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DEEDS AND THE DETERMINACY NORM: INSIGHTS FROM *BRANDT* AND OTHER CASES ON AN UNDESIGNATED, YET EVER-PRESENT, INTERPRETIVE METHOD

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ABSTRACT

The land one holds is generally only as good as the property rights contained in the deed. The rights contained in the deed are only as good as the ability to get those rights enforced. And, the enforcement is only valuable if it recognizes a determinate meaning in the deeds from the point of conveyance. This Article pens the term "determinacy norm" to explain a collection of rules for the interpretation of deed terms that aim to make the meaning of deed terms determinate. I contend that, in order to satisfy the determinacy norm for deed interpretation, courts must (and arguably do) interpret the terms in deeds and land grants as having a fixed meaning set contemporaneously with the transfer and based on the discernable intent and expectations of the parties at the time of the conveyance or grant. This norm runs through existing case law and is pivotal to facilitating an effective property system. But, courts have failed to recognize either the term (or even the organizing principle) that is the determinacy norm.

As an illustrative example, some see the 2014 U.S. Supreme Court case of Brandt Revocable Trust v. United States *as just a railroad right-of-way decision. But a closer look reveals that it is a good exemplar of courts striving to add determinacy to deeds and equivalent instruments like statutory land grants.* Brandt *reveals a pattern of U.S. Supreme Court jurisprudence that the Court itself is not adequately articulating where the determinacy norm lurks in the substructure of opinions.*

We should more directly recognize the determinacy norm's presence in private deed and public land grant cases. Doing so will allow us to better monitor and check the actions of judges to be sure that they are living up to the constraints of the determinacy norm. Such monitoring will help us better identify and protect the rights in the deeds that help organize our property system.

I. INTRODUCTION

The land one holds is generally only as good as the property rights contained in the deed. The rights contained in the deed are only as good as the ability to get those rights enforced. And, the enforcement is only

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valuable if it recognizes a determinate meaning in the deeds from the point of conveyance. This Article examines those basic tenets of our system of property law. It posits that the law of property depends on enforcement of the private agreements expressed in deeds and that the rules of interpretation for deeds have evolved around what I will call a "determinacy norm," without which deeds would have only limited value, if any at all. In this Article, I define the parameters of the "determinacy norm" as follows: *In order to satisfy the determinacy norm for deed interpretation, courts must interpret the terms in deeds and land grants as having a fixed meaning set contemporaneously with the transfer and based on the discernable intent and expectations of the parties at the time of the conveyance or grant.* It is this premise that I seek to show runs through existing case law and that I intend to defend as meritorious in our interpretation of deeds and pivotal to facilitating an effective and efficient property system.

In the 1979 case of *Leo Sheep v. United States*, the U.S. Supreme Court articulated an extremely important tenet of judicial interpretation of real property deeds and statutory grants of title when it declared that the "Court has traditionally recognized the *special need for certainty and predictability where land titles are concerned*" and that the Court is extremely conscious of a presumptive "unwilling[ness] to upset settled expectations" of the parties to the title transfer.[1] There is much to be learned from that statement and the critically important fundamentals of the determinacy norm that rest behind it.

In several recent U.S. Supreme Court cases, including most recently the March 10, 2014, case of *Brandt Revocable Trust v. United States*,[2] this tenet has played an undervalued yet critical role in the determination of the meaning of terms in property deeds (or in the near-equivalence of deeds, where property is transferred by statutory grants of land, by government patents, or with statutory reservations of real property interests). And, this special need for certainty and predictability has been a theme that plays a vital part in the general preservation of an efficient and effective system of established property rights and secure property conveyances.[3]

1. Leo Sheep Co. v. United States, 440 U.S. 668, 687 (1979) (emphasis added).

2. 134 S. Ct. 1257 (2014).

3. *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 140 (James Alt & Douglass North eds., 1990) ("One gets *efficient* institutions by a polity that has built-in incentives to create and enforce efficient property rights."); Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L.J. 129, 130 (2014) ("Predictability and usability of property depend on clear answers to ownership questions.").

It is a fundamental principle of the interpretation of property deeds that they must have a fixed meaning, identifiable at the time of conveyance.[4] This concept lacks comprehensive coverage in the literature and has not been sufficiently captured in a particular term. This Article seeks to fill these gaps and proposes that this concept should be termed the "determinacy norm" for deed interpretation. This norm focuses on the need to find a definite, exact, and unchanging meaning in the terms of the deed, set and fixed at the transfer point such that going forward all parties can rely on a single interpretation in making investment decisions related to the property and all parties to the deed transfer can appropriately set their expectations regarding what was given and what was retained—the "who has what and when" issues. It is the application of what might be called a "rule of deeds" that reflects the same rule of law values that we impose on the legal system generally.[5]

Property ownership and the scope of one's deed must be settled, knowable, and known from the outset of property acquisition. If they are not, the indeterminacy of the deeds in our system would have profoundly damaging impacts on the investment and incentive structure present in the private property system. Any other interpretation would create shifting private property rights whose security would simply be at the whim of others, including governments, judges, neighbors, or competing claimants.

This Article will not empirically test whether deed interpretation is, in fact and in practice, accomplished with a high level of determinacy. That is beyond the scope of this Article, which aims to show in this installment only that the goal of deed interpretation as expressed in the rules of interpretation is to find determinate meaning in deeds. Nonetheless, this Article will show examples where in practice the determinacy norm for deed interpretation seems vibrant.

Thus, this Article analyzes this determinacy norm both in the abstract and, importantly, in the context of several actual cases, including *Brandt*.[6] The *Brandt* case (like many of the other cases highlighted here) has received a relatively small amount of attention in scholarly analysis, and almost none of that attention has focused on the rules of deed and land grant interpretation,[7] even though, as Danaya Wright

4. *See* 2 ROBERT T. DEVLIN, A TREATISE ON THE LAW OF DEEDS § 836, at 102, § 851, at 128 (San Francisco, Bancroft-Whitney Co., 2d ed. 1887); 26A C.J.S. *Deeds* § 178, Westlaw (database updated Dec. 2015).

5. *See* Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 1012 (1995) ("[M]ost theorists have assumed that the rule of law requires a significant measure of determinacy in legal rules.").

6. 134 S. Ct. at 1257.

7. Only a few case summaries, articles, or student notes in law journals have been published since the decision, almost all critical of the outcome and not particularly focused on deed interpretation issues. *See, e.g.*, Danaya C. Wright, *Doing a Double Take: Rail-Trail*

has written, the Supreme Court in *Brandt* "hand[ed] the government a stunning 8-1 defeat on an issue of statutory construction of an 1875 act that granted rights-of-way over public lands to railroads."[8] Part of the purpose of this Article will be to show that the decision should not be considered stunning at all if one acknowledges the longstanding precedents on conveyance interpretation involved in the decision and their fit inside a pattern of deed-based jurisprudence that recognizes a determinacy norm.

Brandt can be briefly summarized as follows. The government claimed reversionary interests in railroad easements after railroad operations ceased.[9] The property owners claimed that easement law counsels differently—that the government only obtained a limited interest in the property, that the purpose of an easement is not transferable to a different use, and if the purpose of the easement ceases then the owner of the fee absorbs the abandoned easement upon termination of the originally granted use.[10] In other words, the government

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Takings Litigation in the Post-Brandt Trust *Era*, 39 VT. L. REV. 703, 705-06 & n.17 (2015) (focusing largely on takings-related implications of the case) [hereinafter Wright, *Doing a Double Take*]; Hannah Christian, Comment, Marvin M. Brandt Revocable Trust v. United States: *Turning a National Asset into a Private Gain*, 92 DENV. U. L. REV. 363, 398 (2015) (lamenting the loss of the new uses to which railroad easements might be put if the federal government could only retain a reversionary interest and proclaiming the "unjust[]" conversion of "a unique national asset created for the public benefit"); Justin G. Cook, Comment, *How the Supreme Court Jeopardized Thousands of Miles of Abandoned Railroad Tracks with a Single Opinion* [Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014)], 54 WASHBURN L.J. 227 (2014) (arguing that *Brandt* adversely affects the rails-to-trails system); Ernest Thompson, Student Article, *The Disappearing Railroad Easement Blues: Riding the Rails of* Marvin M. Brandt Revocable Trust v. United States, 60 S.D. L. REV. 308, 312-15 (2015) (showing basic case summary with a focus on assisting practitioners with related takings clause issues); Alice M. Noble-Allgire, Brandt Revocable Trust: *A Victory for Private Landowners in Abandoned Railroad Right-of-Way Case*, PROB. & PROP., Sept./Oct. 2014, at 10 (showing basic case summary with analysis for other railroad easement cases); Norman A. Dupont, *The Supreme Court Decides Rails to Trails Case: A New Governmental Attorney Estoppel Doctrine or a Case of Revisionist History?*, TRENDS, July/Aug. 2014, at 9 (providing basic case summary); Danaya C. Wright, *A New Era of Lavish Land Grants: Taking Public Property for Private Use and* Brandt Revocable Trust v. United States, PROB. & PROP., Sept./Oct. 2014, at 30 (focusing on takings) [hereinafter Wright, *A New Era*], http://www.americanbar.org/publications/probate_property_magazine_2012/2014/september_october_2014/2014_aba_rpte_pp_v28_5_article_wright_lavish_land_grants.html. Professor Wright also wrote an article appearing before the decision. *See* Danaya C. Wright, *Reliance Interests and Takings Liability for Rail-Trail Conversions:* Marvin M. Brandt Revocable Trust v. United States, 44 ENVTL. L. REP. 10173 (2014) [Wright, *Reliance Interests*]. Another law review article provides a useful and relatively impartial analysis. *See* Shelley Ross Saxer, *"Rails-to-Trails" Potential Impact of* Marvin M. Brandt Revocable Trust v. United States, 48 LOY. L.A. L. REV. 345, 361-67 (2014). One law review article has been published that supports the decision. *See* Brian T. Hodges, *When the Common Law Runs into the Constitution: The Train Wreck Avoided in* Marvin M. Brandt Revocable Trust v. United States, 39 VT. L. REV. 673, 675-76 (2015) (discussing impacts on takings and rails-to-trails, and defending the decision's protections for certainty and predictability in land titles).

8. Wright, *A New Era*, *supra* note 7, at 30.

9. 134 S. Ct. at 1263.

10. *Id.*

cannot reserve an easement for one use and decades later convert it (without re-bargaining or paying more) to a different use that was not anticipated, expected, or bargained for at the time of the original transfer. The land grant's provisions must be determinate and not subject to one party's choice to expand its rights under it. In some ways, this seems intuitive. But as the *Brandt* case and others illustrate, application of what I am calling the determinacy norm has sometimes become a more complex question in practice (and perhaps unnecessarily so).

