

# THE MYTH OF THE MILD DECLARATORY JUDGMENT

SAMUEL L. BRAY<sup>†</sup>

## ABSTRACT

*When plaintiffs want prospective relief, they usually request an injunction, a declaratory judgment, or both. The fact that plaintiffs often choose between these remedies, or seek them together, raises an obvious question: How are they different? The standard answer is that the declaratory judgment is milder and the injunction is stronger. This mildness thesis has been endorsed by the Supreme Court, the Restatement (Second) of Judgments, and many legal scholars. Three rationales have been given for why the declaratory judgment is milder, each focused on something the declaratory judgment is said to lack: a command to the parties, a sanction for disobedience, and full issue-preclusive effect. This Article critiques the rationales for the mildness thesis, demonstrating that they cannot be squared with the way the declaratory judgment and the injunction are actually used.*

*This Article also offers an alternative account of the choice between these remedies. In many contexts they are substitutes, but not always perfect substitutes. This Article therefore explores the conditions under which each remedy has a comparative advantage when used prospectively. Central to this account is judicial management. The injunction has—and the declaratory judgment lacks—a number of features that allow a court to effectively manage the parties. There is also a difference in timing, because the declaratory judgment is sometimes available at an earlier stage of a dispute. This account clarifies the choice between these remedies, and it has implications for the doctrine of ripeness.*

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<sup>†</sup> Assistant Professor of Law, UCLA School of Law. Thanks for helpful comments are due to Stuart Banner, Will Baude, Marc DeGirolami, John Golden, Robert Goldstein, Ranjit Hakim, Rick Hasen, Allison Hoffman, Bert Huang, Máximo Langer, Doug Laycock, Jerry Lopez, Dan Markel, Steve Munzer, Grant Nelson, Doug Rendleman, Bertrall Ross, Joanna Schwartz, Tracy Thomas, Jon Varat, Eugene Volokh, Kevin Walsh, Howard Wasserman, Steve Yeazell, and participants in workshops at Florida State University, the University of Illinois, and UCLA. Thanks are also due to Hannah Dubina and Sarah Dubina for excellent research assistance.

## TABLE OF CONTENTS

|  |      |
|--|------|
| Introduction .....   | 1092 |
| I. The Mildness Thesis .....   | 1096 |
| II. Assessing the Rationales for the Mildness Thesis .....   | 1105 |
| A. The Command Rationale .....   | 1105 |
| B. The Sanction Rationale .....  | 1109 |
| C. The Preclusion Rationale .....  | 1113 |
| D. Underlying Mistakes of the Rationales for Mildness.....   | 1120 |
| III. Rethinking the Differences Between Declaratory Judgments<br>and Injunctions .....                             | 1123 |
| A. The Dimension of Management.....  | 1124 |
| 1. <i>The Spectrum of Need for Judicial Management</i> .....   | 1124 |
| 2. <i>The Managerial Features That the Injunction Has<br/>            and the Declaratory Judgment Lacks</i> ..... | 1125 |
| B. The Dimension of Timing .....   | 1133 |
| C. Evaluating the Dimensions of Difference .....   | 1138 |
| D. Summary .....   | 1143 |
| IV. Implications for Remedies and for Ripeness .....   | 1144 |
| Conclusion.....  | 1151 |

## INTRODUCTION

In the initial litigation over the Patient Protection and Affordable Care Act,<sup>1</sup> there was a moment of curious confusion. A district court held the act unconstitutional,<sup>2</sup> and the remedy it gave was a declaratory judgment.<sup>3</sup> In response, the Department of Justice filed an unusual Motion to Clarify, claiming that, because the court's decision was a declaratory judgment, it would not have any legal effect until appeals were concluded.<sup>4</sup> The district court rightly rejected

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, 29, and 42 U.S.C.).

2. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1306 (N.D. Fla. 2011), *rev'd sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

3. *Id.* at 1305.

4. Defendants' Motion to Clarify at 1, *Bondi*, 780 F. Supp. 2d 1256 (No. 3:10-cv-91-RV/EMT), 2011 WL 1060637 ("Defendants, through undersigned counsel, respectfully move the Court to clarify that its January 31, 2011, declaratory judgment does not relieve the parties of their rights and obligations under the Affordable Care Act while the declaratory judgment is the subject of appellate review."); *id.* at 5-6 ("[D]efendants are not aware of any past examples of a court relying on a general presumption that the government would adhere to the legal rulings in a declaratory judgment to conclude that the government would immediately halt

that claim.<sup>5</sup> But it is striking that this kind of basic question about the declaratory judgment's effect was even in dispute. This confusion is symptomatic of a broader misunderstanding of the declaratory judgment and its connection to the central nonmonetary remedy in American law, the injunction.<sup>6</sup>

The standard account of the relationship between these two remedies is that the injunction is the stronger remedy and the declaratory judgment is the milder one. That account, which is here called the mildness thesis, has been prominently advanced by the Supreme Court: "The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy."<sup>7</sup> Many scholars have echoed the mildness thesis, including Professors Owen Fiss<sup>8</sup> and Peter Schuck.<sup>9</sup> Lower federal courts have repeatedly embraced it. And its status as conventional wisdom is confirmed by its appearance in treatises and practice manuals, in briefs by leading practitioners, in student notes, and in the Restatement (Second) of Judgments.<sup>10</sup>

Yet scholars and courts have not settled on a single rationale for why the declaratory judgment is milder. Several have been offered. One is that the declaratory judgment lacks any command to the defendant.<sup>11</sup> Another is that it has no sanction for disobedience—in

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implementation of so many statutory provisions with respect to so many plaintiffs, and indirectly affecting so many people, while appellate review is pending.").

5. *Bondi*, 780 F. Supp. 2d at 1316, 1319 (rejecting the Department of Justice's argument because a declaratory judgment is a "final determination of rights," though wisely granting a stay pending appeal).

6. Throughout this Article, *injunction* refers to permanent injunctions, not preliminary ones.

7. *Steffel v. Thompson*, 415 U.S. 452, 467 (1974) (quoting *Perez v. Ledesma*, 401 U.S. 82, 111 (1971) (Brennan, J., concurring in part and dissenting in part) (quotation mark omitted)); see also, e.g., *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 33 (2008) (quoting *Steffel's* statement that the declaratory judgment was "plainly intended" by Congress "to act as an alternative to the strong medicine of the injunction").

8. See OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 107 n.39 (1978) (describing the declaratory judgment as "simply an injunction without sanctions"); Owen M. Fiss, *Dombrowski*, 86 *YALE L.J.* 1103, 1122 (1977) ("The injunction, then, involves an additional element of coercion.").

9. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 14–15 (1983).

10. See, e.g., *RESTATEMENT (SECOND) OF JUDGMENTS* § 33 cmt. c (1982) ("A declaratory action is intended to provide a remedy that is simpler and less harsh than coercive relief . . ."). For treatises, briefs, and student notes, see *infra* notes 67–69.

11. See, e.g., Cass R. Sunstein, *Judicial Relief and Public Tort Law*, 92 *YALE L.J.* 749, 751 (1983) (book review).

particular, when a declaratory judgment is disobeyed, there is no threat of being held in contempt.<sup>12</sup> Yet another is that the declaratory judgment lacks the full issue-preclusive effect given to other kinds of judgments.<sup>13</sup>

This Article explores the similarities of and differences between the declaratory judgment and the injunction, and it reassesses the mildness thesis.<sup>14</sup> The courts and scholars who distinguish these remedies in terms of strength are thinking of them in the abstract, without taking into consideration the particular contexts in which the declaratory judgment is used. Once one considers those contexts—such as intellectual-property suits, insurance disputes, and pre-enforcement challenges to statutes and regulations—none of the rationales for the mildness thesis is persuasive.<sup>15</sup> These rationales also ignore how plastic the injunction and the declaratory judgment are, for the intensity of each one in a particular case is highly dependent on drafting.<sup>16</sup>

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12. See, e.g., Fiss, *supra* note 8, at 1122.

13. Steffel v. Thompson, 415 U.S. 452, 470–71 (1974) (raising doubts about the preclusive effect of a declaratory judgment); *id.* at 481–85 (Rehnquist, J., concurring) (arguing that state prosecutors are not bound by lower federal courts' declaratory judgments on the constitutionality of state statutes); Perez v. Ledesma, 401 U.S. 82, 124–25 (1971) (Brennan, J., concurring in part and dissenting in part) (“[A] declaration [of partial unconstitutionality] does not necessarily bar prosecutions under the statute, as a broad injunction would.”).

14. There appears to have been one explicit criticism in legal scholarship of what is here called the mildness thesis, a short, shrewd observation that “the degree of a federal remedy’s intrusion on state judicial processes defies measurement in terms of a simplistic distinction between declaratory and injunctive relief.” Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1239 (1988). In addition, several scholars have disagreed with one rationale for the mildness thesis, that is, that the declaratory judgment has reduced issue-preclusive effect. See David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 346 n.199 (1978); Doug Rendleman, *Prospective Remedies in Constitutional Adjudication*, 78 W. VA. L. REV. 155, 168 (1976); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 763–64 (1979). Professor Doug Laycock is notably absent from the remedies scholars who have called the declaratory judgment a milder remedy, and he has consistently treated that remedy and the injunction as having similar effects. See *infra* note 74. And in the specialized context of *retrospective* declaratory judgments, a student note once criticized “the ‘milder remedy’ theory” of the declaratory judgment. Note, *Declaratory Judgment and Matured Causes of Action*, 53 COLUM. L. REV. 1130, 1131–33 (1953).

15. See *infra* Part II.

16. For many illustrations of this point for injunctions in patent litigation, see John M. Golden, *Injunctions as More (or Less) than “Off Switches”: Patent-Infringement Injunctions’ Scope*, 90 TEX. L. REV. 1399, 1401 (2012) (“Although much commentary treats injunctions as mere ‘off switches’ that enforce property rules, injunctions can take any of a number of different shapes having differing degrees of effectiveness.” (footnote omitted)).

This Article offers not only criticism but also an alternative account of the choice between the declaratory judgment and the injunction. When used prospectively, these remedies are rough substitutes, and in many cases they have the same effect. Yet in some cases their differences matter. The most important difference is their capacity for *management*, in the sense of judicial direction and control of the parties. A vast amount of human conduct is “managed” by law, in the sense of being shaped by the law’s commands, inducements, and reasons. But what is in view here is a more immediate and particular management: this court directing this person and overseeing her obedience. It is easier for a court to manage the parties in this way when it employs an injunction, because that remedy has features that enable courts to observe and respond to violations. These features include the requirement of specificity, the information generated by the contempt process, the prospect of modification and dissolution, the permissibility of prophylaxis, and the use of monitors and receivers. The declaratory judgment lacks these managerial features, and it is typically used when heightened management of the parties is unnecessary. One other dimension of difference is that a declaratory judgment is sometimes available earlier than an injunction in the lifecycle of a dispute.<sup>17</sup> Thus the differences between the declaratory judgment and the injunction are best seen in terms of management and timing, rather than mildness.

Of course, one could keep the “mildness” label but swap out the meaning behind it—instead of calling the declaratory judgment milder with respect to commands, sanctions, and preclusion it could be called milder with respect to management. It is hard to see any benefit from that semantic shuffle, though the problems would also be modest. (Keeping that label might cause some confusion and it would obscure the timing difference.) At any rate, more important than the mildness label is the content behind it, and this Article gives an account of these two remedies that differs markedly from the account given by the Supreme Court and by most of the scholarly literature.

This Article’s argument has doctrinal implications beyond the law of remedies. First, this Article raises the question whether

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17. In contrast to the permanent injunctions considered here, preliminary injunctions are given even before there has been a decision on the merits, albeit only if there is a likelihood that the moving party will, in fact, win on the merits. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

justiciability standards should apply in the same way to both the declaratory judgment and the injunction. The answer to this question affects whether there is early access to the declaratory judgment. Second, and more speculatively, in a future case a court might transgress its constitutional bounds (for example, with respect to structural limits) by claiming with false modesty that it was “merely” giving a declaratory judgment.<sup>18</sup> This danger of strategic deployment can be mitigated by rejecting the mildness thesis.

This Article is organized as follows: Part I summarizes the mildness thesis and shows its frequent invocation by scholars and courts. Part II critiques the rationales that have been given for it. Part III develops an alternative understanding of the choice between the declaratory judgment and the injunction, one that emphasizes management and timing. Part IV shows why the rejection of the mildness thesis matters both inside and outside the law of remedies.

### I. THE MILDNESS THESIS

It is important first to consider—and clear away—the conventional wisdom about what distinguishes these two remedies. Scholars and courts have frequently said that the injunction is the stronger remedy and the declaratory judgment is the milder one. The *locus classicus* for this distinction is *Steffel v. Thompson*.<sup>19</sup> The plaintiff, Richard Guy Steffel, and a companion were distributing handbills opposing the Vietnam War in a shopping center, and they were warned by police officers that they would be arrested if they did not leave.<sup>20</sup> Steffel left.<sup>21</sup> His companion stayed and was prosecuted

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18. Cf. *Powell v. McCormack*, 395 U.S. 486, 517 (1969) (justifying an intrusion into congressional self-governance because it was “express[ing] no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment”).

19. *Steffel v. Thompson*, 415 U.S. 452 (1974). This Article focuses on the Court’s opinion in *Steffel*, because it is the canonical text, but it had antecedents. *Steffel* quotes lengthy passages from the separate opinion that Justice Brennan wrote three years earlier in *Perez v. Ledesma*, 401 U.S. 82 (1971), which was in turn largely copied verbatim from his lengthy but never-published separate opinion in *Younger v. Harris*, 401 U.S. 37 (1971). That unpublished opinion, not previously cited in legal scholarship, is the fullest statement of Justice Brennan’s views on the declaratory judgment. See *Younger v. Harris*, Nos. 4, 11, 20 (U.S. June 1970) (Brennan, J., unpublished separate opinion) [hereinafter Brennan, J., Unpublished Opinion]. The opinion is both on file with the *Duke Law Journal* and available from the Library of Congress’s William J. Brennan Papers, at Box I:235, Folder 7.

20. *Steffel*, 415 U.S. at 455.

21. *Id.*

for criminal trespass.<sup>22</sup> Steffel then sought a declaratory judgment that his conduct, if he were to return to the shopping center and resume distributing handbills, would be protected by the First Amendment.<sup>23</sup> The Court held that Steffel could seek declaratory relief, distinguishing the *Younger v. Harris*<sup>24</sup> constraints on injunctive relief on the grounds that the declaratory judgment was a different remedy.<sup>25</sup> What made the declaratory judgment a different remedy? The Court gave a confident answer: “The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy.”<sup>26</sup>

Yet before *Steffel* there had been only rare references to the declaratory judgment as a milder remedy. Most of those references were from the era between the two World Wars, and they reflected the quaint idea that the declaratory judgment was a “civilized” or “gentlemanly” step in the evolution of the exercise of state power.<sup>27</sup>

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22. *Id.* at 455–56.

23. *Id.* at 454. Steffel also sought injunctive relief but abandoned that request on appeal. *Id.* at 456 n.6.

24. *Younger v. Harris*, 401 U.S. 37 (1971).

25. *Steffel*, 415 U.S. at 459. *Younger* had required, among other things, a showing of exceptional circumstances before a federal court could enjoin a pending state prosecution. *Younger*, 401 U.S. at 41. For a compact account of *Younger* and entry points to the voluminous scholarly literature, see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1091–1100 (6th ed. 2009). Note that by the time the Court decided *Steffel* it had already signaled that *Younger* abstention would ordinarily be appropriate in a declaratory judgment action brought *after* criminal proceedings against the plaintiff had begun in state court. See *Samuels v. Mackell*, 401 U.S. 66, 69–73 (1971). In *Steffel* the Court faced the question whether *Younger* abstention principles would apply to a declaratory judgment action brought *before* the prosecution commenced. *Steffel*, 415 U.S. at 456.

