 THEORETICAL INQ. IN L. 417 (2017).

**The Digital Revolution and the Future of Law Reviews**, 99 MARQ. L. REV. 1101 (2016).

**A Comment on Metzger and Zaring: The Quicksilver Problem**, 78 LAW & CONTEMP. PROBS. No. 3 at 189 (2015).

**Why Restate the Bundle?: The Disintegration of the Restatement of Property**, 79 BROOKLYN L. REV. 681 (2014) (with Henry E. Smith).

**Four Questions About Fracking**, 63 CASE W. RES. L. REV. 971 (2013).

**Contested Shore: Property Rights in Reclaimed Land and the Battle for Streeterville**, 107 NW. U. L. REV. 1057 (2013) (with Joseph D. Kearney).

**Property as Modularity**, 125 HARV. L. REV. ONLINE (2012).

**Justice Stevens and the *Chevron* Puzzle**, 106 NW. U. L. REV. 551 (2012).

**The Character of the Governmental Action**, 36 VER. L. REV. 649 (2012).

**The Property Prism**, 8 ECON. JOURNAL WATCH 247 (2011).

**Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine**, 105 NW. U. L. REV. 1417 (2011) (with Joseph D. Kearney).

**Why *Lingle* is Half Right**, 11 VER. J. ENV. L. 421 (2010).



**Direct Voting by Property Owners**, 77 U. CHI. L. REV. 275 (2010).

**Faithful Agent, Integrative, and Welfarist Interpretation**, 14 LEWIS & CLARK L. REV. 1565 (2010).

**Energy Policy for an Economic Downturn: A Proposed Petroleum Fuel Price Stabilization Plan**, 27 YALE J. ON REG. 1 (2010) (with David M. Schizer).

**Delegation and Judicial Review**, 33 HARV. J. L. & PUB. POL'Y 73 (2010).

**Public Use/Popular Constitutionalism**, 11 POWELL ON REAL PROPERTY WFL08-1-WFL08-16 (2008).

**The Conservative Case for Precedent**, 31 HARV. J. L. & PUB. POL'Y 977 (2008).

**Rescuing Federalism After *Raich*: The Case for Clear Statement Rules**, 9 LEWIS & CLARK L. REV. 823-51 (2005).

**Global Warming as a Public Nuisance**, 30 COLUM. J. ENV'TL L. 293 (2005).

**The Property Clause**, in THE HERITAGE FOUNDATION GUIDE TO THE CONSTITUTION (2005).

**Private Property and the Politics of Environmental Protection**, 28 HARV. J. L. & PUB. POL'Y 69 (2004).

**Introduction: The Demsetz Thesis and the Evolution of Property Rights**, 31 J. LEGAL STUD. S331 (2002).

**Incomplete Compensation for Takings**, 11 N.Y.U. ENV'TL L. REV. 110 (2002).

**Beyond the Independent Counsel: Evaluating the Options**, 43 ST. LOUIS U. L. REV. 1047 (1999).

**The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising**, 93 NW. U. L. REV. 1143 (1999).

**High-Level, "Tenured" Lawyers**, 61 LAW & CONTEMP. PROB. 83 (1998).

**Compensation and the Interconnectedness of Property**, 25 ECOLOGY L. Q. 327 (1998).

**Trespass and Nuisance**, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (Peter Newman, ed.) (1998).

**Toward a Principled Interpretation of the Commerce Clause**, 22 HARV. J. L. & PUB. POL'Y 31 (1998).

**A New Age of Federalism?** 1 GREEN BAG 2d 153 (1998).

**Does the Constitution Require that We Kill the Competitive Goose? Pricing Local Phone Services to Rivals**, 73 N.Y.U. L. REV. 1122 (1998) (with William J. Baumol).

**Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996**, 72 N.Y.U. L. REV. 1037 (1997) (with William J. Baumol).

**Does Public Choice Theory Justify Judicial Activism After All?**, 21 HARV. J. L. & PUB. POL. 219 (1997)

**Institutional Choice and Political Faith**, 22 LAW & SOC. INQ. 959 (1997) (review essay of N. Komesar, *Imperfect Alternatives*).

**Bork v. Burke**, 19 HARV. J. L. & PUB. POL. 509 (1996).

**Constitutional Limitations on Physician Price Controls**, 21 HASTINGS CONST. L. Q. 635 (1994).

**Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes**, 25 RUTGERS L. J. 621 (1994).

**A Modest Proposal for a Political Court**, 17 HARV. J. LAW & PUB. POL'Y 137 (1994).

**Pluralism, the Prisoner's Dilemma, and the Behavior of the Independent Judiciary**, 88 NW. L. REV. 396 (1993).

**The Judicial Prerogative**, 12 PACE L. REV. 327 (1992).

**Zero-Sum Madison**, 91 MICH. L. REV. 1392 (1992) (review of J. Nedelsky, *Private Property and the Limits of American Constitutionalism*).

**Wealth and Property**, 38 UCLA L. REVIEW 489 (1990) (review of S. Munzer *A Theory of Property*).

**Public Contracts, Private Contracts, and the Transformation of the Constitutional Order**, 37 CASE W. RES. L. REV. 597 (1987).

**Rent Seeking and the Compensation Principle**, 80 NW. U. L. REV. 1561 (1986) (review essay of R. Epstein, *Takings: Private Property and the Power of Eminent Domain*).

**First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine**, 44 U. CHI. L. REV. 205 (1976) (student comment).

**PERSONAL**

Married to Kimberly Evans Merrill.

Three daughters: Jessica (44), Margaret (41) m. Jeffrey Alleva, Elizabeth (38) m. Mattis Krasberg; six grandchildren.