The inattention to *Brandt* in existing literature is undeserved, as the case teaches us very valuable lessons about the rules for interpretation of deeds that are necessary to an effectively functioning system of private property.[11] In part, the very limited coverage may be because the case is seen on the surface as one about railroad rights-of-way—a fairly limited and somewhat obscure area of concern. Yet, in the substructure of the *Brandt* opinion—while hardly expressly discussed by the Court—is a necessary recognition of, and respect for, the determinacy norm in the interpretation of deeds. This Article explores and reveals that largely hidden substructure. Thus, while *Brandt* is interesting and important on its own particulars, what is especially enlightening for this Article's purposes is the opinion's implicit endorsement of the determinacy norm. Especially when read in light of the other recent cases, *Brandt* reveals a pattern of U.S. Supreme Court jurisprudence in which the Court itself is not adequately articulating where the determinacy norm is present (even when not expressly stated as such).

As a brief introductory aside, it should be noted here that this Article will use the term "deeds" broadly, sometimes with the intention of including within it similar legal instruments that have the same effect but a different name—principally statutory land grants, government patents, and statutory reservations. Statutory grants and reservations and government-issued land patents are, in most respects, subject to the same rules of interpretation that we apply to deeds between private individuals.[12] The only substantial difference between the two is that ambiguities in deeds are construed against the grantor (at least when the grantor is the drafter)[13] while ambiguities in land grants

11. *See* Hodges, *supra* note 7, at 674 ("The Brandt decision . . . is certainly destined for property law textbooks."); *id.* at 695-96 ("The implications of the Supreme Court's decision are far-reaching. The common law relies on a predictable and well-understood system for characterizing the various types of interests in property.").

12. GEORGE W. THOMPSON, 5B COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2725, at 383 (1978); Beard v. Federy, 70 U.S. 478, 491 (1865) ("[T]he patent [land grant authorized by statute] is a deed of the United States.").

13. HERBERT HOVENKAMP & SHELDON F. KURTZ, THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY, § 6.1, at 129 (6th ed. 2005) ("A deed is always construed most strongly against the grantor who has used the language.").

from the government are construed in favor of the sovereign.[14] Thus, what this Article concludes for deeds mostly applies to grants, patents, and reservations, and vice versa.

Part II explains the determinacy norm and the rules of interpretation that collectively follow or flow from that norm. Part III presents a series of examples from U.S. Supreme Court opinions were the determinacy norm is not expressly iterated but is nonetheless present and crucial to the Court's holdings. All of the examples are chosen because they fall in a line of statutory grant and land patent cases similar to the recent decision in *Brandt*. Very curiously, though, the Court itself has done a very poor job tying these cases together and recognizing their similarities. In fact, some of these cases were not even cited in *Brandt* while others received only passing reference. There appears to be a lack of comprehension of a thread that binds these cases together, and this Article seeks to remedy that failing. The principal cases discussed in Part III include *Watt v. Western Nuclear, Inc.*,[15] *Amoco Production Co. v. Southern Ute Indian Tribe*,[16] and *BedRoc Ltd., LLC v. United States*.[17] Part IV follows with a discussion of *Brandt* and its lessons for the determinacy norm in deed interpretation.

While hardly an exhaustive list of U.S. Supreme Court cases where the deed-based determinacy norm lurks in the background, these cases discussed in Parts III and IV are able educators of the presence of the norm in our jurisprudence. There are very important lessons in these cases regarding the vitality of the determinacy norm and the lessons of *Leo Sheep*.[18] Part V reflects on the benefits of the fierce application of a determinacy norm in deed interpretation, explaining that the effective functioning, indeed the very existence, of the property system is dependent on vigorous adherence to the norm and the values it aims to foster. This Article concludes that we should more directly recognize the determinacy norm's presence in deed and land grant cases, so that we may better synthesize our understanding and application of deed-based jurisprudence and more effectively promote the utility of our deed-based private property system.

14. United States v. Union Pac. R.R., 353 U.S. 112, 116 (1957) (describing "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it").

15. 462 U.S. 36 (1983).

16. 526 U.S. 865 (1999).

17. 541 U.S. 176 (2004).

18. 440 U.S. 668, 687 (1979).

II. DEFINING THE DETERMINACY NORM RELATING TO THE INTERPRETATION OF PROPERTY DEEDS AND EQUIVALENT LAND GRANTS

Property deeds must have a fixed meaning, identifiable at the time of the conveyance, and it is this meaning that a court seeks to find when interpreting them.[19] As the U.S. Supreme Court explained in the 1867 case of *Cavazos v. Trevino*, when construing a grant, a court should assess the language of the deed and the "the attendant and surrounding circumstances, at the time it was made, . . . *for the purpose of placing the court in the same situation, and giving it the same advantages for construing the paper, which were possessed by the actors themselves*."[20] The *Cavazos* Court further explained that the "object and effect" of this exercise is "not to contradict or vary the terms of the instrument, but to enable the court to arrive at the proper conclusion as to its meaning and the understanding and intention of the parties."[21] It is a court's job to put itself in the situation of the parties at the time of conveyance and to discern the intent of the parties in a manner that sustains the life, at a later date, of the meaning that was attached to the deed at that earlier, critical moment in time when the meaning was birthed. It is this task that makes the deed determinate. In his noteworthy *Treatise on the Law of Deeds*, Robert Devlin reported on the legal standards that have developed over time requiring that "[a] deed should receive a fair and reasonable construction which will effectuate the intention of the parties, and a contemporaneous exposition of the deed is always entitled to the greatest consideration."[22] Similar advice regarding the contemporaneous intent-focused nature of the inquiry into the meaning of deed terms was stated by Lord Chief Baron Eyre in the 1791 opinion in *Gibson v. Minet*: "Deeds are at the common law, they have their operation and their construction by the rules of the common law, they are contracts of a more solemn nature

19. DEVLIN, *supra* note 4, § 836, at 102, § 851, at 128; *see also* 23 AM. JUR. 2D *Deeds* § 248, Westlaw (database updated Nov. 2015) ("In the construction of the language used in a deed for the purpose of ascertaining the land conveyed, the intention of the parties, especially that of the grantor, as deduced from the whole instrument and the surrounding circumstances and conditions is controlling, just as it is in determining any other question arising in the construction of the deed."); 26A C.J.S. *Deeds* § 178, *supra* note 4 ("Interpretation of a deed focuses upon the intention of the parties at the time of the conveyance . . . ."); RICHARD R. POWELL, POWELL ON REAL PROPERTY § 81A.05[3][a] (Michael Allan Wolf ed., 2015) ("The intent of the parties is the polestar for interpreting a deed . . . ."); Hodges, *supra* note 7, at 696 ("The terms used by the common law have precise definitions and a complex system of rules flows from those definitions.").

20. 73 U.S. 773, 784 (1867) (emphasis added).

21. *Id.*

22. DEVLIN, *supra* note 4, § 851, at 128.

than other contracts; between *particular parties, respecting particular interests, in particular subjects*."[23] It is this particularity that makes the determinate deeds valuable.

This Part probes what we mean by a "determinacy norm" for deed interpretation and catalogs some of the rules of interpretation that further the norm, like those described above. "Determinacy" is defined in *Merriam-Webster*'s dictionary as "the quality or state of being determinate" and "the state of being definitely and unequivocally characterized: exactness."[24] Individuals engaging in transactions associated with property, particularly those who place a reliance on deeds (including, but not limited to, buyers), demand this "exactness" and ability to predict the scope of the ownership interests of any one property "owner." "Determinate" is similarly defined as "definitely known or decided" and "definitely settled."[25] In this sense, the determinacy norm in property law reflects many of the same values as the rule of law generally, including non-retroactivity and the inability to change the rules of the game as time goes on.[26] The focus on interpreting the meaning of deeds "at the time of conveyance"[27] is key because it sets a temporal point where exactness is decided and when matters of the deed are "definitely settled," after which they are not to be disturbed lest we enter the realm of indeterminacy.

Although not much discussion regarding the determinacy of deeds exists in the literature, there is a rich discussion regarding indeterminacy of law generally—questioning whether law can be objective and provide single answers to questions—from which some insights can be

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23. Gibson v. Minet (1791) 126 Eng. Rep. 326 (HL) 351 (appeal taken from Eng.) (emphasis added). The rules for property law and the regard for property rights have deep roots in the origins of the common law. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *139 ("The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The origin of private property is probably founded in nature . . . ."); ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 107 (1966) ("[C]ommon law of the twelfth and thirteenth centuries is in large part the law of land and tenures, the law of property rights . . . . A glance at the chapters of Magna Carta or at any collection of common-law writs will reveal the dominant concern with rights in land . . . .").

24. *Determinacy*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/determinacy (last visited Feb. 16, 2016).

25. *Determinate*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/determinate (last visited Feb. 16, 2016).

26. *See, e.g.*, Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 656 (1829) (Story, J.) (discussing the "danger, inconvenience and mischiefs of retrospective legislation in general," including its effects in "disturb[ing] the security of titles").

27. 1 PATTON AND PALOMAR ON LAND TITLES § 202, Westlaw (database updated Nov. 2015) ("Deeds generally are subject to the same rules of construction as are applied to contracts. The primary purpose is to ascertain the intent of the parties as expressed in the deed . . . . The rights of the parties are determined by the law as it exists *at the time of the conveyance*.") (emphasis added); *see also* DEVLIN, *supra* note 4, § 836, at 102-03 ("As in the case of all contracts, the intent of the parties to the deed, when it can be obtained from the instrument, will prevail, unless counteracted by some rule of law.").

borrowed to explain my use of the term "determinacy" regarding deeds. For example, Kent Greenawalt compares the definition of determinacy to what we mean by the rule of law, positing that determinacy in law means one finds the answer *in the law*:

> Here the "rule of law" idea connects to my basic standard for a determinate answer. The main criterion for judging the existence of a determinate answer is whether virtually any intelligent person familiar with the legal system would conclude, after careful study, that the law provides that answer. This standard reflects well the notion that the answer exists independently of either individual idiosyncrasies or controversial moral and political judgments.[28]

One can analogize Greenawalt's definition to the meaning of determinacy in deed interpretation by saying that the answer to the deed's meaning lies *in the deed*, which is infused with the ingredients of the terms used by the parties and their corresponding intent at the time that the deed—like the law—was written and executed such that it provided the answer then and always. With this focus on temporal and constant meaning, the lessons of Douglass North are applicable here as well when he concludes that "[s]ecure property rights will require political and judicial organizations that effectively and impartially enforce contracts across space and time."[29] The meaning of the terms in a deed begins and remains with the deed—forever set "across space and time" from the point of conveyance—and is not later found in some other point of authority, opinion, or competing value.