26. *Steffel*, 415 U.S. at 467 (quoting *Perez v. Ledesma*, 401 U.S. 82, 111 (1971) (Brennan, J., concurring in part and dissenting in part)); see also *id.* at 471 (characterizing the declaratory judgment as “a much milder form of relief than an injunction” (quoting *Perez*, 401 U.S. at 125–26 (Brennan, J., concurring in part and dissenting in part))). By the time *Steffel* was decided, four Justices already supported the mildness thesis on record. See *Perez*, 401 U.S. at 111 (Brennan, J., concurring in part and dissenting in part, joined by Justices White and Marshall); *O’Brien v. Brown*, 409 U.S. 1, 10 (1972) (Marshall, J., dissenting, joined by Justice Douglas).

27. See, e.g., Homer H. Cooper, *Locking the Stable Door Before the Horse Is Stolen*, 16 ILL. L. REV. 436, 455 (1922) (“Thus the declaratory action partakes of the nature of a friendly contest, and, as is said, ‘You treat your adversary like a gentleman.’”); C.S. Potts, *The Declaratory Judgment*, 9 TEX. L. REV. 172, 177 (1931) (noting that the declaratory judgment has become increasingly prominent in England, because “[a]s a country advances in civilization it has less need for the exercise of compulsory processes”); Edson R. Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69, 88–89 (1917) (characterizing England’s declaratory judgment as suited to “the exacting requirements of modern civilization”); see also ROBERT F. WAGNER, DECLARATORY JUDGMENTS IN NEW

When intellectual fashions changed, the characterization of the declaratory judgment as milder in the sense of being more civilized went out of style. Thus the idea that the declaratory judgment was a less powerful remedy was not central to its judicial or scholarly discourse. Until *Steffel*.

What was the basis for *Steffel*'s confident pronouncement about the essential difference between the injunction and the declaratory judgment? In his opinion, joined by the entire Court, Justice Brennan supported the mildness thesis with a three-stage history of federalism since the Civil War.<sup>28</sup>

In the first stage, the "sense of nationalism" was powerful, and its legal manifestations were statutes that "empower[ed] the lower federal courts" to vindicate constitutional rights.<sup>29</sup> In particular, Justice Brennan pointed to the Civil Rights Act of 1871,<sup>30</sup> the Judiciary Act of 1875,<sup>31</sup> and the Court's decision in *Ex parte Young*<sup>32</sup> approving a federal injunction against a state official.<sup>33</sup> Together, Justice Brennan said, these "established the modern framework for federal protection of constitutional rights from state interference."<sup>34</sup>

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YORK: SPEECH DELIVERED BY HON. ROBERT F. WAGNER, UNITED STATES SENATOR, AT OTSEGO COUNTY BAR ASSOCIATION, JULY 2, 1927 2-3 (1927). *But see* Robert Cover, *Violence and the Word*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 203 (Martha Minow, Michael Ryan & Austin Sarat eds., 1992). In addition, the declaratory judgment was sometimes described as a milder remedy in the specialized context of retrospective declaratory judgments. *E.g.*, Note, *supra* note 14, at 1131-35.

Note that even scholars who characterized the declaratory judgment as more "civilized" thought that its polite appearance should not mislead anyone into thinking it was less powerful. *See* Edson R. Sunderland, *The Courts as Authorized Legal Advisors of the People*, 54 AM. L. REV. 161, 163 (1920) ("It is not to be assumed that the peaceful acquiescence of the highly civilized man in the legal findings of the court implies any loss of power in the court itself.").

28. On Justice Brennan's federalism jurisprudence, see generally Lyle Denniston, *Federalism, the "Great Design," and the Ends of Government*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 263 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997); Robert C. Post, *Justice Brennan and Federalism*, 7 CONST. COMMENT. 227 (1990).

29. *Steffel*, 415 U.S. at 463-64.

30. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985-1986 (2006)).

31. Judiciary Act of 1875, ch. 137, 18 Stat. 470 (current version at 28 U.S.C. § 1331 (2012)).

32. *Ex parte Young*, 209 U.S. 123 (1908).

33. *Steffel*, 415 U.S. at 463-65. For more careful assessments of *Ex parte Young*, see *infra* note 48.

34. *Steffel*, 415 U.S. at 465 (quoting *Perez v. Ledesma*, 401 U.S. 82, 107 (1971) (Brennan, J., concurring in part and dissenting in part)).

The second stage in Brennan's history was backlash against *Ex parte Young* and other exercises of federal judicial power.<sup>35</sup> This backlash led to major restrictions on the ability of a single federal district court judge to enjoin the enforcement of a state statute.<sup>36</sup>

The third stage mediated between the first two, reconciling the thesis of Reconstruction nationalism and the antithesis of state backlash in a new, better synthesis.<sup>37</sup> What accomplished this synthesis, on Justice Brennan's account, was the Declaratory Judgment Act.<sup>38</sup> Congress intended the declaratory judgment, he said, to be "an alternative to the strong medicine of the injunction,"<sup>39</sup> allowing federal courts to offer their views on constitutional questions without the "harsh and abrasive remedy"<sup>40</sup> of "injunctions against state officials."<sup>41</sup>

There are reasons to doubt this dialectical history of federalism. One is that it elides the chronological gap between Reconstruction and *Ex parte Young* by presenting them as a single constitutional moment. Between 1865 and 1908 there was more than one radical transformation in the relationship of the federal government to the states: First the expansive federal role reflected in the Reconstruction

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35. *Id.* (citing PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 967 (2d. ed. 1973)).

36. *Id.* at 465 & nn.16–17, 466; *see also id.* at 467 (asserting that this "strong feeling . . . produced the Three-Judge Court Act in 1910, the Johnson Act of 1934, . . . and the Tax Injunction Act of 1937"). On the three-judge courts, *see generally* David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964); Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101 (2008).

37. The terms *thesis*, *antithesis*, and *synthesis* are not used in the opinion, but they are apt designations of the stages in the opinion's historical narrative.

38. Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202 (2012).

39. *Steffel*, 415 U.S. at 466.

40. *Id.* at 463 (quoting *Perez*, 401 U.S. at 104 (Brennan, J., concurring in part and dissenting in part)).

41. *Id.* at 467 (quoting *Perez*, 401 U.S. at 115 (Brennan, J., concurring in part and dissenting in part)); *see also id.* at 465–66 (asserting that the Declaratory Judgment Act was intended "[t]o dispel these difficulties," referring to state objections to injunctions after *Ex parte Young*); *id.* (stating that "the declaratory judgment was designed to be available to test state criminal statutes in circumstances where an injunction would not be appropriate" (quoting *Perez*, 401 U.S. at 112 (Brennan, J., concurring in part and dissenting in part))); *id.* at 469–70 (describing "a federal declaration of [a statute's] unconstitutionality" as "reflect[ing] the opinion of the federal court that the statute cannot be fully enforced" (quoting *Perez*, 401 U.S. at 124 (Brennan, J., concurring in part and dissenting in part))).

amendments,<sup>42</sup> then the retreat by the national government after the Compromise of 1877.<sup>43</sup> That retreat included the Court's acquiescing to systematic constitutional violations in the southern states<sup>44</sup> and limiting the equitable remedies it would grant against those states.<sup>45</sup> Yet this was also the era in which the Court began to aggressively strike down state statutes under the Due Process Clause of the Fourteenth Amendment. Thus, *Ex parte Young* represented not a moment of "nationalism" but rather an ambiguous moment for the role of the federal courts—they were expanding their role on some fronts (for example, in *Lochner v. New York*<sup>46</sup>) while retreating on others (for example, in *Plessy v. Ferguson*<sup>47</sup>). Moreover, at the time no one seemed to think *Ex parte Young* was an epoch-making case; rather, it was viewed as a more-or-less routine request for an antisuit injunction.<sup>48</sup>

Another reason for skepticism about this dialectical history is especially relevant to thinking about the declaratory judgment. *Steffel* suggests that Congress passed the Declaratory Judgment Act in order to balance state and federal interests. But when Congress passed the act, it was not seen that way.<sup>49</sup> Rather, members of Congress, the bar,

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42. See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988).

43. See Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115 (1994) (identifying the end of Reconstruction as a "constitutional moment" à la Bruce Ackerman); see also Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2007–09 (1999) (affirming McConnell's analysis).

44. E.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896). On *Plessy*, see generally OWEN FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 352–85 (Stanley N. Katz ed., Cambridge Univ. Press 2006) (1993); ANDREW KULL, THE COLOR-BLIND CONSTITUTION 113–30 (1992); Cheryl I. Harris, *In the Shadow of Plessy*, 7 U. PA. J. CONST. L. 867 (2005).

45. E.g., *Giles v. Harris*, 189 U.S. 475, 487 (1903); *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528, 545 (1899). For discussion of *Giles*, see generally Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000). For discussion of *Cumming*, see generally Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 383–87; J. Morgan Kousser, *Separate but Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J. S. HIST. 17 (1980).

46. *Lochner v. New York*, 198 U.S. 45 (1905).

47. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

48. See John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 1014 (2008); see also David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 90–94 (2011) (endorsing the broad outlines of, and qualifying, Harrison's account).

49. The only support for this idea that *Steffel* and *Perez* can adduce is a sentence by Professor Edwin Borchard, reproduced as part of a very lengthy quotation in the Senate report accompanying the bill that became the Declaratory Judgment Act, about "hostility to the extensive use of the injunction power by the Federal courts." See *Steffel v. Thompson*, 415 U.S.

and the academy saw the Declaratory Judgment Act as an effort in law reform. They saw it as extending to federal courts a remedial innovation that could reduce legal uncertainty, an innovation that had already been successfully adopted by most of the states.<sup>50</sup> And those state declaratory judgment statutes that inspired the Declaratory Judgment Act—there were thirty-four by the time the federal act passed<sup>51</sup>—had of course never been justified on the basis of federalism and the need for federal courts to be sensitive to state interests.<sup>52</sup>

Nor was Justice Brennan's federalism reading of the Declaratory Judgment Act grounded in previous decisions of the Supreme Court. In earlier cases the Court had sometimes said that federalism should affect a judge's decision whether to grant relief under the act,<sup>53</sup> but it had never suggested that federalism motivated Congress's decision to pass the act in the first place. In short, the attribution of a federalist purpose to the Declaratory Judgment Act is difficult to defend with reference to conventional legal materials and interpretive techniques.<sup>54</sup>

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452, 468 n.18 (1974); *see also* *Perez v. Ledesma*, 401 U.S. 82, 113–14 (1971) (Brennan, J., concurring in part and dissenting in part) (quoting S. REP. NO. 73-1005, at 3 (1934)). In context, however, Borchar'd's concern was not with state autonomy but with procedural exactitude, a concern that "the injunction procedure is abused in order to render what is in effect a declaratory judgment." S. REP. NO. 73-1005, at 3. In other words, Borchar'd was more concerned about what the federal courts were doing to the injunction than about what they were doing to the states.

50. *See, e.g.*, H.R. REP. NO. 68-1441, at 1–2 (1925) (referring to numerous states and nations with declaratory judgment statutes and concluding that "wherever adopted" the reform "has given pronounced satisfaction in that it has accomplished most wholesome simplification and expedition in the administration of justice"). Further evidence that the declaratory judgment was seen as an effort in law reform can be found in the titles of the first congressional hearings on bills to allow declaratory judgments. *See Simplification of Judicial Procedure in Federal Courts: Hearing on S. 1011, 1012, 1546, 2610, and 2870 Before a S. Subcomm. of the Comm. on the Judiciary*, 67th Cong. (1922); *Legislation Recommended by the American Bar Association, Hearing on H.R. 5030, H.R. 10141, H.R. 10142, H.R. 10143 Before the H. Comm. on the Judiciary*, 67th Cong. (1922).

51. EDWIN BORCHAR'D, *DECLARATORY JUDGMENTS* xvii (2d. ed. 1941).

52. For the arguments typically made, *see* WAGNER, *supra* note 27, at 2.

53. *See, e.g.*, *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952) ("Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system."); *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 471 (1945) ("In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid . . . needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes.").

54. *Cf. Steffel*, 415 U.S. at 478 (Rehnquist, J., concurring) ("[M]y reading of the legislative history of the Declaratory Judgment Act of 1934 suggests that its primary purpose was to enable persons to obtain a definition of their rights before an actual injury had occurred, rather than to

Nevertheless, it would be cramped and narrow to evaluate Justice Brennan's opinion in *Steffel* solely by the standards of historical accuracy. What Justice Brennan was offering for the declaratory judgment was in effect a *myth*, in the sense of a story of origins that has present-day normative implications, or "ideology in narrative form."<sup>55</sup> Consistent with this reading, other scholars have regarded *Steffel*'s invocation of federalism as strategic.<sup>56</sup> If *Steffel*'s account of the milder declaratory judgment is seen in these terms, as a myth, it can be judged not merely as a historical account but also as a descriptive and normative one, as an account of what the declaratory judgment at present is and should be.

Judging *Steffel* in these terms comports with its reception by scholars and courts. Its history has been largely ignored.<sup>57</sup> What has endured is the general conclusion that Justice Brennan drew from the history, the meaning of the myth, so to speak: that the declaratory judgment is "a much milder form of relief than an injunction."<sup>58</sup> No matter how doubtful its historical foundations, that conclusion has become the leading statement of the difference between these two remedies.

Others have built on the foundation of this myth. Professor Owen Fiss describes the declaratory judgment as "simply an injunction without sanctions."<sup>59</sup> Professor Peter Schuck characterizes

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palliate any controversy arising from *Ex parte Young* . . ."). On this point Justice Rehnquist was correct. On other points, however, his view of the declaratory judgment was mistaken. *See infra* Part II.C.

55. BRUCE LINCOLN, *THEORIZING MYTH: NARRATIVE, IDEOLOGY, AND SCHOLARSHIP* xii (1999) (emphasis omitted).

56. *See* Fiss, *supra* note 8, at 1121, 1129 (praising Justice Brennan's "deft manipulation of technical doctrine" to reduce the effect of *Younger* and describing *Steffel* as "[t]he full triumph of Justice Brennan's strategy"); Douglas Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636, 667-68 (1979) (describing Fiss's account of Justice Brennan's "deeply laid strategy to save declaratory judgments where no prosecution was pending" as "largely convincing" but questioning the shrewdness of the execution); *cf.* Fallon, *supra* note 14, at 1172 (classifying *Steffel* as a "Nationalist" opinion). Qualified support for this assessment can be seen in the drafting history of the opinion of the Court in *Steffel*, *see supra* note 19, which suggests that Justice Brennan's view of the declaratory judgment was part of the long struggle over "Our Federalism" on the Burger Court. Note, though, that *Steffel* is entirely consistent with a major theme of Justice Brennan's jurisprudence on federalism, namely the importance of federal rights being defined by courts. *See* Denniston, *supra* note 28, at 267-70; Post, *supra* note 28, at 236.

57. *But see* FALLON ET AL., *supra* note 25, at 28 (quoting *Steffel*'s history with respect to the significance of the Judiciary Act of 1875).

58. *Steffel*, 415 U.S. at 471.

59. FISS, *supra* note 8, at 107 n.39.

it as a remedy that lacks any “palpable ‘bite.’”<sup>60</sup> Professor Caitlin Borgmann says that the declaratory judgment was “expressly intended as a ‘milder alternative’ to an injunction.”<sup>61</sup> Professor Matthew Adler describes the declaratory judgment as “intended in part as a less coercive technique for judicial invalidation of state statutes.”<sup>62</sup> Other scholars contrast “weak remedies such as declaratory relief” with “strong remedies such as injunctions,”<sup>63</sup> or speak of “the near-futility of declaratory judgments.”<sup>64</sup> And many others make similar statements.<sup>65</sup> The mildness thesis is embraced by

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60. SCHUCK, *supra* note 9, at 15.

61. Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 792 (2006).

62. Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 143 (1998).

63. Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEX. L. REV. 1643, 1649 n.22 (2011).

64. Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 440.

65. *See, e.g.*, Michael J. Bednarz, *Comity Bars Federal Damages for Section 1984 Discriminatory State Tax Assessments*, 1 B.U. J. TAX L. 147, 148 n.5 (1983); Stephen Berry, *A Federal Forum for Broad Constitutional Deprivation by Property Tax Assessment*, 65 CALIF. L. REV. 828, 862 (1977); Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL’Y 743, 755 (2012); Peter E. Glick, Comment, *Pulliam’s Pacific Progeny: Deep Pockets in the Judges’ Robes?*, 17 PAC. L.J. 461, 488 (1986); Frank L. Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEX. L. REV. 1324, 1337 (1972); Rendleman, *supra* note 14, at 165; David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 387 (2004); Mathew D. Staver, *The Abstention Doctrines: Balancing Comity with Federal Court Intervention*, 28 SETON HALL L. REV. 1102, 1151 n.291 (1998); Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1206 n.89 (1977).

numerous federal courts,<sup>66</sup> treatises and practice manuals,<sup>67</sup> briefs by leading practitioners,<sup>68</sup> and student notes.<sup>69</sup>

Nor is *Steffel's* reach limited to constitutional or regulatory cases. In *MedImmune, Inc. v. Genentech, Inc.*,<sup>70</sup> the Court's most recent major case on declaratory judgment actions in patent law, there are several pages across the majority and dissent devoted to *Steffel* (albeit not about the declaratory judgment's effect but about its timing and availability).<sup>71</sup> Federal and state courts sometimes invoke the mildness thesis in nonconstitutional cases as a general statement of the difference between the declaratory judgment and the injunction.<sup>72</sup> And the Restatement (Second) of Judgments points to strength as the difference between these remedies.<sup>73</sup> In short, with only a handful of exceptions,<sup>74</sup> scholars and courts have persistently described the declaratory judgment as a milder remedy than the injunction.

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66. See, e.g., *Alli v. Decker*, 650 F.3d 1007, 1014 (3d Cir. 2011); *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993); *Dickinson v. Ind. State Election Bd.*, 933 F.2d 497, 503 (7th Cir. 1991); *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1055 (1st Cir. 1987); *Morrow v. Harwell*, 768 F.2d 619, 627 (5th Cir. 1985); *Familias Unidas v. Briscoe*, 544 F.2d 182, 188 (5th Cir. 1976). It is less common for state court judges to describe the declaratory judgment as a milder remedy, though some have done so without citing *Steffel*. See, e.g., *Donaldson v. State*, 292 P.3d 364, 391–92 (Mont. 2012) (Nelson, J., dissenting).

67. See 3 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 8:31[6] (3d ed. 2010); 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, *FEDERAL PRACTICE AND PROCEDURE* § 3566, at 288 (3d ed. 2008); Kathryn Smith, *Declaratory Judgments*, in 10 *FEDERAL PROCEDURE, LAWYERS' EDITION* § 23:3, at 12 (Francis M. Dougherty & Julie R. Cataldo eds., 2007), available at Westlaw FEDPROC § 23:3.

68. See, e.g., Reply Brief for Petitioner at 6, *Nken v. Mukasey*, 555 U.S. 1042 (2008) (No. 08-681), 2009 WL 106651, at \*6 (reply brief signed by, among others, Donald Verrilli, who subsequently became the Solicitor General of the United States).

69. See, e.g., James L. Lovsin, Note, *A Constitutional Door Ajar: Applying the Ex Parte Young Doctrine to Declaratory Judgment Actions Seeking State Patent Invalidity*, 2010 U. ILL. L. REV. 265, 301 n.311; Note, *Judicial Limitation of Three-Judge Court Jurisdiction*, 85 YALE L.J. 564, 567 (1976).

70. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

71. *Id.* at 129, 134 n.12; *id.* at 137, 143–46 (Thomas, J., dissenting).

72. See, e.g., *City of Rome v. Verizon Commc'ns, Inc.*, 362 F.3d 168, 175 n.3 (2d Cir. 2004) (“Another purpose [of declaratory actions], however, is to furnish a less formidable alternative to injunctive relief.”); *Mycogen Corp. v. Monsanto Co.*, 51 P.3d 297, 304 (Cal. 2002) (describing the “purpose of declaratory actions” as “provid[ing] a remedy that is simpler and less harsh than coercive relief” (quoting *Criste v. City of Steamboat Springs*, 122 F. Supp. 2d 1183, 1189 (D. Colo. 2004) (quotation mark omitted))).

73. See *supra* note 10.

74. The conspicuous absence from those who call the declaratory judgment a milder remedy is Professor Doug Laycock. Although he has never directly rebutted the mildness thesis, his work has consistently recognized the force and value of a declaratory judgment. See, e.g., DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 4, 577, 595

## II. ASSESSING THE RATIONALES FOR THE MILDNESS THESIS

This Part examines three rationales that have been given for why the declaratory judgment is a milder remedy: that it lacks a command, a sanction, or full issue-preclusive effect. These rationales are not wholly baseless. The scholars and courts offering them usually start with a correct observation about a difference between the declaratory judgment and the injunction, such as the observation that a declaratory judgment cannot be the basis for contempt proceedings. But they then misapprehend the significance of that difference. As a result, these rationales cannot justify the mildness thesis.

### A. *The Command Rationale*

Some scholars suggest the declaratory judgment is milder because it lacks a command—it “only declares.”<sup>75</sup> For example, Professor Cass Sunstein says that a declaratory judgment provides “only a conclusion of law”—it “does not by its own force require any change in the [parties’] conduct.”<sup>76</sup> Similarly, Schuck describes the declaratory judgment as a remedy that does not “compel[] [defendants] to do, or refrain from doing, anything,” but “merely pronounces particular practices or conditions to be illegal, leaving defendants free to respond as they see fit.”<sup>77</sup> In the same vein, some federal courts say the declaratory judgment is “generally less coercive because it ‘is merely a declaration of legal status [and] rights,’”<sup>78</sup> imposing no “affirmative obligations.”<sup>79</sup>

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(4th ed. 2010) [hereinafter LAYCOCK, MODERN AMERICAN REMEDIES]; DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 135 (1991) [hereinafter LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE]; Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 718 (1990); Laycock, *supra* note 56, at 665. On other scholarship at odds with the mildness thesis, see *supra* note 14.

75. I. Zamir, *The Declaratory Judgment Revisited*, 30 CURRENT LEGAL PROBS. 43, 52 (1977).

76. Sunstein, *supra* note 11, at 751; see also ELAINE W. SHOBN, WILLIAM MURRAY TABB & RACHEL M. JANUTIS, REMEDIES: CASES AND PROBLEMS 1021 (5th ed. 2012) (“A declaratory judgment is considered a ‘milder’ remedy than an injunction because it does not command that specific actions be taken and does not bind the parties in personam.”).

77. SCHUCK, *supra* note 9, at 15; see also William J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 SETON HALL L. REV. 1, 42 (1999) (suggesting that declaratory judgments “do not place parties under any legal obligations”).

78. *PGBA, LLC v. United States*, 389 F.3d 1219, 1228 n.6 (Fed. Cir. 2004) (quoting *Perez v. Ledesma*, 401 U.S. 82, 124 (1971) (Brennan, J., concurring in part and dissenting in part)); see also *Clark v. United States*, 691 F.2d 837, 841 (7th Cir. 1982) (“A declaratory judgment is just

It is true that when a court grants a declaratory judgment, no command is given to the parties.<sup>80</sup> But does the absence of a command mean that the declaratory judgment is milder in the contexts where it is actually used?

Begin with three scenarios in which plaintiffs routinely seek a declaratory judgment in federal court: disputes over the validity of intellectual property, disputes over the duties of insurers, and pre-enforcement challenges to statutes or regulations.<sup>81</sup>

In the first scenario, an inventor has a product design that might infringe a patent. There is ample reason to think that the patentholder will sue for patent infringement,<sup>82</sup> and, accordingly, the

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that: a declaration of rights. It is not a coercive remedy like an injunction or a money judgment.”).

79. *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010); *see also PGBA*, 389 F.3d at 1228 n.6 (distinguishing an injunction from a declaratory judgment because the former can mandate or prohibit conduct); *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1055 (1st Cir. 1987) (concluding that a declaratory judgment “does not, in itself, coerce any party or enjoin any future action,” and that it is “a milder remedy” than an injunction).

80. *See Samuel L. Bray, Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1282–85 (2010) (noting that in a declaratory judgment “there is no command: the opinion only expresses how the court has resolved the case”).

81. Scholars have long recognized that intellectual property and insurance are areas particularly amenable to declaratory judgments. *See, e.g.*, Edwin M. Borchard, *Declaratory Judgments and Insurance Litigation*, 34 ILL. L. REV. 245, 245 (1939); George B. Fraser, *A Survey of Declaratory Judgment Actions in the United States*, 39 IOWA L. REV. 639, 651–55 (1954); William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 700 (1994); Joseph Rossman, *Declaratory Judgments*, 17 J. PAT. OFF. SOC’Y 3, 4–5 (1935). Plaintiffs frequently request declaratory relief (and often injunctive relief as well) when challenging legislative or executive action, as in pre-enforcement challenges to agency regulations. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3149 (2010); *Abbott Labs. v. Gardner*, 387 U.S. 136, 138–39 (1967); *see also* 1 FRANK CROSS, FEDERAL ENVIRONMENTAL REGULATION OF REAL ESTATE § 1:19 (2013) (noting that plaintiffs who sue under the National Environmental Policy Act “typically request both injunctive and declaratory relief”); *cf.* 2 WILLIAM W. SCHWARZER, A. WALLACE TASHIMA & JAMES M. WAGSTAFFE, CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL §§ 10:25–31 (1992) (listing as typical declaratory judgment cases in federal court those involving the validity of intellectual property, insurance coverage, other contract actions, and constitutional rights).

82. Even after *MedImmune*, the Federal Circuit has required some affirmative act from the patentholder before granting a declaratory judgment. *See Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office*, 689 F.3d 1303, 1319–20 (Fed. Cir. 2012) (concluding that “declaratory judgment jurisdiction will not arise merely on the basis that a party learns of the existence of an adversely held patent, or even perceives that such a patent poses a risk of infringement, in the absence of some affirmative act by the patentee”), *aff’d in part, rev’d in part on other grounds sub nom. Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013). In *Myriad Genetics* the Supreme Court did not comment on the Federal Circuit’s standard, though it did reiterate briefly its own traditional test for the availability of the declaratory judgment and found it met. *See Myriad Genetics*, 133 S. Ct. at 2115 n.3 (requiring a

inventor would like to know whether the patent is valid.<sup>83</sup> To find out, she brings a declaratory judgment action. If the court grants a declaratory judgment, no command will usually be needed.

If the inventor wins, the declaratory judgment will let her make the product without fear of infringing the patent. The losing defendant in the declaratory judgment action will not bring a pointless and perhaps sanctionable enforcement action.

If the inventor loses, she is almost certain to refrain from making the product, for she would be willfully infringing the patent and risking treble damages<sup>84</sup>—the very risk that prompted her to seek a declaratory judgment in the first place. Either way, after a declaratory judgment both parties usually know what to do.

In a second scenario, an insurer seeks a federal declaratory judgment about whether it is required to defend an insured in separate proceedings in state court.<sup>85</sup> If the court declares that the insurer does have a duty to defend, the insurer will be certain to fulfill that duty (after all, avoiding liability for failing to do so was the entire point of seeking a declaratory judgment).<sup>86</sup> Nor does the insurer need any instruction in how to defend the insured. Alternatively, if the court declares that that the insurer has no duty to defend the insured, it will not put on a defense. Either way the court has no need to

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plaintiff to allege “sufficient facts ‘under all the circumstances, [to] show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment’” (alteration in original) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007))).

83. See generally Lorelei Ritchie de Larena, *Re-evaluating Declaratory Judgment Jurisdiction in Intellectual Property Disputes*, 83 IND. L.J. 957 (2008) (describing the use of declaratory judgments in patent litigation). The question considered here is the remedy *before* there has been infringement. A much larger literature exists on remedies *after* infringement, when the choice is usually between an injunction and damages. See generally, e.g., Thomas F. Cotter, *Patent Holdup, Patent Remedies, and Antitrust Responses*, 34 J. CORP. L. 1151 (2009); Einer Elhauge, *Do Patent Holdup and Royalty Stacking Lead to Systematically Excessive Royalties?*, 4 J. COMPETITION L. & ECON. 535 (2008); John M. Golden, *Principles for Patent Remedies*, 88 TEX. L. REV. 505 (2010); Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007).

84. 35 U.S.C. § 284 (2006 & Supp. V 2011).

85. Unlike the patent scenario, the insurance scenario is also common in state court (which is not surprising, given that the federal cases derive from diversity jurisdiction). See, e.g., *Troelstrup v. Dist. Court*, 712 P.2d 1010, 1010–11 (Colo. 1986) (en banc) (insurer sought declaratory judgment regarding whether a pollution exclusion in an insurance policy absolved it of a duty to defend the insured); *Harleysville Ins. Grp. v. Omaha Gas Appliance Co.*, 772 N.W.2d 88, 90 (Neb. 2009) (same).

86. On the scope of this liability, see *infra* note 97.

command the parties to do anything, for the court's definitive interpretation is sufficient to guide their behavior.

In the third scenario, someone is bringing a pre-enforcement challenge to legislative or executive action (as in *Steffel* itself). If the challenger wins, the public official who was the losing defendant will ordinarily not need a command. Once a court tells an executive official that certain conduct is required or forbidden, it is presumed that the official will comply.<sup>87</sup> Alternatively, if the challenger loses, she will not need a command to follow the law she challenged. Indeed, a losing declaratory judgment plaintiff knows what the law is, and she has brought herself conspicuously to the attention of the relevant officials or private claimants by the act of seeking a declaratory judgment.<sup>88</sup>

The bottom line is that in these three scenarios—which are the most common scenarios for federal plaintiffs to seek a declaratory judgment—there is no need for a command. After the declaratory judgment, everyone knows what to do. This point is not limited to the scenarios just given. It can be generalized to the other kinds of legal uncertainties that are resolved in declaratory judgment actions.<sup>89</sup> For

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87. See, e.g., *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 97–98 (1992) (White, J., concurring) (stating that “[t]here is nothing new about expecting governments to satisfy their obligations” and giving as an example the expectation that government officials will comply with a declaratory judgment); *Poe v. Gerstein*, 417 U.S. 281, 282 (1974) (per curiam) (affirming a three-judge district court's denial of an injunction—even though it had granted a declaratory judgment—because there was no reason to think the public officials in question would fail to “acquiesce in the decision” (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 165 (1943))); *Roe v. Wade*, 410 U.S. 113, 166 (1973) (noting the Court's confidence that state officials would comply with the declaratory judgment); *Comm. on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam) (“[W]e have long presumed that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction.”); see also J. Raz, *Legal Rights*, 4 O.J.L.S. 1, 3 (1984) (noting that there are “circumstances where by convention” a declaratory judgment “is respected as if it were an ordinary enforcement or remedial action”). There will of course be exceptional cases when officials disobey a declaratory judgment, see *infra* notes 108, 110, just as there are with injunctions.

88. This point has been made, with respect to advance tax rulings by Yehonatan Givati, *Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings*, 29 VA. TAX REV. 137, 167–68 (2009).