Consider also another definition of the indeterminacy of law generally. Again, the context for the following statements is the debate over whether law itself suffers from indeterminacy (i.e., it lacks the characteristics of objectivity, neutrality, etc.), but there are lessons that can be drawn for the definition of deed determinacy. Ken Kress articulates that "[l]aw is indeterminate to the extent that legal questions lack single right answers. In adjudication, law is indeterminate to the extent that authoritative legal materials and methods permit multiple outcomes to lawsuits."[30] Accepting this reasoning, deeds are indeterminate if we do not ground their interpretation in a set of rules that work to induce judges to find a single right answer based in a definite source of authority. With deeds, that source of authority is the deed itself and the intent of the parties as judged by the deed terms and other evidence of intent that existed contemporaneously with the execution of

28. Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 3 (1990).

29. NORTH, *supra* note 3, at 121.

30. Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 283 (1989).

the deed.[31] So, whereas Kress says of the metrics for evaluating the determinacy of law in general that "[l]aw is indeterminate where the correct theory of legal reasoning fails to yield a right answer or permits multiple answers to legal questions,"[32] the deed interpretation rules discussed here and below are at the very least attempting to create a theory of legal reasoning that prohibits multiple answers to the meaning of a deed.

Finally, let us consider Lawrence Solum's definitions of indeterminacy in the debate over the general nature of law and legal systems. Solum provides definitions for three key terms. First, he argues that "[t]he law is determinate with respect to a given case if and only if the set of results that can be squared with the legal materials contains one and only one result."[33] In contrast, Solum posits that "[t]he law is indeterminate with respect to a given case if and only if the set of results in the case that can be squared with the legal materials is identical with the set of all imaginable results."[34] The point here is that indeterminacy will exist if one is not constrained in the choice of result. Where there are no rules for deed interpretation to constrain a judge's pool of available interpretations down to one, the deeds that would be interpreted would suffer from indeterminacy. Thus, if we wish to foster determinacy in deeds, the rules of interpretation for deeds should be, and are, designed to limit the possible meanings given to a deed term to one and only one meaning. Of course, the law may strive for absolute determinacy and fall short yet not entirely devolve into indeterminacy. Thus, Solum proposes that "[t]he law is underdeterminate with respect to a given case if and only if the set of results in the case that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results."[35] Using this definition of "underdeterminate" and recognizing that rules limiting choice of interpretation are imperfect and may not always be followed, it may be that, in practice, the legal system generally and deed interpretation in particular is better characterized as falling in this underdeterminate category. I will leave exploration of that debate for another day. Instead, my focus in this Article is to defend the proposition that the deed interpretation rules are at least structured with the goal of determinacy in mind and that they seek to operate as a constraint designed to limit judges to a single (closed set of one) interpretation of any particular deed.

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31. DEVLIN, *supra* note 4, § 836, at 103-04 ("The rule is that the intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention if practicable when not contrary to law.").

32. Kress, *supra* note 30, at 320.

33. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (emphasis omitted).

34. *Id.* (emphasis omitted).

35. *Id.* (emphasis omitted).

The meaning of determinacy of deed interpretation is also informed by understanding the relationship between determinacy and the rule of law. There are substantial similarities between the importance served by a determinacy norm for deed interpretation and the goals sought by embracing rule of law values, including determinacy.

The rule of law includes the freedom from what John Locke calls the "inconstant, uncertain, unknown, arbitrary will" of others.[36] As Joseph Story has explained, it is particularly important that rule of law values dominate when it comes to private property concerns:

> Indeed, in a free government, almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers.[37]

Thomas Morgan and Robert Tuttle explain the utility and necessity of being able to discern the law's meaning and boundaries, stating that "[i]n order to act freely within their protected realm and to participate effectively in cooperative acts, individuals must know 'with fair certainty' what the law is."[38] They continue that "[i]f the law is radically indeterminate, official discretion will not be bounded, individual freedom will not be secure, and social interaction will become infinitely more complex."[39] These conclusions regarding the dangers when the rule of law is absent are equally applicable to what would happen if we fail to respect a determinacy norm for deeds. Freedom to exchange or invest in property is insecure when we do not know whether our deed rights will be enforced.[40] Social interaction, including conveying and

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36. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 17 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690). Consider Locke's description of the protection against arbitrary or indeterminate rules:

> [F]reedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man . . . .
>
> This freedom from absolute, arbitrary power, is so necessary to, and closely joined with a man's preservation, that he cannot part with it, but by what forfeits his preservation and life together . . . .

Id. (emphasis omitted).

37. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1784, at 661 (Boston, Hilliard, Gray, & Co. 1833).

38. Morgan & Tuttle, *supra* note 5, at 1012.

39. *Id.*

40. *See* LUDWIG VON MISES, SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS 335 (J. Kahane trans., Liberty Fund 1981) (1936) ("The desire for an increase of wealth can

contracting property rights, is more complex when the reliance and confidence regarding the enforceability of deed rights necessary to incentivize productive behavior and investment are diminished.

Drawing from these definitions, it seems clear that to achieve determinacy in the interpretation of deeds, courts must adopt rules that ensure that the ownership and the scope of one's deed rights are settled, knowable, and known from the point of the deed's execution. Perhaps most importantly, we must judge the meaning of deed terms in private conveyances, and in statutory land grants, at the time of the conveyance or grant, in accordance with the intent of the private parties to an agreement, or the intent and expectations of the government and its patentees, when dealing with language in a statutory land grant or patent.[41] Without these standards to foster determinacy, property owners would be left with little security in the rights held through their deeds, and the system of property law would lack the legitimacy it requires.[42]

Both the rule of law and determinacy norms seek to add a sense of established and knowable standards upon which individuals can predict enforceability of rules and adjust their behaviors[43] and where government officials, including judges, are constrained from upsetting expectations and the justifiable reliance individuals place on pre-set rules.[44] Friedrich Hayek, for example, explains that the rule of law "means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[45]

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be satisfied through exchange, which is the only method possible in a capitalist economy, or by violence and petition as in a militarist society, where the strong acquire by force, the weak by petitioning.").

41. 26A C.J.S. *Deeds* § 191, *supra* note 4 ("Courts may determine the intent of the parties in a disputed deed with reference to the position of the parties at the time of conveyance and in light of surrounding circumstances, and resort to rules of construction."); *cf.* Greenawalt, *supra* note 28, at 38 ("The claim that the law can yield determinate answers is most straightforward with respect to simple statutory texts.").

42. Morgan & Tuttle, *supra* note 5, at 1011-12 ("The legitimacy of the rule of law in a pluralistic society is usually taken to depend on two of its features, neutrality and determinacy.").

43. *See* Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008) ("[M]any conceptions of the Rule of Law place great emphasis on legal certainty, predictability, and settlement; on the determinacy of the norms that are upheld in society; and on the reliable character of their administration by the state.").

44. *See id.* ("The Rule of Law is a multi-faceted ideal. Most conceptions of this ideal, however, give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.").

45. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944).

The basis of legitimacy for a government begins with the rule of law,[46] which can be defined as having the following characteristics within the legal system: (1) clear, known, and understandable laws, rules, and regulations; (2) predictability and certainty of enforcement, application, and the protection of rights and remedies for wrongs; (3) procedural validity and regularity in the establishment of laws, rules, and regulations; (4) fair and equal, non-biased application of the laws, rules, and regulations; and (5) freedom from arbitrary, capricious, or ad hoc decisions that make the law so indeterminate and unestablished as to make predictable compliance impossible.[47]

Consider the recent counsel of the Michigan Supreme Court on the virtues of predictable and stable interpretations of property rights.[48] It began by quoting the U.S. Supreme Court's explanation in *Payne v. Tennessee* regarding the general benefits of stare decisis effects in law that, "[i]n approaching any case, '[s]tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' "[49] The court then continued that "if there is any realm within which the values served by stare decisis—stability, predictability, and continuity—must be most certainly maintained, it must be within the realm of property law," especially because of the extensive reliance parties place on the "establish[ed] 'rules of property.' "[50] As the Michigan Supreme Court had accurately explained in a previous case,

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46. *See* Waldron, *supra* note 43, at 3 ("The Rule of Law is one of the most important political ideals of our time. It is one of a cluster of ideals constitutive of modern political morality, the others being human rights, democracy, and perhaps also the principles of free market economy.") (footnote omitted).

47. RONALD A. CASS, THE RULE OF LAW IN AMERICA 1-22 (2001); *see* LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969) (noting the ways in which a system of legal rules may fail, resulting in not only a flawed legal system, but a nonexistent legal system); JOHN RAWLS, A THEORY OF JUSTICE 235, 237 (4th prtg. 1972) ("A legal system is a coercive order of public rules . . . . When these rules are just they establish a basis for legitimate expectations. . . . [A]ctions which the rules of law require and forbid should be of a kind which [individuals] can reasonably be expected to do and to avoid."). Waldron summarizes Fuller's ideas as follows:

> A conception of the Rule of Law like the one just outlined emphasizes the virtues that Lon Fuller discussed in *The Morality of Law*: the prominence of general norms as a basis of governance; the clarity, publicity, stability, consistency, and prospectivity of those norms; and congruence between the law on the books and the way in which public order is actually administered.

Waldron, *supra* note 43, at 7.

48. 2000 Baum Family Tr. v. Babel, 793 N.W.2d 633, 655 (Mich. 2010).

49. *Id.* (alteration in original) (emphasis omitted) (citing Payne v. Tenn., 501 U.S. 808, 827 (1991)).

50. *Id.* (citing Bott v. Comm'n of Nat. Res., 327 N.W.2d 838, 849 (Mich. 1982)).

"[j]udicial 'rules of property' create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital."[51] Predictable interpretation of determinate deeds operates much like stare decisis in producing these benefits of stability in the property system.

If an owner is in a dispute with someone contesting the terms of a deed, there is no security or confidence in the owner's ability to prove the legitimacy of her rights under the deed unless there is a *neutral* state enforcement system that is searching for a determinate answer to the meaning of the deed's terms.

The security one feels in her deed rights is directly proportional to the level of confidence she has in this process. Her property will diminish in value if she lacks the ability to confidently and accurately predict how the neutral enforcement system will adjudicate disputes over the deed.[52] So, too, will a buyer or investor's incentives change based on what degree of accuracy exists for assessing the judicial interpretation risks associated with investments in or acquisition of property. Thus, our legal system provides the opportunity to prove ownership and operates to adjudicate the rights articulated in the terms of deeds on the basis of set and known rules.