89. State courts report that a declaratory judgment frequently resolves uncertainty about the ownership of real property, the validity or interpretation of a contract (including insurance contracts), the existence of some kind of legally significant status (for example fiduciary, mother, father, husband, wife), or the constitutionality or validity of administrative action. See, e.g., *Quality Foods, Inc. v. Smithberg*, 653 S.E.2d 486, 491 (Ga. Ct. App. 2007) (real property); *Aselco, Inc. v. Hartford Ins. Grp.*, 21 P.3d 1011, 1017 (Kan. Ct. App. 2011) (insurance contracts); *Bank One Ky. NA v. Woodfield Fin. Consortium LP*, 957 S.W.2d 276, 280 (Ky. Ct.

example, once a court declares that *A* has a better claim to ownership of a parcel of land than *B*, the court does not need to command *A* and *B* to perform their respective roles of owner and nonowner. When a command would be superfluous, the absence of a command does not make the declaratory judgment a milder remedy.

### *B. The Sanction Rationale*

Another explanation scholars and courts offer for the mildness of the declaratory judgment is that it lacks a sanction. Most prominently, Fiss says that the mildness of the declaratory judgment consists in the fact that it lacks “an additional element of coercion, an additional threat of sanction for disobedience.”<sup>90</sup> Fiss identifies the missing “threat of sanction” as contempt proceedings: “if the defendant disobeys” a declaratory judgment, “the plaintiff cannot get a contempt order.”<sup>91</sup> Along similar lines, Professor Ralph Whitten argues that the absence of contempt proceedings after a declaratory judgment allows a kind of socially useful civil disobedience by government officials, for they can ignore a declaratory judgment in “extraordinary cases of need.”<sup>92</sup> Or as the Court said about the declaratory judgment in *Steffel*, “[N]oncompliance with it may be *inappropriate*, but is not contempt.”<sup>93</sup>

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App. 1997) (contracts); Gov’t Emps. Ins. Co. v. Butler, 320 A.2d 515, 517 (N.J. Super. Ct. Ch. Div. 1974) (insurance contracts); Smith v. City of Santa Fe, 171 P.3d 300, 303 (N.M. 2007) (challenges to local ordinances); Thome v. Alexander & Louisa Calder Found., 890 N.Y.S.2d 16, 24 (N.Y. App. Div. 2009) (validity of foreign divorce); Trinity Universal Ins. Co. v. Sweatt, 978 S.W.2d 267, 271 (Tex. Ct. App. 1998) (contracts); Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowner’s Ass’n, 295 P.3d 314, 319 (Wash. Ct. App. 2013) (real property).

90. Fiss, *supra* note 8, at 1122; *see also* Adler, *supra* note 62, at 146 n.496 (citing *Steffel*’s description of “differences between declaratory judgments and injunctions, in particular [the] less coercive cast of [the] former”); Currie, *supra* note 36, at 15–16 (calling contempt “the significant distinguishing feature of an injunction” and suggesting that “[i]n the absence of an injunction, a statute may be enforced even though it has been held unconstitutional”); Rendleman, *supra* note 14, at 162 (“In the abstract, an injunction may be viewed as a declaration backed by a contempt sanction.”).

91. Fiss, *supra* note 8, at 1122.

92. Ralph U. Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C. L. REV. 591, 626–27 (1975).

93. *Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (emphasis added) (quotation mark omitted); *cf.* *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) (indicating that declaratory judgments do not establish obligations “backed by a contempt sanction”); *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (refusing to find contempt absent direct orders to promulgate regulations); *Rivera Puig v. Garcia Rosario*, 785 F. Supp. 278, 293 (D.P.R. 1992) (“Noncompliance is inappropriate but, nevertheless, is not contempt.”), *aff’d sub nom.* *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311 (1st Cir. 1992).

The scholars and courts who propose this explanation usually concede that a plaintiff who receives a declaratory judgment can go back to court and receive an injunction if needed—and then that injunction can be the basis for initiating contempt proceedings.<sup>94</sup> As Fiss puts it, the distinction between the two remedies is that an injunction “gives the defendant one more chance,” but the declaratory judgment “gives the defendant two more chances.”<sup>95</sup>

It is certainly black-letter law that a declaratory judgment cannot be the basis for contempt proceedings. But this distinction does not make the declaratory judgment a milder remedy in the circumstances in which it is usually sought and obtained.

Start with the perspective of a losing plaintiff. When a person seeks a declaratory judgment, she is often trying to resolve legal uncertainty to avoid making a mistake that would result in liability. In many cases, though certainly not in all, the liability the declaratory judgment plaintiff is trying to avoid would exceed ordinary compensatory damages. In the patent context it is treble damages.<sup>96</sup> In the insurance context it is punitive damages and attorneys’ fees.<sup>97</sup> Elsewhere, it may be agency-imposed fines and other regulatory consequences,<sup>98</sup> or even criminal prosecution.<sup>99</sup> In such cases there is no need to threaten the losing plaintiff with a contempt sanction: the very sanction that motivated a person to seek a declaratory judgment is a sufficient deterrent.

In other cases, such as disputes over the ownership of real property, a person may seek a declaratory judgment not to avoid liability beyond ordinary compensatory damages but rather to avoid incurring pointless and potentially large expenses, such as the costs of

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94. Fiss, *supra* note 8, at 1122.

95. *Id.*

96. 35 U.S.C. § 284 (2006 & Supp. V 2011).

97. See Landes & Posner, *supra* note 81, at 700; see also *Korte Constr. Co. v. Am. States Ins.*, 750 N.E.2d 764, 768 (Ill. App. Ct. 2001) (upholding an award of compensatory damages, punitive damages, and attorneys’ fees against an insurer that did not defend an insured); Karon O. Bowdre, “*Litigation Insurance*”: *Consequences of an Insurance Company’s Wrongful Refusal To Defend*, 44 *DRAKE L. REV.* 743, 776–77 (1996) (analyzing punitive damages for an insurer’s failure to defend); cf. John C.P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 *HARV. J.L. & PUB. POL’Y* 3, 11 n.24 (2004) (recognizing that an insurer’s bad-faith breach of the duty to defend is especially egregious and may therefore warrant special treatment, including punitive damages, even though such damages are not generally available for breach of contract).

98. *E.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 139 (1967).

99. *E.g.*, *Steffel v. Thompson*, 415 U.S. 452, 467–75 (1974).

investigating and investing in property that is later determined to belong to someone else. Again, the contempt sanction is not typically needed: if the court determines that a person does not own the property, she hardly needs the threat of contempt to ensure that she does not spend money improving it.

Now consider the perspective of a losing defendant. Does one additional step to a contempt sanction matter? Imagine two losing defendants. One is genuinely trying to obey the law; the other is a Holmesian bad man thinking only of legal sanctions.<sup>100</sup> The person trying to obey the law would not care that the sanction of contempt was two steps away instead of only one. Nor would the Holmesian bad man—he is not so shortsighted as to ignore the police officer he knows is only two steps around the corner.<sup>101</sup>

There is a way to test this intuition. The Declaratory Judgment Act includes a provision, codified at 28 U.S.C. § 2202, that expressly allows successful declaratory judgment plaintiffs to go back to court to get an injunction. It gives federal courts the authority to grant “[f]urther necessary or proper relief based on a declaratory judgment.”<sup>102</sup> Yet careful analysis of the history of § 2202 in the federal courts shows that it is hardly ever invoked. Over the past eighty years, the federal courts have issued thousands of declaratory judgments, but the statutory authorization of further relief has been considered in published district court opinions in only about seventy-five cases—less than one per year.<sup>103</sup> And, under § 2202, the form of “further relief” that plaintiffs request from district courts more than any other is attorneys’ fees.<sup>104</sup> Other cases raising § 2202 have involved plaintiffs who sought a declaratory judgment and an

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100. See O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459–61 (1897).

101. Cf. *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010) (Easterbrook, C.J.) (“A litigant who tries to evade a federal court’s judgment—and a declaratory judgment is a real judgment, not just a bit of friendly advice—will come to regret it.”).

102. 28 U.S.C. § 2202 (2012). Similar provisions are found in state declaratory judgment statutes. The language in the federal statute is taken almost verbatim from the Uniform Declaratory Judgments Act, which has been widely adopted. See UNIF. DECLARATORY JUDGMENTS ACT § 8 (1922), 12A U.L.A. 528 (2011).

103. This number was up to date as of November 9, 2013, and is based on a search of the DCT database in Westlaw using the query “further necessary or proper relief” & 28 /2 (u.s.c. usc) /2 2202, followed by screening out cases that did not present a § 2202 issue. It is certainly true that a court could also grant such relief in an unpublished order.

104. E.g., *Key Constr., Inc. v. State Auto Prop. & Cas. Ins. Co.*, No. 06-2395-KHV, 2008 WL 940797, at \*1 (D. Kan. Apr. 7, 2008).

injunction at the same time.<sup>105</sup> In another case, an insurer had obtained a declaratory judgment that a policy was void, and then sought as “further relief” restitution of money that had been paid out under the policy.<sup>106</sup>

What is not widespread, at least as far as the published opinions reveal, is the fact pattern implicit in Fiss’s explanation for the mildness of the declaratory judgment—the situation in which a plaintiff wins a declaratory judgment, the defendant disobeys, and the plaintiff goes back to court to get an injunction.<sup>107</sup> In fact, the total number of cases with published opinions involving that fact pattern under § 2202 appears to be less than twenty. In some of these cases the district court granted the requested injunction,<sup>108</sup> and in some it did not.<sup>109</sup> The meager use of this provision throughout its nearly

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105. *E.g.*, *DeFalco v. Dechance*, No. 11-CV-05502 ADS ETB, 2013 WL 2658641, at \*3, \*10 (E.D.N.Y. June 13, 2013) (denying simultaneous request for declaratory and injunctive relief under § 2201 and § 2202 respectively); *see also Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981) (relying on § 2202 in affirming the simultaneous grant of declaratory and injunctive relief). Sometimes plaintiffs request declaratory and injunctive relief at the same time, citing § 2202, but receive only declaratory relief. *See, e.g.*, *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1298 (D. Utah 2002).

106. *Cedar Hill Hardware & Constr. Supply, Inc. v. Ins. Corp. of Hannover*, No. 4:04CV743-DJS, 2006 WL 2862145, at \*1–2 (E.D. Mo. Oct. 4, 2006).

107. *See Fiss, supra* note 8, at 1122.

108. *See, e.g.*, *Shoom, Inc. v. Elec. Imaging Sys. of Am., Inc.*, No. C 07-05612 JSW, 2011 WL 4595212, at \*4 (N.D. Cal. Oct. 4, 2011) (granting an injunction against a patentholder’s successors and assigns who were bringing litigation inconsistent with an earlier declaratory judgment); *Tesmer v. Kowalski*, 114 F. Supp. 2d 622, 628 (E.D. Mich. 2000) (granting an injunction against state judges who did not comply with the court’s earlier declaratory judgment in litigation against other state judges), *rev’d on other grounds*, 543 U.S. 125 (2004); *Pub. Citizen v. Carlin*, 2 F. Supp. 2d 18, 20–22 (D.D.C. 1998) (granting an injunction after the archivist of the United States persistently violated a declaratory judgment invalidating agency schedule for destruction of documents), *rev’d on other grounds*, 184 F.3d 900 (D.C. Cir. 1999); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 759 F. Supp. 1216, 1228, 1236–38 (N.D. Tex. 1990) (granting an injunction against the creditors of the losing defendant in a declaratory judgment action, and noting § 2202 as one possible ground), *aff’d in part, rev’d in part*, 960 F.2d 1286 (5th Cir. 1992); *Babbitz v. McCann*, 320 F. Supp. 219, 223 (E.D. Wis. 1970) (granting an injunction against state prosecutors refusing to abide by a declaratory judgment that a statute was unconstitutional), *vacated*, 402 U.S. 903 (1971) (remanding in light of *Younger v. Harris* and *Samuels v. Mackell*); *see also Morris v. Travisono*, 509 F.2d 1358, 1362 (1st Cir. 1975) (upholding an injunction against prison officials who failed to comply with a declaratory judgment and consent decree); *Teas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263, 1264 (5th Cir. 1969) (upholding an injunction against a corporation that filed suits inconsistent with an earlier declaratory judgment that had interpreted contracts and oil-and-gas leases); *cf. Conley v. Dauer*, 463 F.2d 63, 66–67 (3d Cir. 1972) (remanding but declining to grant an injunction when state officials had been tardy in complying with a declaratory judgment but claimed that compliance was imminent).

109. *See, e.g.*, *Comprehensive Care Corp. v. Katzman*, No. 8:09-cv-1375-T-24 TBM, 2011 WL 5080303, at \*2 (M.D. Fla. Oct. 26, 2011) (denying an injunction because it was not needed

eighty-year history shows that there is no pattern of disregarded declaratory judgments.<sup>110</sup> Instead, declaratory judgments are usually complied with, but on rare occasions they are disobeyed. This is of course the precise situation that obtains with injunctions—they are usually obeyed, but not always.<sup>111</sup> In short, there is no reason to think that in actual operation the declaratory judgment lacks the coerciveness of the injunction.

### C. *The Preclusion Rationale*

The third rationale for the claim that the declaratory judgment is a milder remedy is that it has less issue-preclusive effect.<sup>112</sup> In *Steffel*, Justice Brennan described a declaratory judgment as “persuasive” though “not ultimately coercive,” and said it “may have some *res*

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to effectuate a declaratory judgment); *Kemp v. TysonSeafood Grp., Inc.*, No. Civ.5-96-173, 2004 WL 741590, at \*5–6 (D. Minn. Mar. 30, 2004) (denying an injunction because the movant had not established prerequisites for injunctive relief); *Ladd v. Thomas*, 14 F. Supp. 2d 222, 226 (D. Conn. 1998) (denying an injunction because the defendant had made changes in accordance with the declaratory judgment); see also *Heartland By-Prods., Inc. v. United States*, 568 F.3d 1360, 1368 (Fed. Cir. 2009) (declining to grant an injunction because the defendant had ceased its activities); *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 774 F.2d 135, 144 (6th Cir. 1985) (affirming the denial of an injunction when the defendants were unlikely to commit additional violations). The cases cited in this footnote and the preceding one suggest another point: the lack of requests for injunctions under § 2202 cannot be explained on the basis of judicial unwillingness to grant them, because in *none* of these cases did the court fail to grant a follow-on injunction against an obdurately disobedient defendant.

110. There are undoubtedly a few additional cases in which courts follow a declaratory judgment with an injunction either on the basis of other authority or without specifying the authority. See *Landry v. Daley*, 288 F. Supp. 189, 194 (N.D. Ill. 1968) (granting an injunction after a declaratory judgment without specifying authority); *Vt. Structural Slate Co. v. Tatko Bros. Slate Co.*, 149 F. Supp. 139, 140 (N.D.N.Y. 1957) (granting an injunction after a declaratory judgment and suggesting that this was an exercise of “inherent power”), *aff’d*, 253 F.2d 29 (2d Cir. 1958). In at least one case an unpublished declaratory judgment was not obeyed but without, it seems, any further proceedings. See *Carter v. Jury Comm’n of Greene Cnty.*, 396 U.S. 320, 327–28 & n.4 (1970) (referring to an unpublished declaratory judgment given in a federal district court in 1964).

111. If injunctions were never disobeyed, there would of course be no body of contempt law and no collateral-bar rule. On disobedience of injunctions, see, for example, DOUG RENDLEMAN, *COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT* 625–29 (2010).

112. The question is about the issue-preclusive, not claim-preclusive, effect of the declaratory judgment. It is well-established that in many circumstances a plaintiff in a declaratory judgment action may later seek further relief on the same claim. See *RESTATEMENT (SECOND) OF JUDGMENTS* § 33 cmt. c (1982). But there is an important exception to this claim-preclusion rule: “If the initial action sought more than just a declaratory judgment, most courts hold that all related relief should have been brought at the same time.” LAYCOCK, *MODERN AMERICAN REMEDIES*, *supra* note 74, at 578 (citing *Mycogen Corp. v. Monsanto Co.*, 51 P.3d 297 (Cal. 2002)).