By further examining a few well-established rules for the interpretation of deeds we can see that the formulation of these rules can be justified as furthering the determinacy norm for deed interpretation. Deeds are law by private ordering, and as such they need rule of law values to govern their interpretation if such ordering is to be effective. Critical amongst those rule of law values at play with deed interpretation is knowability. Knowable deed rights are necessary to predict and structure investment. As Hayek has explained in relation to the determinacy aspects of the rule of law generally:

> The rationale of securing to each individual a known range within which he can decide on his actions is to enable him to make the fullest use of his knowledge . . . . The law tells him what facts he may count on and thereby extends the range within which he can predict the consequences of his actions.[53]

51. *Bott*, 327 N.W.2d at 849.

52. *See* Hodges, *supra* note 7, at 697 (discussing *Brandt* and positing that "[i]f courts are unwilling to give effect to titles, then the owners' interests and expectations in their property become potentially worthless").

53. F.A. HAYEK, THE CONSTITUTION OF LIBERTY 156-57 (1960).

Individuals tailor their behavior to their expectations created by the division of rights they perceive manifest in the executed deeds. The less stable the expectations, the less likely one will invest in the acquisition or improvement of property.[54]

Courts routinely focus on the well-established rule that the intent of the parties governs the interpretation of deeds. The purpose of deed interpretation is to identify "the object had in view by the parties."[55] As the rules that have developed for deed interpretation clearly state, the task for the interpreting judge is to ascertain intent, focusing in on the law, language, situation, and circumstances "when the instrument was framed."[56] The aim is to give a deed a fixed meaning from a fixed time forward, with enforceability tied to that moment and adjudication aimed at finding the meaning of the deed's terms as of that historical moment. And, through private ordering, private law accomplishes the adjustment of property rights through deeds; thus the intent and desires of the private parties affected—or, the "law" that *they* have chosen to regulate the allocation of property rights between them—should dictate the interpretation of *their* agreements.[57]

The fact that courts try to resolve the meaning and identify the intent as expressed in and based on the text alone whenever possible[58]

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54. *See* Waldron, *supra* note 43, at 6-7. Waldron explains one account of the rule of law as stressing the ties between the ability to predict legal outcomes, expectations, and willingness to invest as follows:

> On this account, the Rule of Law is violated when . . . officials act on the basis of their own discretion rather than norms laid down in advance. If actions of this sort become endemic, then not only are people's expectations disappointed, but they will increasingly find themselves unable to form any expectations at all, and the horizons of their planning and their economic activity will diminish accordingly.

Id.

55. 26A C.J.S. *Deeds* § 429, *supra* note 4 (explaining the rules for construing restrictions on the use of property and that "effect is to be given to the intention of the parties, as shown by the language of the instrument, considered in connection with the circumstances surrounding the transaction, and the object had in view by the parties") (footnote omitted).

56. *See* Colton v. Colton, 127 U.S. 300, 310 (1888). In *Colton*, the U.S. Supreme Court explained:

> The object . . . of a judicial interpretation of [every written instrument] is to ascertain the intention of the testator [or grantor], according to the meaning of the words he has used, deduced from a consideration of the whole instrument and a comparison of its various parts in the light of the situation and circumstances which surrounded the testator [or grantor] *when the instrument was framed*.

Id. (emphasis added); *see also* 26A C.J.S. *Deeds* § 181, *supra* note 4 ("[T]he construction of a deed must be governed by the strict rules of the common law, and the governing law at the time of conveyance.") (footnote omitted).

57. *See* 26A C.J.S. *Deeds* § 178, *supra* note 4 ("The main object in construing a deed is to ascertain the intention of the parties.").

58. *See* Van Ness v. Mayor of Wash., 29 U.S. (4 Pet.) 232, 285 (1830) ("Here we have a solemn instrument embodying the final intentions and agreements of the parties, without

is another important determinacy norm-based rule. First, judicial rules that focus on the text of the document for ascertaining intent incentivize parties to memorialize their intent in precise, revealing, and informative text. The judicial interpretation rules route behavior. Thus, it incentivizes complete and clearer drafting when the parties know that judges and others will look first to the language in the transfer documents when interpreting deeds. Second, the focus on the text reflects our desire as a society to have set rules and an identifiable place where persons outside the transaction transferring the property (and not just judges) can ascertain the respective rights of the parties.[59]

Intent matters because it is what the parties themselves are most intimately associated with and most capable of discovering between themselves in order to evaluate their respective rights and tailor their behaviors to the property and the rights, immunities, liabilities and obligations associated with the land transaction.[60] When interpreting the terms of a conveyance that have "natural meaning" and when the parties use "appropriate terms of art" understood within property law to express their meaning and intent, then that determinate meaning controls, and the court cannot "defeat the legal meaning, and resort to a conjectural intent."[61] The courts cannot ignore the will of the private parties as expressed in the terms of the deed by construing them any other way.[62] To do so would, in the words of Lord Eyre, which were later incorporated in an opinion by the U.S. Supreme Court, mean that "we no longer construe men's deeds, but make deeds for them,"[63] which is a line the courts cannot cross.

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any allegation of mistake; and we are to construe that instrument according to the legal import of its terms."); *see also* 26A C.J.S. *Deeds* § 195, *supra* note 4 ("The primary rule in construing a deed is to ascertain the intention of the parties from the deed itself, construed as a whole.") (footnote omitted); 74 C.J.S. *Railroads* § 163, Westlaw (database updated Dec. 2015) ("A court will give effect to the intention of the parties to instruments conveying a right-of-way or other interests to a railroad as far as can be ascertained from the instrument.").

59. *See* Gisborn v. Charter Oak Life Ins. Co., 142 U.S. 326, 331-36 (1892) (showing terms of written instruments arrived at by having the parties determine their rights).

60. *See* HOVENKAMP & KURTZ, *supra* note 13, § 6.1, at 128 ("The purpose of construing a conveyance or will when its terms are ambiguous is to determine the intention of the parties. All rules of construction are subservient to this purpose. In other words, the first rule of construction is to give effect to the parties' intent.").

61. *Van Ness*, 29 U.S. (4 Pet.) at 285 ("How then can the court defeat the legal meaning, and resort to a conjectural intent?").

62. *See id.* at 286 ("But it is sufficient for us, that here there is a solemn conveyance, which purports to grant an unlimited fee . . . and we know of no authority which would justify us in disregarding the terms, or limiting their import, where no mistake is set up and none is established.").

63. United States v. Union Pac. R.R., 91 U.S. 72, 86 (1875) (quoting Lord Chief Baron Eyre in *Gibson v. Minet*, (1791) 126 Eng. Rep. 326 (HL) 351 (appeal taken from Eng.)) (adding that "[t]his rule is as applicable to a statute as to a deed").

Thus, based on these stated rules of interpretation and the survey of the way courts themselves have historically treated the search for meaning in deed terms, I repeat from the introduction the formulation of the summary for what can be called the determinacy norm for the interpretation of deeds: *In order to satisfy the determinacy norm, courts must interpret the terms in deeds and land grants as having a fixed meaning set contemporaneously with the transfer and based on the discernable intent and expectations of the parties at the time of the conveyance or grant.* With that formulation in view, an analysis of the cases in the next two Parts begins to reveal the yet-obscured threads that bind them together. Each holding can be justified based on interpretive rules that reflect the determinacy norm.

III. SELECTED PRE-*BRANDT* EXAMPLES OF UNSTATED U.S. SUPREME COURT RECOGNITION OF THE DETERMINACY NORM

This Part identifies several examples from U.S. Supreme Court opinions in which the interpretive foundations of the determinacy norm are applied. The Court appears to be following a trend that it has not yet articulated (at least not with any sense of clarity). Each of the examples in this Part have similarities with *Brandt*, although the *Brandt* opinion hardly cited them.

Because property is traditionally a state law issue, the U.S. Supreme Court hears few cases involving the interpretation of deeds. When it has engaged in such interpretation of deeds, it has normally followed the determinacy norm-based interpretive rules, as some of the example cases in Part II illustrate. More often, the Court is called upon to interpret federal statutory land grants (and reservations) and land patents.

After all this talk about "deeds" so far in this Article, some readers may wonder why this Part is so heavily focused on the interpretation of statutory land grants and land patents. The answer is basic. As you may recall from the introduction, courts adopt the same core construction rules for interpreting statutory land grants and patents (the terms we associate with public, or government, conveyances) as they do for interpreting deeds (the term we per se associate with private conveyances).[64] Most often, this Article is using "deeds" loosely as shorthand to refer to all of these similar legal instruments. The determinacy norm is prevalent in each category in the same way without regard to the proper name we give to these documents that secure and establish ownership rights depending on the status of the grantor. As noted earlier, there is a bit of a difference in the presumptions that apply in the

64. *See supra* notes 12-14 and accompanying text.

face of ambiguity in these instruments: ambiguities in private deeds most often are construed against the grantor when the grantor is the drafter, but ambiguities in public land grants are construed in favor of the sovereign.[65] Neither that distinction nor any other nuances in construction are really consequential for the analysis in this Article.

What is important for our purposes is that these cases in this Part all show the determinacy norm employed to reach the conclusions in the cases, although none of the opinions say directly that the judges are doing so. But we can learn from these cases how the determinacy norm operates. And whether we look at "deed" cases or "land grant" cases to witness the norm's application is largely inconsequential. Private conveyance law can learn from public conveyance law, and the same is true in reverse.

I have chosen these cases in part because they exemplify the operation of the determinacy norm (and demonstrate that the courts, unfortunately, do not so label it). I have also chosen them because of *Brandt's* currency. And lastly, I have chosen to focus on these cases because their interconnectedness is neither fully recognized by the Court nor by the literature, and that deficit is really something worth correcting.

Thus, one ancillary purpose of this Part, separate from the goal of elucidating the determinacy norm, is to, for the first time, present these cases together so that one can see how closely related they are as a matter of land grant interpretation and natural resources law. That alone makes the collection of cases interesting. The cases presented below also provide excellent case studies in the application of the determinacy norm while failing to expressly say so. Finally, please note that this is an illustrative, rather than an exhaustive, collection of Supreme Court analysis on these issues. Through this collection, however, it should be clear that the determinacy norm is vibrant in deed and land grant jurisprudence.

A. Watt v. Western Nuclear, Inc.

In *Watt v. Western Nuclear, Inc.*,[66] the U.S. Supreme Court in 1983 was required to interpret a mineral reservation in land patented under the Stock-Raising Homestead Act of 1916 ("SRHA"),[67] which "provided for the settlement of homesteads on lands the surface of which was

65. *Union Pac. R.R.*, 353 U.S. 112, 116 (1957) (describing "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it" (citing Caldwell v. United States, 250 U.S. 14, 20-21 (1919))); *see also supra* notes 13-14 and accompanying text.

66. 462 U.S. 36 (1983).

67. 43 U.S.C. §§ 291-302 (1970) (repealed 1976).

'chiefly valuable for grazing and raising crops' and 'not susceptible of irrigation from any known source of water supply.' "[68] As mentioned earlier, a land "patent" is essentially the term used in the place of "deed" when the "conveying" of real property is done by the federal government granting the property to a private individual.[69] When granting property through land patents issued pursuant to the SRHA, the statute provided that "all the coal and other minerals" were reserved and owned by the United States.[70] In the *Western Nuclear* case, the question became whether gravel was one of the "other minerals" reserved and belonging to the United States or, alternatively, whether that gravel belonged to the patentee who received all property rights except those reserved.[71]

Importantly, the Court attempted to find a definitive meaning from dictionaries or "legal understanding of the term 'minerals' that prevailed in 1916."[72] This effort illustrates the Court's recognition of the obligation to seek to find a determinate meaning when possible that is tied to the time of the deed's execution or the statutory grant's passage into law. Ultimately, the Court found those sources wanting,[73] but it did interpret the meaning and scope of "other minerals" by relying on "the purposes of the SRHA"[74] which existed in the statute and thus were present and discoverable by the parties at the time of the transfer's authorization and forever set for the future. In other words, the source of the patent's interpretation (the SRHA) had a fixed meaning at the fixed time of the SRHA enactment and within the fixed and knowable purposes of the SRHA. The Court's focus was on what "Congress plainly contemplated"[75] in the terms and what "Congress plainly expected"[76] as well as what "Congress certainly could not have expected"[77] regarding the usages of the lands patented at the time it created the SRHA land grant scheme.

Although the Court never expressly stated it, it seemed to hint at least that the SRHA patentees themselves also could not have expected that they would get rights to the gravel because the purposes

68. *W. Nuclear*, 462 U.S. at 37 (quoting 43 U.S.C. § 292).

69. *See* Brandt Revocable Tr. v. United States, 134 S. Ct. 1257, 1262 (2014) ("A land patent is an official document reflecting a grant by a sovereign that is made public, or 'patent.' ").

70. *W. Nuclear*, 462 U.S. at 37 (citing 43 U.S.C. § 299).

71. *See id.* at 37-38.

72. *Id.* at 46-47.

73. *Id.*

74. *Id.* at 47.

75. *Id.* at 51.

76. *Id.* at 53.

77. *Id.* at 55; *see also id.* at 47 (making a conclusion "[s]ince Congress could not have expected").

of their grants did not include mining. The Court engaged in a lengthy evaluation of Congress's knowledge of mineral law as of 1916 (the time of enactment of the SRHA) and its intent and expectations for the SRHA[78] before concluding that "[w]hatever the precise scope of the mineral reservation may be, we are convinced that it includes gravel."[79] Whether one agrees with the majority's assessment of what Congress intended or what it meant, there is no doubt that the majority believed that it was required to identify Congress's intent and expectations at the time of the SRHA enactment in order to determine the respective rights of the parties. For example, it concluded that "Congress *could not have expected* that stockraising and raising crops would entail the extraction of gravel deposits from the land,"[80] and thus "the congressional purpose of facilitating the concurrent development of both surface and subsurface resources is best served by construing the mineral reservation to encompass gravel."[81] The Court supported its interpretation by employing "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it"[82] and by relying on legislative history.[83] All in all, *Western Nuclear* is an example of a case where, although the Court could not find completely unambiguous intent, it nonetheless worked extremely hard to try to get to that point with an understanding of the importance of setting a meaning that existed and became effective upon enactment of the SRHA and that would also have been understood by Congress and the patentee at that time too. That exercise was in the spirit of following the determinacy norm.

B. Amoco Production Co. v. Southern Ute Indian Tribe

In *Amoco Production Co. v. Southern Ute Indian Tribe*,[84] the U.S. Supreme Court in 1999 interpreted the scope of land patents issued pursuant to the Coal Land Acts of 1909 and 1910 (collectively "Coal Land Acts") and in so doing had occasion to employ interpretative rules that underlay what I am here calling the determinacy norm. The patents under the Coal Land Acts "conveyed to the patentee the land and everything in it, except the 'coal,' which was reserved to the United

78. *Id.* at 48-56.

79. *Id.* at 55.

80. *Id.* at 47 (emphasis added).

81. *Id.*

82. *Id.* at 59 (citations omitted) (quoting United States v. Union Pac. R.R., 353 U.S. 112, 116 (1957)).

83. *Id.* at 60.

84. 526 U.S. 865 (1999).

States."[85] Inside coal seams, there is often present another mineral known as coal bed methane ("CBM").[86] So, the Court was required, when interpreting the reservation, to determine whether the term "coal" (covering the reserved property in the patent belonging to the United States) included CBM.[87] It held that CBM was not part of the "coal"—CBM was distinct and thus was included within the patentee's package of ownership.[88] In doing so, the Court was again focused on finding a determinate meaning at the time of the Coal Lands Acts such that the parties could, with confidence, identify the state of ownership at the time the Acts passed (and consequently all of this would already be known when the patents issued as well).

The Court very clearly explained that the interpretation of a land grant (or conveyance) cannot be dependent on present-day knowledge or current understanding. We must look back at the time of the conveyance or grant and try to determine what the parties would have expected the boundaries of the transfer to be:

> While the modern science of coal provides a useful backdrop for our discussion and is consistent with our ultimate disposition, it does not answer the question presented to us. *The question is not whether, given what scientists know today, it makes sense to regard CBM gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910*. In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress "was dealing with a practical subject in a practical way" and that it intended the terms of the reservation to be understood in "their ordinary and popular sense." We are persuaded that the common conception of coal *at the time Congress* passed the 1909 and 1910 Acts was the solid rock substance that was the country's primary energy resource.[89]

The Court exhaustively examined both the language and surrounding circumstances that would have informed Congress at the time of enactment of the Coal Land Acts, noting, among other things, that "*[a]t the time the Acts were passed*, most dictionaries defined coal as the solid fuel resource,"[90] and thus:

> [T]he common understanding of coal *in 1909 and 1910* would not have encompassed CBM gas, both because it is a gas rather than a

85. *Id.* at 867.

86. *Id.* at 872-73.

87. *Id.*

88. *See id.* at 880.

89. *Id.* at 873-74 (emphasis added) (first quoting Burke v. S. Pac. R.R., 234 U.S. 669, 679 (1914); then citing Perrin v. United States, 444 U.S. 37, 42 (1979)).

90. *Amoco Prod. Co.*, 526 U.S. at 874 (emphasis added).

> solid mineral and because it was understood as a distinct substance that escaped from coal as the coal was mined, rather than as a part of the coal itself.[91]

Therefore, when the United States reserved "coal" for itself, neither Congress nor the patentees would have expected that CBM was reserved. The Court buttressed this interpretation and its "at the time"-analysis by looking at the surrounding circumstances including the practicalities of the subject[92] and the fact that, given the "condition of the country *when the acts were passed*,"[93] CBM was not even considered in the same category as coal (a valuable resource) but instead was largely considered an uneconomic and "dangerous waste product."[94] All of the focus was on identifying a determinate meaning as of the date of enactment of the statutes authorizing the patents. Finally, it is important to note that the Court was confident in its plain meaning interpretation and stated that "[b]ecause we conclude that the most natural interpretation of 'coal' as used in the 1909 and 1910 Acts does not encompass CBM gas, we need not consider the applicability of the canon that ambiguities in land grants are construed in favor of the sovereign."[95]

C. BedRoc Ltd., LLC v. United States

In *BedRoc Ltd., LLC v. United States*,[96] the U.S. Supreme Court in 2004 was required to interpret the meaning of terms in another statutory reservation tied to a statutorily authorized grant of government property to a private individual. The Pittman Underground Water Act of 1919 ("Pittman Act") authorized the transfer of a land patent[97] to

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91. *Id.* at 874-75 (emphasis added).

92. *Id.* at 873 (first citing *Burke*, 234 U.S. at 679; then citing *Perrin*, 444 U.S. at 42).

93. *Id.* at 875 (emphasis added) (quoting Leo Sheep Co. v. United States, 440 U.S. 668, 682 (1979)).

94. *Id.* at 876.

95. *Id.* at 880. This rule finds itself in many court opinions, including this one drawing on the lessons of Vattel:

> Vattel's first general maxim of interpretation is that "it is not allowable to interpret what has no need of interpretation," and he continues: "When a deed is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusion—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it." Here the words are plain and interpret themselves.

Ruggles v. Illinois, 108 U.S. 526, 534 (1883) (quoting EMER DE VATTEL, THE LAW OF NATIONS 244 (John Chitty ed., The Lawbook Exch. Ltd. 2006) (1854).

96. 541 U.S. 176 (2004).

97. *Id.* at 179; *see also* Brandt Revocable Tr. v. United States, 134 S. Ct. 1257, 1262 (2014) ("A land patent is an official document reflecting a grant by a sovereign that is made public, or 'patent.' ").

settlers for the purposes of supporting and incentivizing irrigation projects in the area of the land patents within the State of Nevada.[98]

These grants by statute—the equivalent of legislative "conveyances"—had language (as did the express terms of the patent document itself) that included a "reservation to the United States of all the coal and other *valuable* minerals in the lands . . . together with the right to prospect for, mine, and remove the same."[99] The predecessors in title to the property owners in the *BedRoc* case held their Pittman Act property subject to this reservation, yet they proceeded to extract sand and gravel from that property.[100] The United States brought administrative actions against the land grant holders, including claiming a trespass on the property of the United States.[101] The property in question was namely the sand and gravel that the government claimed belonged to the United States because the sand and gravel were supposedly "valuable minerals" and thus would have been severed from the original patent and included in the reservation.[102] The owners of the property from the land grant filed an action to quiet title to the sand and gravel in the U.S. District Court,[103] claiming that sand and gravel—while valuable today—were not *valuable* minerals in 1919 even if they were minerals; and, thus, the expectations of the parties (Congress and all prospective patentees) at the time of the statutory grant could not have been that sand and gravel were reserved. The District Court and the U.S. Court of Appeals for the Ninth Circuit ruled in favor of government ownership of the sand and gravel pursuant to the reservations in the patent.[104] The U.S. Supreme Court reversed and interpreted the patent in favor of the patentees and their successors' claims to ownership of the sand and gravel.[105] In doing so, the Court reached its decision—again in spirit more than expressly—within the contours of the determinacy norm.

The *BedRoc* Court explained that the word "valuable" made this case distinguishable from *Western Nuclear* where the language there did not have the modifier "valuable" in front of the word "minerals."[106] The Pittman Act reserved a narrower set of interests for the United

98. *See BedRoc*, 541 U.S. at 179-80.

99. Pittman Act, ch. 77, § 8, 41 Stat. 293, 295 (1919) (emphasis added); *BedRoc*, 541 U.S. at 179-80 (quoting the granting language from the Act).