*judicata* effect, though this point is not free from difficulty and the governing rules remain to be developed with a view to the proper workings of a federal system.”<sup>113</sup> In a concurring opinion, then-Justice Rehnquist suggested that a declaratory judgment had no legal force at all, even in a future prosecution of the declaratory judgment plaintiff,<sup>114</sup> and he argued that a declaratory judgment should never serve as the basis for a subsequent injunction.<sup>115</sup>

Since *Steffel*, the Court’s doubts about the issue-preclusive effect of a declaratory judgment have received only slender support. Two Justices mentioned those doubts in later opinions.<sup>116</sup> Several scholars may share those doubts,<sup>117</sup> but more scholars reject them.<sup>118</sup> The lower courts have seen little debate about the declaratory judgment’s

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113. *Steffel v. Thompson*, 415 U.S. 452, 470–71 (1974) (quoting *Perez v. Ledesma*, 401 U.S. 82, 125 (1971) (Brennan, J., concurring in part and dissenting in part)). In his unpublished *Younger* opinion and in his opinion in *Perez* (but not in *Steffel*), Justice Brennan included a footnote recognizing contrary legislative history on this point. *See Perez*, 401 U.S. at 126 n.16; Brennan, J., Unpublished Opinion, *supra* note 19, at 19.

114. *Steffel*, 415 U.S. at 480–84 (Rehnquist, J., concurring) (suggesting that “[s]tate authorities may choose to be guided by” the declaratory judgment, and a plaintiff who receives one and is then arrested “may, of course, raise the federal declaratory judgment in the state court for whatever value it may prove to have”). *But see id.* at 477 (White, J., concurring) (suggesting that a federal declaratory judgment “should be accorded res judicata effect” in state court).

115. *Id.* at 480–81 (Rehnquist, J., concurring) (rejecting the idea of injunctions based on earlier declaratory judgment because it would “totally obscure” the distinction that the declaratory judgment was “a milder alternative to the injunction remedy” (quoting *id.* at 467 (majority opinion))). Note that Justice Rehnquist’s position on the lack of issue-preclusive effect for a declaratory judgment is not merely a restatement of the better-founded position that state courts do not have to follow the constitutional interpretation of a lower federal court. *See Arizonaans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997); *Lockhart v. Fretwell*, 506 U.S. 364, 375–76 (1993) (Thomas, J., concurring).

116. *Edgar v. MITE Corp.*, 457 U.S. 624, 650 & n.2, 651 & n.3 (1982) (Stevens, J., concurring in part and concurring in the judgment); *see Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 305–06 (1997) (Souter, J., dissenting) (suggesting that a decision quieting title to real property—whether styled that way or as a declaratory judgment—would not have generous issue-preclusive effect).

117. *See SHOBEN ET AL.*, *supra* note 76, at 1021 (describing a declaratory judgment as “not coercive in the same sense as an injunction” but saying it “often will strongly influence parties” (emphasis added)); John E. Kennedy & Paul D. Schoonover, *Federal Declaratory and Injunctive Relief Under the Burger Court*, 26 SW. L.J. 282, 333–34 (1972) (seeming to endorse Justice Brennan’s doubts about “the res judicata effect of a declaratory judgment”). Other scholars have recognized *Steffel*’s doubts on this point without endorsing them. *See FALLON ET AL.*, *supra* note 25, at 1111–12; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 33 reporter’s note to cmt. b (1982).

118. *See, e.g., Currie*, *supra* note 14, at 346 n.199; Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 217; Rendleman, *supra* note 14, at 167; Shapiro, *supra* note 14, at 763–64.

effect.<sup>119</sup> And Justice Rehnquist himself abruptly changed his position a year after *Steffel*.<sup>120</sup> Indeed, over his several decades on the Court, he zigged and zagged on the effect of a declaratory judgment. At various times he said that a declaratory judgment had essentially no effect,<sup>121</sup> that it had the same effect as an injunction,<sup>122</sup> that it might not have the same effect,<sup>123</sup> and that it absolutely had to have the same effect in order to be constitutional.<sup>124</sup>

This idea of diminished issue-preclusive effect survives, though, in the argument that a declaratory judgment lacks legal effect until appeals are concluded. As noted above,<sup>125</sup> the Department of Justice unsuccessfully made this argument in the litigation over the Affordable Care Act.<sup>126</sup> In other litigation, however, the argument has met with a modicum of success. One federal appellate court has accepted it, and another has noted it in passing.<sup>127</sup> Conversely, two

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119. See RESTATEMENT (SECOND) OF JUDGMENTS § 33 reporter's note to cmt. b; see also, e.g., *United States v. Doherty*, 786 F.2d 491, 499, 502 (2d Cir. 1986) (refusing to grant a declaratory judgment but recognizing that it would have had “preclusive effect”). For a rare suggestion by a lower court that the effect was in doubt, see *Wild Cinemas of Little Rock, Inc. v. Bentley*, 499 F. Supp. 655, 664 & n.8 (E.D. Ark. 1980).

120. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

121. See *Steffel v. Thompson*, 415 U.S. 452, 480–84 (1974) (Rehnquist, J., concurring).

122. See *Doran*, 422 U.S. at 931 (noting that “[o]rdinarily . . . the practical effect of [injunctive and declaratory relief] will be virtually identical” (alterations in original) (quoting *Samuels v. Mackell*, 401 U.S. 66, 73 (1971))).

123. See *Green v. Mansour*, 474 U.S. 64, 73 & n.2 (1985) (concluding that a retrospective declaratory judgment against a state either had preclusive effect—in which case it was barred by the Eleventh Amendment—or it did not—in which case it was pointless and “unavailable for that reason”).

124. See *Calderon v. Ashmus*, 523 U.S. 740, 749 (1998) (holding that a declaratory judgment in that case would have been an advisory opinion, and therefore unconstitutional, given that it would not have had “coercive impact on the legal rights or obligations of either party”). In another case, *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), a premise in Justice Rehnquist's opinion for the Court was that if the plaintiffs could not seek an injunction they should not be able to seek a declaratory judgment, since the latter “would be fully as intrusive as the equitable actions that are barred by principles of comity.” *Id.* at 113. Bizarrely, the plaintiffs had not even sought a declaratory judgment! First the Court had to find that there was a declaratory judgment implicit in the suit for damages, and only then could it find that the implicit declaratory judgment would be equivalent to an injunction. For a critique of this aspect of *McNary*, see Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 70 & n.379 (1984).

125. See *supra* notes 2–4 and accompanying text.

126. Defendants' Motion to Clarify, *supra* note 4, at 4.

127. See *Heartland By-Prods., Inc. v. United States*, 568 F.3d 1360, 1367 n.13, 1367–68 (Fed. Cir. 2009) (endorsing the argument in dicta, and citing, among other cases, *Steffel*); *Alli v. Decker*, 650 F.3d 1007, 1015 n.13 (3d Cir. 2011) (noting the argument in passing); see also Note,

district courts have rejected it,<sup>128</sup> as has a meticulous scholar of federal courts,<sup>129</sup> and the argument is impossible to reconcile with the Supreme Court's reasoning in an early declaratory judgment case.<sup>130</sup> There is thus at most some support in the case law for the idea that the declaratory judgment has *delayed* effect, but even this support is modest.

It is hardly surprising that there has been scant willingness to reduce the issue-preclusive effect of a declaratory judgment. First, that idea squarely contradicts the text of the federal and state declaratory judgment statutes. The text of the federal statute authorizing declaratory judgments says: "Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."<sup>131</sup> This express statement dooms any effort to give the declaratory judgment less "force and effect" than other judgments.<sup>132</sup> To be doubly clear, the text employs the old language for decisions both at law (*judgment*) and equity (*decree*), indicating that a declaratory judgment does not fall short of either one.<sup>133</sup>

Not only that, the Declaratory Judgment Act even specifies that a declaratory judgment has this effect while under review,<sup>134</sup> which

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*supra* note 69, at 578 (arguing that a "state may choose not to recognize" a declaration of unconstitutionality "pending review by an appellate court").

128. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1316 & n.5 (N.D. Fla. 2011), *rev'd sub nom.* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *Pub. Citizen v. Carlin*, 2 F. Supp. 2d 18, 20 (D.D.C. 1998) (noting that an appeal "does not affect the validity of the declaratory judgment unless and until the judgment is reversed" or stayed), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999).

129. See *Currie*, *supra* note 14, at 346 n.199; *Currie*, *supra* note 36, at 15–18.

130. See *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943) (noting that if declaratory judgments were available about tax collection they might "in every practical sense operate to suspend collection of the state taxes *until the litigation is ended*" (emphasis added)).

131. 28 U.S.C. § 2201(a) (2012); see also UNIF. DECLARATORY JUDGMENTS ACT § 1 (1922), 12 U.L.A. 336 (2008) ("[S]uch declarations shall have the force and effect of a final judgment or decree . . ."). On the force and effect of a final judgment, see generally William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008).

132. 28 U.S.C. § 2201(a); see also *Bondi*, 780 F. Supp. 2d at 1316 ("A declaratory judgment establishes and declares 'the rights and other legal relations' between the parties before the court and has 'the force and effect of a final judgment.'" (quoting 28 U.S.C. § 2201(a))).

133. This provision has been part of the Declaratory Judgment Act since its passage, and similar provisions were included even in the earliest bills introduced in Congress to authorize declaratory judgments. See H.R. 5194, 68th Cong. (1924) (proposing that "such declarations shall have the force of a final decree and be reviewable as such"); S. 5304, 65th Cong. (1919) (indicating that "such declaration shall have the force of a final judgment").

134. See 28 U.S.C. § 2201(a) ("Any such declaration shall have the force and effect of a final judgment or decree and shall be *reviewable as such*." (emphasis added)); see also UNIF.

subverts any argument that it lacks legal effect until appeals are concluded. It should therefore be no surprise that from the inception of the declaratory judgment in American law it has been widely understood as having the same issue-preclusive effect as any other judgment.<sup>135</sup>

Second, the idea that the declaratory judgment has less issue-preclusive effect is incompatible with the purpose of that remedy. The declaratory judgment action is meant to resolve a certain kind of dilemma about legal consequences, what could be called a “crossroads dilemma.” Someone finds herself faced with a consequential choice between two roads, which are long and different. At least one of the roads is shrouded in legal uncertainty (and often a risk of legal liability). And one road must be chosen.<sup>136</sup>

In this dilemma there are also risks for the public, for the person at the crossroads may choose to forgo conduct that would have generated positive externalities. In the patent case the positive externality is innovation. In a case about the title to real property it is the long-run economic growth that can be fostered by clarity about

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DECLARATORY JUDGMENTS ACT § 7, 12A U.L.A. 426 (2011) (“All orders, judgments and decrees under this act may be reviewed as other orders, judgments and decrees.”).

135. Edson Sunderland, the first American scholar to write about the declaratory judgment, called it “a final and binding declaration on which the client can act with perfect security.” Sunderland, *supra* note 27, at 175. For similar statements, see 2 WALTER H. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS 1070 (2d ed. 1951); SAMUEL W. EAGER, THE DECLARATORY JUDGMENT ACTION: NOTES, CASES AND FORMS 2, 315 (1971); *Developments in the Law—Declaratory Judgments—1941–1949*, 62 HARV. L. REV. 787, 841–42 (1949); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 881 (1952); cf. *Samuels v. Mackell*, 401 U.S. 66, 73 (1971) (noting that “[o]rdinarily . . . the practical effect of” a declaratory judgment and injunction “will be virtually identical”). A declaratory judgment is also given issue-preclusive effect under the laws of the United Kingdom and Canada. See LAZAR SARNA, THE LAW OF DECLARATORY JUDGMENTS 6–7 (1978); LORD WOOLF & JEREMY WOOLF, ZAMIR & WOOLF’S THE DECLARATORY JUDGMENT 3 (4th ed. 2011).

136. For recognition that such a dilemma is central to the theory of the declaratory judgment, see LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 74, at 583–86; Bray, *supra* note 80, at 1303–06; Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1122, 1151–53 (1955); Laycock, *supra* note 56, at 641–49, 684–88; see also *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 134 n.12 (2007) (noting petitioner’s choice between paying royalties under a licensing agreement and facing “the threat of treble damages and loss of 80 percent of petitioner’s business”); *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (noting the predicament of the “hapless plaintiff” placed “between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity”); *Abbott Labs. v. Gardner*, 387 U.S. 136, 152–53 (1967) (noting the costly choice of compliance versus the risk of serious criminal and civil penalties).

property ownership.<sup>137</sup> In a case about the First Amendment, it can be benefits such as greater apprehension of truth and constraints on the abuse of government power.<sup>138</sup>

To see how the declaratory judgment can resolve this sort of dilemma, consider again the example of the potential patent infringer. An inventor is deciding whether to manufacture and distribute a product. There is uncertainty about whether the product would infringe another person's patent. If the inventor makes the wrong choice—in either direction—there will be costs, both private and public. If she manufactures an infringing product, the costs include her risk of treble damages for patent infringement<sup>139</sup> as well as the public and private costs of a patent-infringement trial.<sup>140</sup> If she decides not to manufacture a product that a court would have found to be noninfringing, then she will lose the profits that might have covered the cost of this invention and even subsidized other inventions—with the potentially costly outcome for the public of reduced innovation. She has no viable intermediate options, and unless negotiations provide an escape from the dilemma, she must choose one of the roads: she will or will not make the product.<sup>141</sup>

A declaratory judgment lets you litigate before you leap.<sup>142</sup> But it can liquidate the uncertainty *only* because it has conclusive effect in

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137. See Gary D. Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426, 459–60 (2011).

138. See Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 1 (noting various values that can be served by freedom of speech in the course of arguing that some of those values, such as truth-seeking, have been overemphasized).

139. 35 U.S.C. § 284 (2006 & Supp. V 2011).

140. Domain-specific rules can further heighten the desirability of a declaratory judgment. See, e.g., Chester S. Chuang, *Offensive Venue: The Curious Use of Declaratory Judgment To Forum Shop in Patent Litigation*, 80 GEO. WASH. L. REV. 1065, 1074–77 (2012) (identifying broader forum choices for declaratory judgment actions as a motivation for “accused infringers” to bring them).

141. Many other examples could be given in which the declaratory judgment resolves a crossroads dilemma. A potential owner of real property must make decisions on the assumption that she either is, or is not, the owner. Someone who may be a fiduciary must make decisions as if she were, or were not, the fiduciary. A corporation confronting a potentially invalid agency rule that requires retrofitting a factory either will, or will not, incur the costs of retrofitting. In these cases, as in the patent example, the plaintiff seeking the declaratory judgment would usually have been the *defendant* in a later action.

142. Even so, whether there is a crossroads dilemma is not the only consideration for whether a court should grant a declaratory judgment. Other considerations include the kind of uncertainty a declaratory judgment would resolve, see, e.g., Bray, *supra* note 80, at 1288–96, and the need to constrain opportunism, see, e.g., Henry Smith, *Preventing the Misuse of Preventive*

later litigation. If it lacked such effect it would offer no certainty to the person at the crossroads. Such a declaratory judgment would be costly and pointless.<sup>143</sup> It would not even deserve to be called a judgment.

Despite these arguments from statutory law and the theory of the declaratory judgment, one might object that a distinction should be drawn between private and public law. Perhaps certainty and stability matter for intellectual property and insurance, and so declaratory judgments in those areas should be given full issue-preclusive effect, but the same is less true for constitutional cases and pre-enforcement challenges to agency regulations. In this vein, some scholars have praised the “relative weakness” and “relative ineffectiveness of a declaratory judgment,” suggesting that these traits make it an ideal “vehicle for constitutional judgment.”<sup>144</sup> But such a distinction cannot be supported from judicial practice, for the federal courts have long given issue-preclusive effect to declaratory judgments in constitutional law and administrative law cases.<sup>145</sup> Moreover, any attempt to draw a difference between the issue-preclusive effect of

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*Adjudication: A Response to Bray*, U. CHI. L. REV. LEGAL WORKSHOP (Apr. 4, 2011), <http://legalworkshop.org/2011/04/04/smith>.

143. Pub. Serv. Comm’n of Utah v. Wycoff Co., 344 U.S. 237, 247 (1952); Elizabeth L. Hisserich, *The Collision of Declaratory Judgments and Res Judicata*, 48 UCLA L. REV. 159, 161 (2000); Shapiro, *supra* note 14, at 764; see Rendleman, *supra* note 14, at 167 (noting the administrative costs of Justice Rehnquist’s position in *Steffel* that the declaratory judgment has no binding effect in subsequent cases); cf. Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1374 (1953) (noting that “the purpose of [an] advance challenge is to make an enforcement proceeding unnecessary”).

144. Lewis Donald Asper & Sanford Jay Rosen, Comment, in *Comments on Powell v. McCormack*, 17 UCLA L. REV. 58, 71 (1969). On this point Professor Alexander Bickel was more astute: he praised many devices for judicial modesty and delay, but he never included among them the declaratory judgment—as he almost certainly would have if he had considered it a relatively weak and ineffective remedy that would allow the Court to postpone a binding decision on a constitutional question. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Yale University Press 2d ed. 1986) (1962); Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); *supra* notes 34–36.

145. E.g., *Ma Chuck Moon v. Dulles*, 237 F.2d 241, 242–43 (9th Cir. 1956). Nevertheless, even though a declaratory judgment has the same *effect* in private and public law, it does not follow that the considerations for granting one should be identical. See *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937) (“Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.”); see also *Wycoff*, 344 U.S. at 243 (urging federal courts to avoid “futile or premature interventions, especial[ly] in the field of public law”).

declaratory judgments in private and public law founders on an unanswerable objection. Many of the most momentous and controversial decisions of constitutional law over the last century have been declaratory judgments, including *Powell v. McCormack*,<sup>146</sup> *Roe v. Wade*,<sup>147</sup> *Buckley v. Valeo*,<sup>148</sup> *Bowers v. Hardwick*,<sup>149</sup> *U.S. Term Limits, Inc. v. Thornton*,<sup>150</sup> and most recently *National Federation of Independent Business v. Sebelius*.<sup>151</sup> No critic of any of these decisions has ever contended that it had less effect because it took the form of a declaratory judgment.

Finally, even if one were inclined to find some way a declaratory judgment could have less effect than other judgments, there would still be the challenge of explaining how much effect it should actually have. No one has articulated a way that the declaratory judgment could consistently have some kind of intermediate, 65 percent issue-preclusive effect.<sup>152</sup> For all these reasons, it is time to bury the doubts raised by *Steffel* about the effect of a declaratory judgment.

#### D. Underlying Mistakes of the Rationales for Mildness

These three explanations for the mildness of the declaratory judgment—that it lacks a command, a sanction, or full effect—founder on common mistakes. One mistake is methodological, one metaphysical, and one constitutional.

The methodological mistake is to ignore the circumstances in which plaintiffs actually seek, and courts actually give, declaratory judgments. Two of these rationales start with correct observations about the features of the declaratory judgment, namely that the declaratory judgment does not issue a command to the parties and does not threaten an instantaneous sanction. But the wrong inference

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146. *Powell v. McCormack*, 395 U.S. 486, 489 (1969).

147. *Roe v. Wade*, 410 U.S. 113, 166 (1973).

148. *Buckley v. Valeo*, 424 U.S. 1, 6–9 (1976).

149. *Bowers v. Hardwick*, 478 U.S. 186 (1986); *see id.* at 198 n.2 (Powell, J., concurring).

150. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 785 (1995).

151. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). Other such cases are *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 493 (1996); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990); *Epperson v. Arkansas*, 393 U.S. 97, 100 (1968); *Poe v. Ullman*, 367 U.S. 497, 500–01 (1961); and *Williamson v. Lee Optical Co.*, 348 U.S. 483, 484–85 (1955).

152. It is true that the issue-preclusive scope of a judgment will vary based on many factors, including the degree of factual specificity available at the time it is rendered. Whether a declaratory judgment is given is not one of those factors.

is then drawn.<sup>153</sup> The mistake is in thinking that the meaning and effect of the declaratory judgment can be determined solely by reference to its doctrinal features, without considering the interaction of those features with a legal and social environment.

The metaphysical mistake is to assume that there is a hierarchy of word and deed. Judges can *do* something important, such as “deal pain and death.”<sup>154</sup> Or they can *talk*, merely talk. Although there are circumstances in which this hierarchy exists, it is too simplistic. Words have their own power, and, when spoken by a court, they create or dissolve relations between people and legitimize what would otherwise be theft or violence. Of course a declaratory judgment is not purely *word* nor an injunction purely *deed*. For one could see every decision by a court, including every decision paired with an injunction, as containing something like an implicit declaratory judgment about how the law applies to specific facts.<sup>155</sup> The point is that once we put aside the simplistic notion that word is less powerful than deed, it no longer makes sense to say that the declaratory judgment is a milder remedy because it merely declares.

The last mistake is to ignore the constitutional implications of the argument. If a declaratory judgment had no definitive consequences, if it were only an exhortation to the parties<sup>156</sup> or advice to future courts,<sup>157</sup> it would be an impermissible advisory opinion.<sup>158</sup> In fact, this constitutional objection was once raised against the declaratory judgment.<sup>159</sup> In *Aetna Life Insurance Co. v. Haworth*,<sup>160</sup> the

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153. Part III offers a different interpretation of these features, arguing that they have more to do with management than strength. See *infra* Part III.A.

154. Cover, *supra* note 27, at 213. The quote is from Cover, who did not make this metaphysical mistake.

155. See Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 718 n.156 (1989) (book review); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 220 & n.93 (2004); cf. Thurman W. Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913, 928 (1934) (describing injunctions as “declaratory judgments in disguise”).

156. See SCHUCK, *supra* note 9, at 15 (concluding that declaratory judgments “merely pronounce[] particular practices or conditions to be illegal, leaving defendants free to respond as they see fit”).

157. See *Steffel v. Thompson*, 415 U.S. 452, 482 (1974) (Rehnquist, J., concurring).

158. See Currie, *supra* note 14, at 346 n.199; Rendleman, *supra* note 14, at 168; Shapiro, *supra* note 14, at 764 n.28; see also ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 837 (5th ed. 2007) (concluding that on the view of declaratory judgments given by Justice Rehnquist in *Steffel*, “it is hard to see how they avoid being nonjusticiable advisory opinions”).

159. For secondary sources noting this constitutional objection, see Andrew Bradt, “*Much To Gain and Nothing To Lose*”: *Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 ARK. L. REV. 767, 774–81 (2006); Donald L. Doernberg & Michael B.

Supreme Court rejected the objection on the grounds that the requested declaratory judgment would be “an adjudication of present right”<sup>161</sup> that was “final and conclusive as to the matters thus determined.”<sup>162</sup> The constitutional status of the Declaratory Judgment Act was settled precisely because a prospective declaratory judgment is a real decision that binds and coerces like other judgments.<sup>163</sup> To pull at the thread of that effect would unravel this constitutional settlement and create new and wholly unnecessary doubts about the constitutionality of the declaratory judgment.

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Thus the rationales for the mildness thesis are not persuasive. Even apart from its historical failings, the account given in *Steffel* is inadequate as a present-day description of how the declaratory judgment works and should work. There is no reason to retain the mildness thesis.

The puzzle, then, is how it came to be so widely accepted, and why it has persisted so long. No one answer is entirely satisfactory, but several facts are relevant. One is the Court’s confidence in asserting the mildness thesis. Another is the early enthusiasm that scholars showed for *Steffel* as a way to limit the reach of the abstention principles in *Younger v. Harris*.<sup>164</sup> Still another is that *Steffel* presented its legislative history as beyond doubt. Justice Brennan said he was drawing out only the “highlights” of the federal statute’s legislative history, and that the history had previously been

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Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn’t Looking*, 36 UCLA L. REV. 529, 554–61, 566–69 (1989). Justice Black would later raise the same objection in *South Carolina v. Katzenbach*, 383 U.S. 301, 357–58 (1966) (Black, J., concurring and dissenting) (arguing that a declaratory judgment under section 5 of the Voting Rights Act would be an unconstitutional advisory opinion). *But see* Alexander M. Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 92 (arguing that the *Katzenbach* majority’s response to Justice Black “is probably right, since . . . all that the section effects is to reverse the parties”).

160. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

161. *Id.* at 242.

162. *Id.* at 243.

163. Note that *retrospective* declaratory judgments raise different and not fully resolved questions. *Cf.* Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273, 313–14 (1980) (noting that advisory-opinion concerns may be heightened for retrospective decisions). Part of the complexity is that a different normative theory is needed for retrospective declaratory judgments: when a court gives a declaratory judgment about a road already taken, it might not be resolving a crossroads dilemma for this plaintiff.

164. On *Younger*, see *supra* note 25.

“traced in full detail”<sup>165</sup> in his earlier separate opinion in another case, *Perez v. Ledesma*.<sup>166</sup> That description lent *Steffel*’s history more weight than it deserved for readers who did not follow the citation—*Steffel* had already quoted the relevant passages from *Perez*.<sup>167</sup>

Yet another factor is that *Steffel*’s preclusive-effect rationale has had relatively little influence. If lower courts had actually followed the Supreme Court’s lead on that point, it would have had such a destabilizing effect, and would have conflicted so strongly with the Declaratory Judgment Act, that closer examination of *Steffel* would have been inevitable. As it is, the courts and commentators have tended to rely on the first two rationales for the mildness thesis (that is, the lack of a command and a sanction)—rationales that are still mistaken, but less harmful.

A final factor explaining the reception of the mildness thesis is the fragmentation of scholarship on remedies. Some scholars write about remedies in constitutional cases, and other scholars write about them in intellectual-property cases or contract law. It is easier to detect the weakness of the mildness thesis when the declaratory judgment is considered across a wide range of substantive areas.

### III. RETHINKING THE DIFFERENCES BETWEEN DECLARATORY JUDGMENTS AND INJUNCTIONS

If the declaratory judgment and the injunction should not be distinguished in terms of strength, how should they be distinguished? This Part offers an alternative. As noted above, in many cases in which a plaintiff seeks prospective relief, a declaratory judgment and an injunction are interchangeable. Both resolve uncertainty about the law, and both bind the losing party. For an inventor who fears a patent infringement suit, or for an antiwar protestor who fears prosecution, it will ordinarily make no difference at all whether the court gives the protection of a declaratory judgment or an injunction.

But, despite these similarities, the two remedies are not perfectly interchangeable. In particular, the injunction has a number of features that make it better suited, all else being equal, to management of the parties.<sup>168</sup> The declaratory judgment lacks these

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165. *Steffel v. Thompson*, 415 U.S. 452, 466 (1974).

166. *Perez v. Ledesma*, 401 U.S. 82, 111–15 (1971).

167. On Justice Brennan’s opinion in *Perez*, see *supra* note 19.

168. Many of the managerial features discussed in this Part are not unique to the injunction but are instead characteristic of equitable remedies.

features. Yet it is available at an earlier stage in some disputes than the injunction is. These dimensions of difference—management and timing—more accurately distinguish the declaratory judgment and the injunction than the dimension of strength can.

A. *The Dimension of Management*

The central difference between the declaratory judgment and the injunction in contemporary American law is *management*, in the sense of continuing judicial direction and oversight of the parties. The injunction enables a high degree of management. The declaratory judgment does not. As a result, the decision to grant one or the other of these remedies should chiefly be a decision about the degree of direction and oversight that the relationship of the parties requires of the court.

On this dimension, it is important to distinguish between two analytical categories. The first category is the *situations* in which the injunction and the declaratory judgment are used. The second is the *features* of the injunction and the declaratory judgment that affect each remedy's potential for management. As will be seen, the injunction is used in situations in which continuing direction and oversight of the parties are needed, and it has features that are conducive to this direction and oversight. In contrast, the declaratory judgment is used primarily in situations in which a high degree of management of the parties would be unnecessary or impracticable, and it pervasively lacks features that such management would require.

To recognize the interaction of both analytical categories is to avoid a mistake implicit in the mildness thesis: the mistake of thinking of a remedy entirely in the abstract, apart from how it is used. Rather, the meaning of a remedy is constructed through the interaction of its features with the situations in which it is used within a legal community.

1. *The Spectrum of Need for Judicial Management.* In federal court, declaratory judgment actions are especially frequent for disputes about the validity of patents or other forms of intellectual property, for suits by insurers to establish whether they have a duty to defend an insured, and for pre-enforcement challenges to legislative

and executive action.<sup>169</sup> In state court, declaratory judgment actions are commonly used to resolve ownership of property, to clarify the construction of contracts, to determine legal status, or to challenge administrative action.<sup>170</sup> In all of these situations, what the court is being asked to solve is a problem of legal uncertainty. If the court clarifies the application of the law with a declaratory judgment, then that judgment will provide the only management the parties are likely to need going forward because they will know how to act. In many of these cases, any further management would also be infeasible. For instance, when an insurer sues to determine whether it has a duty to defend, surely the judge does not want to supervise the insurer, and to tell it either how many depositions would be necessary to fulfill that duty or when it should settle the case.<sup>171</sup>

In contrast, the situations in which courts issue injunctions are remarkably diverse. The absence of any typical scenarios is related to equity's traditional role in deciding exceptional cases, including cases for which it is difficult to lay down rules *ex ante*.<sup>172</sup> It is also due to the pervasiveness of the injunction, because it is the most widely used nonmonetary remedy in contemporary American law. Injunctions come in many varieties. They can prevent future violations or repair past ones. They can take the form of a simple flat prohibition; a positive command; a long statute-like array of prohibitions and commands; or a court's effective takeover of operational control of an institution, such as a prison, school, or hospital. Even though there are no paradigmatic scenarios in all of this variety, whenever a high degree of management of the parties is needed the injunction is the remedy of choice.

2. *The Managerial Features That the Injunction Has and the Declaratory Judgment Lacks.* The declaratory judgment and the injunction also differ in the extent to which they have features that

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169. See *supra* note 81 and accompanying text.

170. See *supra* note 89 and accompanying text.

171. Cf. *Tennessee v. Herrington*, 626 F. Supp. 1345, 1361 (M.D. Tenn. 1986) (granting a declaratory judgment requiring the Secretary of the Energy Department to negotiate with the state of Tennessee, but declining to issue an injunction, thereby avoiding having to spell out the form and content of the negotiation).

172. A classic statement of this point is Lord Ellesmere's: "The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances." *The Earl of Oxford's Case*, (1615) 21 Eng. Rep. 485 (Ch.) 486.

are useful for management.<sup>173</sup> In particular, the injunction has many features that allow the court to observe and respond to violations.

*a. Observing Violations.* An injunction must always contain specific prohibitions or requirements. In federal court this feature is codified in the Federal Rules of Civil Procedure: “Every order granting an injunction . . . must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.”<sup>174</sup> The specificity requirement makes it easier for a court to observe whether there has been a violation because the terms of the injunction should tell the court exactly what to look for.<sup>175</sup>

Moreover, it will be easier for the court to learn about noncompliance with an injunction because information can flow to the court from a variety of sources. Contempt proceedings can be initiated by the court itself, by the winning party, or by a prosecutor.<sup>176</sup> And even beyond these there are potential sources of information and investigation, for the court may appoint monitors who can oversee the enjoined party or receivers to take charge of property. The court can even turn the losing party into such a source by

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173. On the broader phenomenon of judicial management, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298–1302 (1976); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 481–94 (1980); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 386–414 (1982).