100. *BedRoc*, 541 U.S. at 180-81.

101. *Id.* at 180.

102. *Id.* at 180-81.

103. *Id.* at 181.

104. *Id.*

105. *Id.* at 185-87.

106. *Id.* at 182-83 ("Whatever the correctness of *Western Nuclear*'s broad construction of the term 'minerals,' we are not free to so expansively interpret the Pittman Act's reservation.").

States than the set of interests reserved under the SRHA.[107] Stated differently, a patentee's package of property rights was larger in a Pittman Act-authorized land grant than in an SRHA-authorized land grant.

The *BedRoc* Court went on to adopt some of the basic tenets of the determinacy norm as it went about identifying the meaning of the terms in the patent. First, it explained that Congress's intent should be interpreted based on a presumption that, when drafting, Congress was looking at the existing situation and adopting a practical, ordinary, and popular meaning of the terms it used. This presumption regarding the method of term choice means that the terms must be judged by looking at the then-present circumstances that could be identifiable by all relevant stakeholders when setting their expectations in 1919.[108]

The *BedRoc* Court emphasized that, "[i]mportantly, the proper inquiry focuses on the ordinary meaning of the reservation *at the time Congress enacted it*"[109] and quoting *Leo Sheep* explained that "land-grant statutes should be interpreted in light of 'the condition of the country *when the acts were passed*.' "[110] It further quoted *Perrin v. United States*, noting, " '[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common *meaning' at the time Congress enacted the statute*."[111]

Looking at this contemporaneous understanding, the Court framed the central question as being about what the parties could determine with a level of determinacy at the time of the patent (i.e., "Because the Pittman Act applied only to Nevada, the ultimate question is whether the sand and gravel found in Nevada were commonly regarded as 'valuable minerals' in 1919.").[112] It concluded that "[c]ommon sense tells us, and the Government does not contest, that the answer to that question is an emphatic 'No' " because sand and gravel were abundant and "commercially worthless in 1919 due to Nevada's sparse population and lack of development;"[113] and "even if Nevada's sand and gravel

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107. *Id.* ("Here, by contrast [to *Western Nuclear*], Congress has textually narrowed the scope of the term by using the modifier 'valuable.' ").

108. *See id.* at 184 ("In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress 'was dealing with a practical subject in a practical way' and that it intended the terms of the reservation to be understood in 'their ordinary and popular sense.' " (quoting Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 873 (1999))).

109. *Id.* (emphasis added) (first citing *Amoco*, 526 U.S. at 874; then citing Leo Sheep Co. v. United States, 440 U.S. 668, 682 (1979)).

110. *Id.* (emphasis added) (quoting *Leo Sheep*, 440 U.S. at 682).

111. *Id.* (alteration in original) (emphasis added) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

112. *Id.*

113. *Id.*

were regarded as minerals, no one would have mistaken them for *valuable* minerals."[114] The Court flatly rejected the government's attempt to look beyond 1919 or beyond Nevada to tag sand and gravel as valuable, because neither set of facts would be relevant to the meaning attached by the parties to the land grant at the time of the Pittman Act's enactment and the patenting in question.[115] The Court determined that the language was clear and stated, "Because we readily conclude that the 'most natural interpretation' of the mineral reservation does not encompass sand and gravel, we 'need not consider the applicability of the canon that ambiguities in land grants are construed in favor of the sovereign.' "[116] Nor would it accept the government's attempt to search legislative history because a "contemporaneous plain meaning of the Pittman Act's mineral reservation" indeed existed.[117] The *parties'* ability to discern their rights based on the language itself and the circumstances present and knowable to them was key in the holding.

IV. *BRANDT REVOCABLE TRUST V. UNITED STATES*: THE LATEST EXAMPLE OF THE DETERMINACY NORM AT PLAY IN THE U.S. SUPREME COURT

The 2014 U.S. Supreme Court decision in *Brandt Revocable Trust v. United States*[118] serves as the latest in a line of cases where the Court has recognized the determinacy norm—even though not expressly doing so. An analysis of the case reveals the endorsements within the decision for the tenets of the determinacy norm. At issue in the case was a railroad right-of-way that was abandoned and the question of what happens to that easement after the abandonment.[119] As the Court explained it:

> This case presents the question of what happens to a railroad's right of way granted under a particular statute—the General Railroad Right-of-Way Act of 1875 ["1875 Act"]—when the railroad abandons it: does it go to the Government, or to the private party who acquired the land underlying the right of way?[120]

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114. *Id.*

115. *See id.* at 184-85.

116. *Id.* at 185 (quoting Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 880 (1999)); *see also id.* at 186-87 ("Having declined to extend *Western Nuclear*'s rationale to a statute where the plain meaning will not support it, we will not allow it in through the back door by presuming that 'the legislature was ignorant of the meaning of the language it employed.' " (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883))).

117. *Id.* at 186.

118. 134 S. Ct. 1257 (2014).

119. *Id.* at 1263-64; *see also id.* at 1262 ("This case requires us to define the nature of the interest granted by the 1875 Act, in order to determine what happens when a railroad abandons its right of way.").

120. *Id.* at 1260.

The 1875 Act[121] "provided that '[t]he right of way through the public lands of the United States is granted to any railroad company' meeting certain requirements, 'to the extent of one hundred feet on each side of the central line of said road.' "[122] At least fifteen special acts granting railroad rights-of-way had preceded this "general" 1875 Act, which was intended to alleviate the need for constant enactments of "special" acts.[123] The 1875 Act also had language that was somewhat distinct from the earlier acts regarding the rights held by the railroads, making some of the past precedent regarding those other acts irrelevant.[124]

In 1976, the United States "patented"—or, in essence, granted—an 83–acre parcel of land to Melvin and Lulu Brandt, giving them "fee simple title to the land 'with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto said claimants, their successors and assigns, forever,' "[125] with some limited exceptions and reservations for rights-of-way held by the United States (none of which were at issue in the case). The one reservation in the Brandt patent that was at issue in the case was one "stating that the land was granted 'subject to those rights for railroad purposes as have been granted to the Laramie[,] Hahn's Peak & Pacific Railway Company ["LHP&P"], its successors or assigns,' " but "[t]he patent did not specify what would occur if the railroad abandoned this right of way."[126] Here, the railroad right-of-way in question "was obtained by [LHP&P] in 1908, pursuant to the 1875 Act," and "[n]early a half-mile stretch of the right of way crosses Brandt's land in Fox Park, covering ten acres of that parcel."[127] The LHP&P right-of-way changed ownership many times and the last owner, the Wyoming and Colorado Railroad, "notified the Surface Transportation Board of its intent to abandon the right of way" in 1996.[128] By 2004, the railroad completed the abandonment, including tearing up the tracks and ties and receiving the Surface Transportation Board's approval to abandon the right-of-way.[129]

After abandonment was complete, the United States believed that it owned the right-of-way. The United States argued "that it had all along retained a reversionary interest in the railroad right of way—

121. 43 U.S.C. §§ 934-939 (2012) (repealed insofar as applicable to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System, 1976).

122. *Brandt*, 134 S. Ct. at 1261 (alteration in original) (quoting 43 U.S.C. § 934).

123. *See id.*

124. *See id.*

125. *Id.* at 1262 (quoting the terms of the patent).

126. *Id.* (first alteration in original).

127. *Id.*

128. *Id.* at 1263.

129. *Id.*

that is, a future estate that would be restored to the United States if the railroad abandoned or forfeited its interest."[130] In 2006, it filed an action against the owners of thirty-one parcels affected by the LHP&P right-of-way, including the Brandts, "seeking a judicial declaration of abandonment and an order quieting title in the United States to the abandoned right of way."[131] The Brandts were the only owners who fought the action; others settled or were subjects of default judgments. The Brandts believed that once the property was abandoned by the railroads that "the stretch of the right of way crossing his family's land was a mere easement that was extinguished upon abandonment by the railroad, so that, under common law property rules, [the Brandts] enjoyed full title to the land without the burden of the easement."[132] Before reaching the Supreme Court, the district court ruled in favor of the government's position, as did the U.S. Court of Appeals for the Tenth Circuit (although recognizing a division among lower courts over the scope of abandoned 1875 Act rights-of-way).[133] The U.S. Supreme Court reversed.

Although the patent did not say what would happen when the railroad abandoned this right-of-way (nor did the statute), the consequence was nonetheless knowable and should have been known by both the patentee and the government through an analysis of the generally applicable legal principles known to all at the time of the grant of the right-of-way, the patent, and the statutory enactments that authorized both. The surrounding legal environment informs the expectations of the parties.

In a previous decision, *Great Northern Railway Co. v. United States*,[134] the U.S. Supreme Court had already interpreted the 1875 Act's rights-of-way and determined that they were basic easements.[135] Thus, here in *Brandt*, the Court very simply stated that, because these are easements held by the railroad and because "[t]he United States

130. *Id.*

131. *Id.* The *Brandt* case is, in many ways, related to a larger body of cases regarding "rails-to-trails" legislation and easement conversion efforts. *See* Saxer, *supra* note 7, at 351-62. Those cases usually focused on issues regarding the scope of the easement or whether an easement had been abandoned, while the *Brandt* litigation focused on the nature of the rights between the parties based on the deed language. *See id.* at 362-63.

132. *Brandt*, 134 S. Ct. at 1263.

133. *Id.* Included among the courts holding contrary to the Tenth Circuit opinion in *United States v. Brandt*, 496 F. App'x 822, 825 (10th Cir. 2012), are decisions by the Seventh and Federal Circuits. *See* Samuel C. Johnson 1988 Tr. v. Bayfield Cty., 649 F.3d 799, 803 (7th Cir. 2011) (noting that the 1875 Act gave no indication to patentees or the railroad holders of rights-of-way that they should "suspect a lurking governmental right so unsettling to the security of private property rights"); Hash v. United States, 403 F.3d 1308, 1314 (Fed. Cir. 2005) (discussing the disposition of lands subject to rights-of-way under the 1875 Act).

134. 315 U.S. 262 (1942).

135. *Id.* at 271.

did not reserve to itself any interest in the right of way in that patent,"[136] there is a law of easements to be applied and that informs the meaning of the rights-of-way as of their creation in 1875. That meaning remained unchanged when the land burdened by the easement was transferred from the United States to the Brandts through the 1976 patent.[137] The *Great Northern* Court clearly identified the interests conferred to the railroads in the 1875 Act as easements only, distinguishing the 1875 Act as granting a more limited interest than some of the prior special rights-of-way acts.[138] *Great Northern* held that the 1875 Act "clearly grants only an easement, and not a fee,"[139] looking at the statutory language that all parties could decipher as of 1875[140] and confirming that interpretation based on the historical background against which Congress and other individuals could judge the meaning of the rights-of-way as of 1875.[141]

Once the *Brandt* Court defined the interest as a simple easement, the majority easily resolved the case based on the common law which informs all grants of property interests. When drafting and articulating their intent, all parties can be expected to rely on the common law as applied to the terms of the statute in order to predict the expected interpretation of the scope of the easements. After quoting the Restatement definition of an easement as a "nonpossessory right to enter and use land in the possession of another and obligat[ing] the possessor not to interfere with the uses authorized by the easement"[142] and explaining that easements may be abandoned (unlike most real property interests which cannot be abandoned),[143] the Court concluded that "[t]he essential features of easements—including, most important here, what happens when they cease to be used—are well settled as a matter of property law."[144] Easements are limited rights.[145]

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136. *Brandt*, 134 S. Ct. at 1265.

137. *See id.* at 1265-66.

138. *Id.* at 1264.

139. *Great N.*, 315 U.S. at 271.

140. *Id.* at 271-72.

141. *Id.* at 273-77.

142. *Brandt*, 134 S. Ct. at 1265 (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2(1) (AM. LAW INST. 2000)).

143. *Id.* ("Unlike most possessory estates, easements . . . may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmt. d, § 7.4 cmts. a, f (AM. LAW INST. 2000)) (alteration in original).

144. *Id.*

145. THOMPSON ON REAL PROPERTY § 60.02(a), at 460 (David A. Thomas ed., Matthew Bender & Co., 2d Thomas ed. 2006) (1924) ("[A]n easement is 'an interest in land in the possession of another' that entitles the easement owner to 'limited use or enjoyment' of that land . . . ."(quoting RESTATEMENT OF PROP. § 450, at 2901 (AM. LAW INST. 1944))).

The conclusion from this well-settled law—against which Congress was presumed to legislate and upon which both parties receiving rights-of-way and those encumbered by the rights-of-way identify a determinate meaning, set their expectations, and establish their reliance—is that "if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land."[146]

The *Brandt* Court rejected multiple arguments where the government attempted to inject post-1875 evidence to establish what Congress meant when it set the terms for the 1875 Act right-of-way.[147] What rights were granted in 1875 (or what the railroads' rights and expectations were in 1908 pursuant to the grant as-authorized in 1875) cannot be determined based on events or conditions that occurred or manifested at some later date after the grant without injecting a high degree of indeterminacy into the grant. The Court explained that the government's reliance on "later enacted statutes" was wrong, citing *Leo Sheep* and its contemporaneous-meaning discussion, because "[t]he case turn[ed] on what kind of interest Congress granted to railroads in their rights of way *in 1875*."[148] The Court further stated that these later statutes do not "shed light on what kind of property interest Congress intended to convey to railroads *in 1875*,"[149] quoting the cautionary note regarding determinacy from *United States v. Price*, where the Court previously warned that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier

146. *Brandt*, 134 S. Ct. at 1265 (citing Smith v. Townsend, 148 U.S. 490, 499 (1893)); *see also id.* ("[W]hoever obtained title from the government to any . . . land through which ran this right of way would acquire a fee to the whole tract subject to the easement of the company, and if ever the use of that right of way was abandoned by the railroad company the easement would cease, and the full title to that right of way would vest in the patentee of the land." (alterations in original) (quoting *Smith*, 148 U.S. at 499)); *id.* ("[T]he purchasers or grantees of the United States took the fee of the lands patented to them subject to the easement created by the act of 1824; but on a discontinuance or abandonment of that right of way the entire and exclusive property, and right of enjoyment thereto, vested in the proprietors of the soil.") (citation omitted).

147. *See id.* at 1266-68.

148. *Id.* at 1268 (emphasis added) (citing Leo Sheep Co. v. United States, 440 U.S. 668, 681 (1979)); *see also id.* ("The pertinent inquiry in this case is the intent of Congress when it granted land to the Union Pacific in 1862." (quoting *Leo Sheep Co.*, 440 U.S. at 681)).

149. *Id.* (emphasis added) (citing United States v. Price, 361 U.S. 304, 313 (1960)).

one."[150] Any attempts to change the scope of rights-of-way reservations were irrelevant after the interests in the land had already been allocated.[151]

The *Brandt* Court concluded that:

> [B]asic common law principles resolve this case. When the Wyoming and Colorado Railroad abandoned the right of way in 2004, the easement referred to in the Brandt patent terminated. Brandt's land became unburdened of the easement, conferring on him the same full rights over the right of way as he enjoyed over the rest of the Fox Park parcel.[152]

This holding is certainly a correct interpretation of the law of easements and reflects the expectations of the burdened estate holder to be unburdened upon abandonment.[153]

Part of what was at stake in all of these cases, and particularly in *Brandt*, was a profound need for the protection of property rights as expressed in deeds and the sanctity of those rights measured by objective enforcement of determinate terms.[154] As Justice Joseph Story explained in the case of *Wilkinson v. Leland*, once a legislature has made a grant of real property, that grant must be respected, and subsequent action cannot have retroactive effects to alter that initial conferral of property rights.[155] The idea that property once transferred must be recognized as transferred, and that the act of the transfer itself should not be subject to retroactive change, is captured well in this passage:

> The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. . . . In Terret *vs.* Taylor, 9 *Cranch*, 43, it was held by this Court, that a grant or title to lands once made by the legislature to any person or corporation is irrevocable, and cannot be re-assumed by any subsequent legislative act; and that a different doctrine is

150. *Id.* (quoting *Price*, 361 U.S. at 313). For additional support for this proposition, see Hastings & D.R. Co. v. Whitney, 132 U.S. 357, 360-61 (1889) (citing Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839) for the proposition that once land is severed from the public lands and transferred to others, it is "one of the fundamental principles underlying the land system of this country" that "no subsequent law or proclamation" may alter that transfer).

151. *See Brandt*, 134 S. Ct. at 1268 ("[P]olicy shift[s] cannot operate to create an interest in land that the Government had already given away.").

152. *Id.* at 1266.

153. *See* JAMES W. ELY, JR. & JON W. BRUCE, THE LAW OF EASEMENTS & LICENSES IN LAND § 10.8, Westlaw (database updated Sept. 2015) ("[C]essation of purpose doctrine is designed to eliminate meaningless burdens on land and is based on the notion that parties that create an easement for a specific purpose intend the servitude to expire upon cessation of that purpose.") (footnote omitted).

154. *See* Hodges, *supra* note 7, at 702 ("*Brandt* follows the Supreme Court's longstanding policy of upholding certainty and predictability in land titles.").

155. Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657-58 (1829).

> utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property *lawfully* acquired.[156]

There are, of course, many other values at stake that require respecting the determinacy of deeds, and the next Part analyzes a few additional benefits of adherence to the norm.

V. VALUES ADVANCED BY A DETERMINACY NORM OF DEED INTERPRETATION

The value and utility of a determinacy norm for deeds seems relatively obvious, so this Part will be relatively short. It will just highlight some of the benefits arising from, and values advanced by, adhering to rules that inject determinacy into the meaning and interpretation of deeds, some of which were also already noted in Part II. Determinate deeds are a fundamental element in any reliable property system.[157] The harder it becomes to confidently identify how a deed will be interpreted, the less stable the real property system becomes. Likewise, a higher confidence quotient for determinate meaning in deeds breeds a healthy and prosperous property system.

The Latin maxim *nemo dat qui non habet*—one who does not have cannot give[158]—is a foundational guide in our society where ownership is the currency of property. In order to know what we can give, we need to understand what we have (or, own), and we primarily turn to our deeds to give us the answers. Knowing what one has to give and being able to predict the meaning of deed terms is a prerequisite to any legitimate property transaction. Of course, the rights conveyed in deeds would be relatively worthless if they did not have a fixed and knowable meaning. Our ability to confidently assess the meaning of our deeds is vital to the necessary high level of certainty that contributes to any efficient economic transfers or investments in the property in question.[159] We need to know what all parties to a property transaction have

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156. *Id.*; *see also* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 23 (1990) (O'Connor, J., concurring) ("[A] sovereign, 'by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.' " (alterations in original) (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980))).

157. *See* LOCKE, *supra* note 36, at § 7, at 9-10; *see also* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 54 (1995) ("The right set of rules governing control over one's person and the assignment of ownership of property play an indispensable part in any social system that seeks to maximize the welfare of its citizens.").

158. *Nemo dat qui non habet*, BLACK'S LAW DICTIONARY (10th ed. 2014).

159. *See* Hernando de Soto, Opinion, *What If You Can't Prove You Had a House?*, N.Y. TIMES (Jan. 20, 2006), http://www.nytimes.com/2006/01/20/opinion/20iht-edsoto.html?pagewanted=all&_r=0 ("We take the law for granted; but without legal documents, people do not exist in a market. If property, business organizations and transactions are not legally documented, they are fated to remain forever uninterpreted and society cannot work as a whole.").

at the time of the transfer so that planning can occur, rights can forever be identified, and interests in the property can be verifiably and effectively sold in the future.

Deeds provide information about the true allocation of ownership rights in any one piece of land valuable to a wide array of individuals.[160] Deeds help identify rights for the grantor, grantee, and multiple interest holders in one piece of land. Deeds also work to facilitate market transactions because those engaged in the transaction have a source from which to identify the rights one has, the authority to transfer, and the rights the other can obtain through purchase. Deeds are the primary authority for judges interpreting disputes over competing claims to property ownership and in resolving conflicts between multiple interest holders.

Those who wish to buy from, invest in, contract with, lease from, or provide capital to real property owners, and many others will all want to know what is in a deed and how it will be interpreted. These stakeholders need to have some confidence in finding a determinate meaning for the deed terms before it is adjudicated. Individuals will want to know what they are getting when purchasing property, for example, and for that they will look at the deed. Prospective buyers of property require discernible deed rights with predictable interpretation to determine the price they are willing to pay. Similarly, those who wish to provide loans based on a piece of property securing the loan or to make other capital investments in property will need assurances that they can identify what rights are included in the recipient's ownership package as articulated in determinate deeds.[161] Mortgages and deeds of trust, for example, will not issue without confidence in deed rights. Leaseholders need to inspect deeds to know what rights the lessor actually has to lease. Title insurance companies will base their premium on the level of security in a deed and the predicted meaning that will attach to its terms. Any interested members of the public that may need to interact with the property at some point in time will demand the ability to identify the rights in the relevant deeds with a high level of certainty about the determinate meaning of the deed's terms.

Predictability of interpretation and reliability of enforcement of deed terms become the linchpins of land's worth.[162] To the extent there

160. Gerald Korngold explains the broad public need for access to title information: "Current and potential participants in land transfer and finance transactions need information so markets can operate efficiently and fairly, thus benefiting those particular players as well as society." Gerald Korngold, *Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S.C. L. REV. 727, 743 (2009). Although he was speaking of the need for records, deeds serve that function as well.