174. FED. R. CIV. P. 65(d)(1). For evidence that these requirements are not always complied with, however, see Golden, *supra* note 16, at 1435–49.

175. It may also be that observing violations is slightly easier because of the habit of thinking of an injunction as having *in personam* effect, because the court would need to review the compliance only of the persons identified in the decree and those acting in concert with them. Still, this point should not be given much weight, for over the last several centuries the significance of this *in personam* quality has been unmistakably eroded. See D.E.C. Yale, *Introduction to LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE' AND 'PROLEGOMENA OF CHANCERY AND EQUITY' 17–18* (D.E.C. Yale ed., 1965) (“Like many other generalisations, the maxim that Equity acts *in personam* has been modified until now, instead of being as it once was a principle of virtually absolute application, it provides rather an initial viewpoint than a comprehensive statement of principle.”); see also LAYCOCK, *MODERN AMERICAN REMEDIES*, *supra* note 74, at 818–20 (analyzing various meanings of the maxim that equity acts *in personam*). See generally Walter Wheeler Cook, *The Powers of Courts of Equity* (pts. 1–3), 15 COLUM. L. REV. 37, 106, 228 (1915) (demonstrating that American law long ago abandoned the idea that equitable decrees lack issue-preclusive effect and operate only on the defendant’s body).

176. Useful overviews of contempt proceedings are found in LAYCOCK, *MODERN AMERICAN REMEDIES*, *supra* note 74, at 766–68; and RENDLEMAN, *supra* note 111, at 629.

imposing on it various recordkeeping and reporting requirements, including a duty to report to the court any violations that occur.<sup>177</sup>

In contrast, when a court grants a declaratory judgment it has none of these devices that make it easier to observe violations. There is no specificity requirement.<sup>178</sup> There is no broadened flow of information to the court, for there is only one obvious way for a court to issue further relief—the winning party must come back to court under a statute that permits subsequent relief after a declaratory judgment.<sup>179</sup> Thus, all else being equal, with an injunction it is easier for a court to take the first step toward effectively managing the parties: observing violations.

*b. Responding to Violations.* The injunction also has features that make it easier for the court to respond after a violation has occurred. One, of course, is the contempt power. Supporters of the mildness thesis have rightly pointed to the contempt power as a difference between the injunction and the declaratory judgment. But, as argued above, in the cases in which a declaratory judgment is actually given, the absence of the contempt power does not make it a milder remedy.<sup>180</sup> Rather, it makes it a less managerial one. When an injunction has been issued, what the threat of contempt gives the court is leverage to control the parties as events unfold—the sort of leverage that one would expect from penalties that are highly discretionary and tailored to the circumstances of a “changing future.”<sup>181</sup> Moreover, the availability of contempt sanctions means

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177. See, e.g., *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 823–24 (1994) (noting that the trial court “ordered the union to take all steps necessary to ensure compliance with the injunction, to place supervisors at picket sites, and to report all violations to the court”).

178. Compare FED. R. CIV. P. 57 (authorizing a declaratory judgment and containing no specificity requirement), with *id.* 65(d)(2) (requiring specificity for injunctions).

179. See, e.g., 28 U.S.C. § 2202 (2012) (allowing a court to grant “[f]urther necessary or proper relief based on a declaratory judgment”); ME. REV. STAT. ANN. tit. 14, § 5960 (2003) (“Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.”); cf. *Ladd v. Thomas*, 14 F. Supp. 2d 222, 225 (D. Conn. 1998) (noting the court’s confidence that if its declaratory judgment were violated “counsel’s demonstrated effective advocacy and tenaciousness will no doubt attract the Court’s prompt attention”). A court that had previously granted a declaratory judgment might also issue an injunction to effectuate it under the All Writs Act, 28 U.S.C. § 1651(a) (2012). See *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 759 F. Supp. 1216, 1228 (N.D. Tex. 1990), *aff’d in part, rev’d in part*, 960 F.2d 1286 (5th Cir. 1992).

180. See *supra* Part II.B.

181. The phrase is from Rendleman, who describes injunctions as “guid[ing] conduct in a changing future.” See Rendleman, *supra* note 14, at 163.

that the court has committed itself to manage the parties' compliance with the decree<sup>182</sup> and has put its own prestige on the line to back up this commitment.<sup>183</sup> Although a contempt sanction can be a punitive means, it is for a managerial end.<sup>184</sup> This can be seen most clearly when a court orders a sanction that is conditioned upon what the defendant chooses to do next.<sup>185</sup>

Furthermore, the injunction has features that enable a court to adapt to changing circumstances. Indeed, the existence of an injunction may require a court to engage in such adaptation. The outer-limit example is the structural injunction, whereby the court takes over the operation of a prison, school, or hospital.<sup>186</sup> There it is obvious that the court, or a special master it has appointed, has power to respond to new facts as it structures and regulates the relationship of the parties.

Without going as far as a structural injunction, though, it is still much easier for a court issuing an injunction to respond to changing circumstances—because that injunction can be modified or dissolved.

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182. See Timothy Stoltzfus Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1101 (1986) (noting that the injunction “projects the power of the court into the future, promising that violation of the terms of the injunction will elicit a punitive or coercive response from the court”).

183. See Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 356–58 (1981); James M. Hirschhorn, Book Review, 22 SETON HALL L. REV. 297, 306 (1991); see also Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 394 (1983) (“[U]nmanageable injunctions will almost certainly dissipate the court’s energy and diminish its prestige.”). As Rendleman also notes, sometimes contempt provides future process but not future punishment. See Rendleman, *supra* note 14, at 169 (noting that courts “may enter a judgment of contempt without sanctions, observing that there is no sufficient reason to prosecute further”).

184. See Rendleman, *supra* note 14, at 169 (“Courts employ contempt to attain compliance, not to display retribution.”).

185. See 1 DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION* 197–98 (2d ed. 1993) (giving the example of a court “impos[ing] a suspended sentence of imprisonment, with incarceration to take place only if the defendant again violates the court’s order”).

186. On structural injunctions, the still-canonical source is FISS, *supra* note 8. For entry points to the extensive literature on the subject, see generally Eisenberg & Yeazell, *supra* note 173; William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Robert D. Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1 (1978); John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387 (2007); and Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978). The Supreme Court’s most recent major foray into structural injunctions is *Brown v. Plata*, 131 S. Ct. 1910 (2011), which upheld an injunction regulating the overcrowding in California state prisons. *Id.* at 1947. For a description of that case and its legal and political context, see generally Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165 (2013).

As the Supreme Court has said, “A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.”<sup>187</sup> No such means of adaptation are available for the declaratory judgment<sup>188</sup>—that is, unless the court subsequently issues an injunction.

The effect of this power of modification and dissolution is important. A court granting prospective relief, whether an injunction or a declaratory judgment, cannot know what the future will hold.<sup>189</sup> But when giving an injunction, the possibility of modification allows the court a fuller range of drafting choices. The injunction-issuing court can choose to be either less specific or more specific than would otherwise be necessary: less specific because the court retains a pencil to later add more terms, or more specific because the court retains an eraser.<sup>190</sup>

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187. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *see also* *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 298 (1941) (describing a permanent injunction as “‘permanent’ only for the temporary period for which it may last”); *Ladner v. Siegel*, 148 A. 699, 703 (Pa. 1930) (“The decree is an ambulatory one, and marches along with time . . . .”); Jost, *supra* note 182, at 1105 (noting “the inherent power of a court sitting in equity to modify its decrees prospectively to achieve equity”); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 *YALE L.J.* 522, 538 (2012) (describing specific remedies, such as injunctions and specific performance, as “often requir[ing] continuing supervision and modification as circumstances change”). Changes in either law or fact can justify a court’s modification of an injunction. *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

188. *Cf. Developments in the Law—Injunctions*, 78 *HARV. L. REV.* 994, 1085 (1965) (noting that occasionally enjoined parties have tried through declaratory judgment actions to clarify an injunction, but advising against this practice because, among other reasons, it is not clear that a declaratory judgment could be modified in the same way as the underlying injunction). There is authority for the proposition that a change in circumstances can be considered when giving a declaratory judgment preclusive effect in *other* cases, *see* *RESTATEMENT (SECOND) OF JUDGMENTS* § 33 cmt. e (1982), though it is unclear how often this occurs.

189. Jost, *supra* note 182, at 1101–02.

190. *See* 1 *DOBBS*, *supra* note 185, at 221 (“The power to modify later is a proleptic consideration: the judge writes the initial decree with knowledge that if it is too broadly formulated, it can be modified if it proves to be too demanding.”). A counterexample of strangely detailed requirements in a declaratory judgment is *Jones v. Diamond*, 594 F.2d 997 (5th Cir. 1979), *aff’d in part, rev’d in part on reh’g en banc*, 636 F.2d 1364 (5th Cir. 1981), *overruled on other grounds by* *Int’l Woodworkers of Am. v. Champion Int’l Corp.*, 790 F.2d 1174 (5th Cir. 1986). In that case the Fifth Circuit included the following instruction to the district court:

A declaratory judgment will be entered requiring that if loss of visitation rights is to continue as a sanction for a violation of jail rules, the jailer, as a matter of minimal due process, shall inform the inmate of the fact that rules violations carry such a penalty, inform him of the suspension, advise him of the reason for it, and give him an opportunity informally to show good cause, if any he has, why he should not be subjected to the sanction. These procedures shall be made known to the inmates.

This ability to add or erase is especially important for mandatory injunctions, which require conduct—in contrast to prohibitory injunctions, which forbid conduct. When issuing a mandatory injunction, a court may need to spell out not only what must be done but also how it must be done, and the court may then need to modify these additional instructions as events unfold.<sup>191</sup> Whether this ability matters in a particular case will of course depend on how the injunction is drafted, and in some circumstances the distinction between mandatory and prohibitory injunctions is one of characterization.<sup>192</sup>

Furthermore, in the shadow of modification, it makes more sense that courts are able to issue injunctions that are prophylactic, in the sense of ordering “additional precautions against future harm.”<sup>193</sup> An example that Professor Tracy Thomas gives comes from Title VII of the Civil Rights Act of 1964<sup>194</sup> and hostile-work-environment sexual harassment. When a court finds a defendant company liable in such a suit, it might choose to order it “to enact anti-harassment policies,

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*Id.* at 1030. One judge partially dissented, noting the oddity of the court’s use of declaratory judgment to give what would conventionally be an injunction. *See id.* at 1031 (Rubin, J., concurring in part and dissenting in part). When the case was reheard en banc, that judge wrote the opinion and the remedy given was an injunction. *Jones v. Diamond*, 636 F.2d 1364, 1367 (5th Cir. 1981) (en banc), *overruled on other grounds by Int’l Woodworkers of Am.*, 790 F.2d 1174.

191. *Cf.* 1 DOBBS, *supra* note 185, at 224 (explaining that courts may be less likely to grant mandatory injunctions because such injunctions may be “more difficult to supervise and enforce”); SCHUCK, *supra* note 9, at 15–16 (distinguishing the institutional demands of prohibitory and mandatory injunctions, because, with the former, the court will need to know and say less about how government “functions should be discharged in the future”); EDWARD YORIO & STEVE THEL, *CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS* § 1.2.2 (2d ed. Supp. 2013) (distinguishing mandatory and prohibitory injunctions with respect to the difficulty of judicial supervision).

192. *See* HENRY L. MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* 32 (2d ed. 1948) (giving the famous example of Lord Eldon’s granting an effectively mandatory injunction in prohibitory form); *cf.* LAYCOCK, *MODERN AMERICAN REMEDIES*, *supra* note 74, at 595 (expressing skepticism about the distinction between mandatory and prohibitory injunctions).

193. *See* Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 *BUFF. L. REV.* 301, 314 (2004) [hereinafter Thomas, *The Prophylactic Remedy*]; *see also* Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 *REV. LITIG.* 99, 100 (2007) (arguing for the legitimacy of prophylactic injunctions). There is also extensive literature on prophylactic rules in constitutional law, though it is only incidentally related to the remedies concept discussed here.

194. Civil Rights Act of 1964 tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. V 2011).

train employees on the meaning and law of sexual harassment, or adopt investigative and complaint procedures.”<sup>195</sup>

Prophylactic requirements that overstate and overprescribe (relative to the underlying legal obligation) are possible with the injunction precisely because the court may undo the prophylaxis in time. How soon the court should undo this prophylaxis is often highly controversial.<sup>196</sup> Yet, at whatever time it occurs, this removal of the prophylactic rule is itself a managerial act, a recognition that the court no longer thinks the same degree of management is needed. The declaratory judgment lacks these means of temporary overstatement.

Alternatively, the injunction can understate and underprescribe. Its terms can be a compromise, a splitting of the difference between the arguments of the two parties. As one treatise on equity puts it:

In balancing the equities, the court is not limited to a determination of whether it will grant or refuse the relief in its entirety, but it may adapt its relief so as to preserve the interests of the parties as far as possible; [or] it may provide for time to adjust to the situation [and] may permit experiments to determine the effect of changes made . . . .<sup>197</sup>

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195. Thomas, *The Prophylactic Remedy*, *supra* note 193, at 315. For patent examples, see Golden, *supra* note 16, at 1426–33; *see also id.* at 1428–29 n.126 (collecting sources on prophylactic injunctions).

196. This point can be seen, for example, in disagreements over the termination of structural injunctions. *Compare, e.g.*, *Horne v. Flores*, 557 U.S. 433, 456–58 (2009), *with id.* 474–75 (Breyer, J., dissenting), and *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250–51 (1991), *with id.* 251–52 (Marshall, J., dissenting). On the disagreement in the case law about whether to use a more exacting or a more lenient test for modification, *see, for example*, David I. Levine, *The Modification of Equitable Decrees in Institutional Reform Litigation: A Commentary on the Supreme Court's Adoption of the Second Circuit's Flexible Test*, 58 BROOK. L. REV. 1239, 1241 (1993).

197. MCCLINTOCK, *supra* note 192, at 391; *see also* *Boomer v. Atl. Cement Co.*, 26 N.Y.2d 219, 231 & n.7 (1970) (Jasen, J., dissenting) (arguing for an injunction that would take effect in eighteen months if the nuisance had not been abated); LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 74, at 496–98 (discussing the enforcement of new rules of law, including cases where courts give injunctions that unfold in stages or that apply only to future violations); Chayes, *supra* note 173, at 1293 (“The comparative evaluation of the competing interests of plaintiff and defendant required by the remedial approach of equity often discloses alternatives to a winner-takes-all decision.”); Golden, *supra* note 16, at 1461 & n.261 (collecting cases in which courts “delay[ed] the full effectiveness of injunctions to avoid some of the special disruption or other hardship that an immediately effective order might cause”); Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 74 (2007) (“The judge’s decisions in drafting an injunction are contextual and discretionary: these are the details of what to forbid or require and the timing of whether or not to give the defendant a period to adjust and, if so, how long.”). Two examples of cases discussing the delay of injunctions for a year, perhaps to encourage bargaining, are *Whalen v.*

With the declaratory judgment there is still flexibility in drafting, which does give a court room to instruct or warn the parties.<sup>198</sup> Yet it remains true that there are fewer possibilities for compromise and experimentation when a court gives a declaratory judgment.<sup>199</sup> Similarly, there can be consent decrees and time-limited injunctions,<sup>200</sup> but a consent declaratory judgment or a time-limited declaratory judgment would be highly irregular.