161. *See* de Soto, *supra* note 159 ("In the developing world, neither capital nor credit will venture where there are no clear property rights.").

162. *See* Hodges, *supra* note 7, at 696 (discussing *Brandt* and contending that "[l]andowners rely on those definitions and terms [used by the common law of property] to establish

are any ambiguities, investors and others interested in a property will investigate the intent of the parties and the law existing at the time of the conveyance to predict how those terms will be interpreted. If the legal rules of deed interpretation give clear guidance as to what to look for and what the relevant time period is for the inquiry (time of conveyance), then a successful investigation is an achievable task, and one can estimate with some degree of certainty how the courts are likely to interpret the deed so long as the court also follows the same rules. But, if the methods and rules of interpretation are themselves indeterminate, then so too will be the meaning of the deed. Upon reading a deed and evaluating the terms in it, the potential investor will assess risk.[163]

Whenever one market participant wishes to exchange rights with another—such as in the acquisition of property—she demands some level of confidence in knowing what she is getting. The level of certainty the would-be acquirer or transferee has in the deed and its expected interpretation is directly proportional to the level of investment the acquirer will make in completing the deal. The higher the risk that a contrary interpretation will be adopted by the courts, the lesser the would-be acquirer's confidence and willingness to invest in the property. Transactions involving high-risk deeds due to uncertainty of interpretation cannot occur on anything other than sub-optimal terms for parties on both sides of a negotiation. Deals to transfer the property may unnecessarily face a road block entirely, investment amounts will be lowered that may not need to be, or the price for the acquisition of the property in question will be inefficiently discounted to account for the high risk.

To avoid such inefficiencies, the law should strive to make the rules of deed interpretation and their application consistent, clear, and based in a determinate meaning identified from the intent of the parties at the point of the deed creation or transfer.[164] This injection of determinacy to deeds can only be achieved by giving deeds a fixed and unalterable meaning (or, at least only alterable through private, consensual agreement to make a change). The more determinate the deed,

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ownership of property"); Waldron, *supra* note 43, at 6 ("Citizens . . . need predictability in the conduct of their lives and businesses. . . . [F]reedom is . . . possible if people know in advance how the law will operate, and how they must act to avoid its having a detrimental impact on their affairs.").

163. *See* Hernando de Soto, President, Inst. of Liberty & Democracy, Keynote Address at the Opening Ceremony of the IBA Annual Conference 2008: Law Connects, *in* INT'L B. NEWS, Dec. 2008, at 14, 14 ("[I]t's the law that represents you in documents. It's through law and legal documents that you're able to identify facts, that you're able to identify risks.").

164. NORTH, *supra* note 3, at 137 ("Institutions determine the performance of economies[.]").

where there is a higher level of confidence regarding the rights enforceable in it, the more likely that a deal—transfer, investment, mortgage or other loan associated with the rights, etc.—will be completed.

For similar reasons, individuals will not invest in their own property in an efficient or optimal manner if they do not have confidence in what rights they already hold in the property pursuant to their deeds. This risk of owner under-investment is a real and unfortunate consequence to indeterminate deeds. To incentivize more investment, we should do our very best to adhere to legal rules of deed interpretation that allow owners to make educated determinations of their deed rights with a low probability of error and a high probability that the courts will enforce those deeds according to the terms as understood by the parties to the deeds at the time of their conveyance.[165]

Deeds are only as good as their predictable interpretation. And predictions also cannot be made with any sense of accuracy unless there exists, and unless those interacting with the deeds have confidence in, a stable and objective court system that is accessible in the event of a dispute.

Moreover, beyond setting up the neutral court system, there must be some trust in the operational and interpretive rules of those institutions. There must be an ability to confidently and accurately predict how the neutral enforcement system will adjudicate disputes over the terms in deeds. Thus, we demand neutral institutions that follow those rules of interpretation that promote the determinacy norm.[166] As North explains:

> [T]hird-party enforcement . . . has been the critical underpinning of successful modern economies involved in the complex contracting necessary for modern economic growth. . . . A coercive third party is essential. . . . Indeed, effective third-party enforcement is best realized by creating a set of rules that then make a variety of informal constraints effective.[167]

The existence of an authoritative source for interpretation is important, but it lacks much value if that source can upset determinacy in deeds. So we must ask that the institutions are independent, impartial, neutral, and objective. But we must also ask that the rules they develop limit the pool of available outcomes in any deed dispute. The

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165. Waldron, *supra* note 43, at 6 ("Knowing in advance how the law will operate enables one to plan around its requirements. And knowing that one can count on the law to protect certain personal rights and property rights enables each citizen to deal effectively with other people and the state.") (footnote omitted).

166. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 25 (1962) ("In both games and society also, no set of rules can prevail unless most participants most of the time conform to them without external sanctions.").

167. NORTH, *supra* note 3, at 35.

interpretive rules must solidify rights and act as a means for constraining the practical behavior of the judges regarding property deeds. Only then do individuals have the ability to predict what the judicial interpretation will be should any dispute arise, a necessary precondition to adjusting their own market behaviors.

The existence of a rule of law for the interpretation of deeds aids *in advance of any court ruling* the evaluation of whether one should invest or acquire any particular piece of real property because the matter of court interpretation is not a speculative enterprise.[168] When there is this neutrality and objectivity in the institutions and a commitment to finding determinate interpretations of deeds in adjudication, the judgments of the adjudicating institutions are sufficiently predictable ex ante. Once parties engaging in a transaction can predict the resolution of possible disputes over deed terms, they can transact in a manner that avoids litigation. This can be accomplished by price adjustments to reflect risk or assignments of risk or liabilities. So, courts committed to the determinacy norm in deed interpretation are just as effective when they are not hearing cases, so long as they exist and so long as there is loyal and recognizable adherence to the determinacy norm in their deed-based jurisprudence. When those conditions obtain, parties order their affairs efficiently without the necessity of court intervention.[169]

So long as individuals know the means of interpretation of deeds that the courts will employ and that the courts will work to honor the deals made according to their original terms as understood and intended by the parties, owners and potential owners or investors in the property will be able to predict how the neutral arbiters will resolve possible disputes or claimed ambiguities in the deeds.[170] With determinate deeds, confidence in what one owns, in what she has the authority to transfer, and in what other parties she will interact with own (and have the authority to transfer) breeds efficient incentives that help property flow smoothly in commerce. Once we accept that one can only own or transfer as much property as the deed allows, then it is easy to

168. *Cf.* Hernando de Soto, *The Destruction of Economic Facts*, BLOOMBERG BUSINESSWEEK (Apr. 28, 2011, 5:00 PM), http://www.businessweek.com/magazine/content/11_19/b4227060634112.htm ("The rule of law is much more than a dull body of norms: It is a huge, thriving information and management system that filters and processes local data until it is transformed into facts organized in a way that allows us to infer if they hang together and make sense.").

169. *Cf.* FRIEDMAN, *supra* note 166, at 25-27 (explaining that so long as the system is structured correctly, the markets benefit from, but need not use, the legal system as an enforcement mechanism).

170. *See* Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 22 (2003) ("The documented effect of increasing rule of law values on economic growth is robust. Individuals are more willing to invest in economic growth where property rights are stable, contracts are secure, and arbitrary governmental action is restrained.").

also understand the importance of having the capability to discern what deed rights one has based on determinate interpretation rules that produce determinate deeds. It is in these determinate deeds and our trust that the courts will honor that determinacy in deed interpretation and enforcement that we achieve an authoritative and confident assessment of respective rights.

Finally, there is one other benefit worth mentioning briefly regarding working toward determinate meaning in deeds—fairness and the avoidance of an unjust windfall for a party involved in the transfer of the property rights reflected in the deed. So long as the courts are working to find a meaning intended by the parties at the time of conveyance, then the prescribed meaning of the deed will be both determinate and fairly allocate the rights as the parties would have expected. The court will interpret the deed's terms in a manner that reflects the values that the parties set for the exchange at the time of conveyance. To upset that contemporaneous bargain would necessarily give one party an ex post advantage without requiring that he make a purchase to get it. The rules should never be set up in a way that would give someone more than they bargained for merely by interpreting a deed to mean something other than what the parties intended at the point of the deal.[171] By following the determinacy norm, the courts avoid abetting such bonanzas.

VI. CONCLUSION

This determinacy norm for the interpretation of deed terms is real. An examination of *Brandt* and the other cases described in this Article proves the determinacy norm's presence and prevalence in the jurisprudential standards for interpreting deeds, in spite of the fact that the courts have not given their bases and methods of decision making such a label. There is a purpose to the rules for deed interpretation that fails to get adequate recognition precisely because we have not created this organizing term and normative theme for these interpretive rules. This Article has aimed to fill those thematic and terminological gaps.

As part of the determinacy norm, there is a longstanding tenet of property that private conveyances and statutory land grants are to be interpreted at the time of the grant in accordance with the intent of

171. Although it was in a different context, Justice Joseph Story made this point well when he explained that there is no case where "a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced." Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829).

the parties.[172] The rule of law and the infrastructure for the protection of property rights that includes the determinate interpretation of deeds are vital components of the governmental structure that support the functioning of a private property system.[173] Impartially securing to individuals what they own is a fundamental obligation of good governance.[174] Doing so requires a neutral, transparent, consistent, and discernable set of rules for the interpretation of deed terms that effectuates the intent of the parties executing the deeds. It requires judicial adherence to the determinacy norm for deeds, providing confident and authoritative measures of ownership so that parties can govern their own private relations and so that the courts can intervene when necessary to resolve disputes in an objective manner and preserve the rights obtained in deeds.[175]

If we more forcefully support and openly acknowledge the quest to make deeds determinate that is furthered by the interpretive rules that we already recognize, the law and its deed-based jurisprudence can better monitor and check the actions of judges to be sure that they are living up to the purposes of the determinacy norm. Adding such safeguards to deed agreements will help us better identify and protect the rights in deeds that help organize our ownership society.

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172. 26A C.J.S. *Deeds* § 191, *supra* note 4 ("Courts may determine the intent of the parties in a disputed deed with reference to the position of the parties at the time of conveyance and in light of surrounding circumstances, and resort to rules of construction.").

173. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 17 (1985) ("Within the original framework the rich array of procedural and jurisdictional protections was expected to serve . . . the protection of private property, of 'lives, liberties, and estates' that Locke considered the purpose of government.").

174. James Madison firmly observed that "[g]overnment is instituted to protect property of every sort . . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, at 174.

175. *See* LOCKE, *supra* note 36, at 66 ("The great and *chief end*, therefore, of men's uniting into common-wealths, and putting themselves under government, *is the preservation of their property*.").