A related point is that the specificity of the injunction, and its usefulness in overprescribing or underprescribing, makes it well-suited to perform one of the traditional roles of equitable remedies: not merely specifying what the parties' legal rights are, but also constraining the exercise of those rights, sometimes forbidding or constraining their use, and sometimes even ordering their relinquishment.<sup>201</sup>

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These two critical aspects of managing the parties—observation and response—are supported to a much greater degree by the features of the injunction than by those of the declaratory judgment. An injunction is a more flexible “judicial ordering of a relationship in conflict.”<sup>202</sup> The features described here allow the injunction to

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*Union Bag & Paper Co.*, 101 N.E. 805, 806 (N.Y. 1913), and *Pile v. Pedrick*, 31 A. 647, 647 (Pa. 1895).

198. See, e.g., *PSA, LLC v. Gonzales*, 461 F. Supp. 2d 351, 354–59 (E.D. Pa. 2006) (declining to give a declaratory judgment but nevertheless offering broad hints about what the declaratory judgment plaintiff could do to avoid prosecution—hints that were likely meant not only for the declaratory judgment plaintiff but also for prosecutors).

199. See *Developments in the Law—Declaratory Judgments—1941–1949*, *supra* note 135, at 792 n.41 (“[T]he court may rule for the plaintiff but assess damages leniently or attach conditions to an injunction, [but] declaratory relief, which must be rendered in favor of one of the parties, does not lend itself to such compromise.”).

200. See, e.g., *Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1465 (M.D.N.C. 1996) (injunction with one- and two-year provisions); First Wis. Mortg. Trust, Litigation Release No. 6519, 5 SEC Docket 178, 179 (Sept. 16, 1974) (twenty-five-year injunction, with the possibility of amendment after seven years upon a showing of compliance). Indeed, in the 1807 statute that authorized federal district courts to grant injunctions, it was specified that these injunctions would persist only until the start of the next circuit court's term. Act of Feb. 13, 1807, ch. 13, 2 Stat. 418. More recent statutes have also specified termination points for injunctions they cover. See 18 U.S.C. § 3626(b)(1)(A) (2012).

201. See Harlan F. Stone, Book Review, 18 COLUM. L. REV. 97, 98 (1918) (describing this characteristic of equity and noting its enduring value).

202. Jost, *supra* note 182, at 1101. An analogy may be made to contracts, which can be one-time exchanges of money for goods or much more complex devices for structuring and regulating a business relationship. For discussions of contract structuring and costs, see

perform this function, ordering and reordering the relationship of the parties until compliance is achieved. In contrast, the declaratory judgment is a less managerial remedy.<sup>203</sup> It lacks the features needed for robust management, and it is primarily used in situations in which continuing direction and oversight of the parties would be unnecessary.

### B. *The Dimension of Timing*

The declaratory judgment and the injunction also occupy different (though overlapping) spaces along another dimension: timing. Ordinarily in anticipatory litigation a declaratory judgment and an injunction are available simultaneously.<sup>204</sup> But at the very beginning of a dispute, it will sometimes be possible to obtain a declaratory judgment but not (yet) an injunction.<sup>205</sup> In this way it could be said that sometimes the declaratory judgment is the earlier remedy and the injunction is the later remedy.

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generally, for example, Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010); Alan Schwartz & Joel Watson, *The Law and Economics of Costly Contracting*, 20 J.L. ECON. & ORG. 2 (2004). By analogy, damages and declaratory judgments are more like one-time exchanges, and injunctions are more like complex contracts that regulate future activity. The analogy could easily be overstated, though, because the difference between these remedies is a matter of degree and is dependent on drafting.

203. A rare case that explicitly makes this point is *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010). The Seventh Circuit, per Judge Easterbrook, affirmed a district court's grant of a declaratory judgment and denial of an injunction because the latter "would be considerably more elaborate than the terms of a declaratory judgment" and "[t]he district judge was not looking for an opportunity to take over management of the University's activity-fee program." *Id.* at 782; *see also* *Superior Helicopter LLC v. United States*, 78 Fed. Cl. 181, 194 n.26, 200 (2007) (granting a declaratory judgment but not an injunction where the court considered the only difference to be that the latter would require it to entertain future submissions from the Forest Service); *Wild Cinemas of Little Rock, Inc. v. Bentley*, 499 F. Supp. 655, 663–64 (E.D. Ark. 1980) (granting a declaratory judgment but not an injunction "because of the potential extreme difficulty in supervising" the latter); *cf.* *Morrow v. Harwell*, 768 F.2d 619, 628–29 (5th Cir. 1985) (granting a declaratory judgment but not an injunction because the conduct of county officials while the suit was pending had "demonstrated that superintending injunctive relief was not necessary").

204. Here and throughout this Article, it is assumed that other prerequisites for both remedies are met, such as the absence of equitable defenses for the injunction.

205. Note that the comparison in the text is between the declaratory judgment and the permanent injunction, rather than between the declaratory judgment and the preliminary injunction. *See supra* note 17. *Preliminary* injunctions are given before a decision on the merits, an even earlier point than a declaratory judgment. *See, e.g.,* *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (noting that if preliminary relief is needed before a declaratory judgment, it must be a preliminary injunction, for there are no preliminary declarations).

Some scholars have recognized the possibility of a temporal distinction between these two remedies. Professor David Currie called the declaratory judgment “a substitute for the injunction” that “may possibly be available before there is cause for traditional relief.”<sup>206</sup> Professor Doug Rendleman describes some plaintiffs seeking declaratory judgments as “people embroiled in an actual controversy which has not developed to the stage at which someone could seek damages or an injunction.”<sup>207</sup> Some courts, too, have suggested that the declaratory judgment can be available sooner than an injunction. For example, in one of his final opinions, Judge Friendly surveyed various statements of the purpose of the federal Declaratory Judgment Act and noted that the statute allows adjudication of rights “in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy.”<sup>208</sup>

Yet there is also contrary authority. Professor Doug Laycock questions the “tradition that the uncertainty and actual controversy necessary to sustain a declaratory judgment may be a bit less than the propensity and irreparable injury necessary to sustain an injunction,” because “[n]o one can clearly articulate the difference, and it is hard to find or imagine examples where a declaratory judgment should be granted but an injunction should not be.”<sup>209</sup> Courts have also

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206. Currie, *supra* note 36, at 19.

207. Rendleman, *supra* note 14, at 161. For further recognition of the possibility that a declaratory judgment may be obtained sooner than an injunction, see DAVID I. LEVINE, DAVID J. JUNG & TRACY A. THOMAS, REMEDIES: PUBLIC AND PRIVATE 415 (5th ed. 2009); P. MEAGHER, W.M.C. GUMMOW & J.R.F. LEHANE, EQUITY: DOCTRINES AND REMEDIES 492 (3d ed. 1992); Thomas E. Baker, Essay, *Thinking About Federal Jurisdiction—Of Serpents and Swallows*, 17 ST. MARY'S L.J. 239, 262 (1986); Doernberg & Mushlin, *supra* note 159, at 553; S. Gene Fendler, Comment, *Federal Injunctive Relief Against State Court Criminal Proceedings: From Young to Younger*, 32 LA. L. REV. 601, 620 (1972); Robert Wyness Millar, *Notabilia of American Civil Procedure 1887–1937*, 50 HARV. L. REV. 1017, 1056 (1937); *cf. de Larena, supra* note 83, at 962 (observing that a declaratory judgment “is most useful when sought early in the process, before either party suffers grave or irreparable damage”).

208. *United States v. Doherty*, 786 F.2d 491, 498 (2d Cir. 1986) (quoting CHARLES WRIGHT, THE LAW OF FEDERAL COURTS § 100, at 671 (4th ed. 1983)); *see also* *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 749 (7th Cir. 1987) (describing two fact situations in which declaratory judgments are available, the latter being cases where “the controversy is real and immediate” but “it has not ripened to . . . a point” where either party may sue for damages or an injunction); *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 943 (9th Cir. 1981) (“In effect, [a declaratory judgment action] brings to the present a litigable controversy, which otherwise might only be tried in the future.”).

209. LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 74, at 586; *cf. Fiss, supra* note 8, at 1122 (commenting that the distinction between the declaratory judgment and the

suggested that there is no distinction in timing between the declaratory judgment and the injunction.<sup>210</sup> Moreover, when the Supreme Court discusses ripeness requirements it often does so without drawing any distinction between declaratory and injunctive relief.<sup>211</sup>

Is there a difference, and if so what is it and why is it so hard to articulate? The answer lies in the interaction of different types of ripeness. When a plaintiff seeks a declaratory judgment, she must show that her case meets the ripeness requirements implicit in Article III. But there is no additional ripeness requirement that is specific to the declaratory judgment.<sup>212</sup> By contrast, when a plaintiff seeks an injunction there is not only the requirement of constitutional ripeness but also the requirement of “equitable ripeness,” which usually means that there must be imminent harm.<sup>213</sup> Speaking a little loosely, one could say that the injunction is a fruit that sometimes ripens more slowly than the declaratory judgment.

Yet it is hard to define the stage in the lifecycle of a dispute when only the declaratory judgment is available. In many disputes this stage will never even exist. When it does exist, it is tenuous and transitory. For instance, in the patent scenario either party can choose to end it: the inventor, by manufacturing and distributing the product, thus prompting a suit for damages by the patent holder; or the patentholder, by explicitly threatening to immediately sue for infringement, thus prompting a suit for an injunction by the

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injunction does “not seem relevant to the imminency requirement” traditionally associated with injunctive relief).

210. See *Hodgers–Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999) (describing the Supreme Court as having “translat[ed] the language of injunctions and imminency into the language of declaratory judgments and ripeness”); *Alcan Aluminium Ltd. v. Dep’t of Revenue*, 724 F.2d 1294, 1299 (7th Cir. 1984) (“The prudential considerations discussed above that require a stringent standard of ripeness for declaratory relief are equally applicable to a suit for an injunction.”).

211. See, e.g., *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1153 (2013); *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 296–98 (1979); *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 123–24 (1974); *Abbott Labs. v. Gardner*, 387 U.S. 136, 155–56 (1967).

212. The Declaratory Judgment Act authorizes a declaratory judgment in a “case of actual controversy,” 28 U.S.C. § 2201(a) (2012), a phrase which has been interpreted to be coextensive with the judicial power under Article III. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (1937).

213. See Laura E. Little, *It’s About Time: Unravelling Standing and Equitable Ripeness*, 41 *BUFF. L. REV.* 933, 977–90 (1993); Shreve, *supra* note 183, at 390–92; see also *RENDLEMAN*, *supra* note 111, at 229–50 (discussing the imminence requirement). *But cf.* *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530 (1925) (resolving a constitutional challenge to a state statute more than a year before that statute would go into effect).

inventor.<sup>214</sup> Furthermore, the boundaries of this stage are fuzzy. The beginning of this stage is marked out by the strictures of Article III, which are famously incapable of precise, rule-like expression.<sup>215</sup> Its end is marked by the availability of the injunction, which is an inquiry suffused with discretion.<sup>216</sup>

Nevertheless, though this stage is bounded by imprecise and discretionary lines, there are cases in which ripeness considerations favor a declaratory judgment.<sup>217</sup> Indeed, one recent Supreme Court case seems to have insisted that this stage be preserved. In *MedImmune, Inc. v. Genentech, Inc.*, the Court rejected a Federal Circuit test that made it impossible as a practical matter for a plaintiff to get a declaratory judgment before an injunction would also be

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214. As noted above, the Federal Circuit still requires some affirmative act by the patent-holder before it will allow the potential infringer to bring even a declaratory judgment action. *See supra* note 82.

215. *See* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 155 (1987) (“The demands of [Article III ripeness] vary greatly according to the dictates and posture of the claim on the merits.”); *see also* Pub. Serv. Comm’n of Utah v. Wycoff Co., 344 U.S. 237 (1952) (describing *Haworth* as treating the “metes and bounds” of the availability of the declaratory judgment as “elastic, inconstant and imprecise”); N.H. Hemp Council, Inc. v. Marshall, 203 F.3d 1, 4–5 (1st Cir. 2000) (Boudin, J.) (describing “Article III standing [a]s largely—albeit not entirely—a practical jurisprudence” and recognizing that in a pre-enforcement challenge “just how clear the threat of prosecution needs to be turns very much on the facts of the case and on a sliding-scale judgment that is very hard to calibrate” (citations omitted)).

216. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (“The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court . . .”).

217. *See, e.g.*, Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n, 461 U.S. 190, 200–02 (1983) (allowing an energy company to seek a declaratory judgment regarding the preemption of a state statute affecting its decision to build a nuclear power plant, even though the statute could not be applied to the company for at least another twelve years); Nw. Forest Res. Council v. Espy, 846 F. Supp. 1009, 1015 (D.D.C. 1994) (granting a declaratory judgment but not an injunction, in part because the latter would be “premature,” since the agency’s plan “ha[d] yet to be translated into action,” and “there will be time enough” after implementation to consider any harm to the plaintiff); G. Heileman Brewing Co. v. Anheuser-Busch Inc., 676 F. Supp. 1436, 1480 (E.D. Wis. 1987) (granting a declaratory judgment but not an injunction in a trademark controversy that the court considered “real and immediate” though it had not “ripened to a point where one of the parties could invoke a coercive remedy (i.e. a suit for damages or an injunction)”), *aff’d*, 873 F.2d 985 (7th Cir. 1989); Tennessee v. Herrington, 626 F. Supp. 1345, 1361 (M.D. Tenn. 1986) (granting a declaratory judgment that the Secretary of the Energy Department was required by statute to negotiate with the state of Tennessee, but declining to issue an injunction because, even though it might be needed in the future, it “[did] not appear to be necessary at this time”).

available.<sup>218</sup> Thus timing, though incapable of rule-like definition, is a second dimension of difference between these remedies.

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So far, this Part has offered an alternative to the mildness thesis. This alternative emphasizes management and timing, and it better fits the circumstances in which courts grant these remedies. For example, an insurer seeking a declaratory judgment about whether it has a duty to defend is seeking an earlier and less managerial remedy, not a milder one. This alternative account is better than the mildness thesis at explaining the differences in the features of the injunction and the declaratory judgment. Assuming, *arguendo*, that one were forced to characterize the distinctive features of the injunction in terms of strength or weakness, some features (for example, contempt, prophylaxis) might suggest that it is a strong remedy, whereas other features (for example, the specificity requirement, dissolvability, the possibility of compromise) might suggest that it is a weak or narrow remedy.<sup>219</sup> But such characterizations would be strained, and they would not aptly describe the interaction of these features with the situations in which the injunction is used.

One other possible account of the difference between these remedies should be mentioned. In its discussion of the declaratory judgment, the leading casebook on federal courts notes that, even if *Steffel* were wrong about this remedy's preclusive effect, "[I]t would not necessarily follow that the distinction" between the declaratory judgment and the injunction "is wholly chimerical."<sup>220</sup> It then asks: "Might a sharp line between declaratory and injunctive relief be based on a possible symbolic difference between the messages that the two remedies communicate?"<sup>221</sup>

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218. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 137 (2007). The Federal Circuit test required a "reasonable apprehension of imminent suit" before a potential patent infringer could seek a declaratory judgment. *See id.* at 132–33 n.11 (emphasis omitted) (rejecting that test and noting its inconsistency with landmark Supreme Court cases on the declaratory judgment). The Court did not, however, explicitly recognize that the Federal Circuit's test had the effect of making it impossible to get a declaratory judgment sooner than an injunction.

219. Although Christopher Langdell is not a reliable guide to equity, he was right in saying that "any one who wishes to understand" it "must study its weakness as well as its strength." C.C. LANGDELL, *A SUMMARY OF EQUITY PLEADING* 38 n.4 (Cambridge, Charles W. Sever 2d ed. 1883).

220. FALLON ET AL., *supra* note 25, at 1112.

221. *Id.*

It might well be that the declaratory judgment symbolizes something different from an injunction. To those who accept the mildness thesis, the choice of a declaratory judgment over an injunction might symbolize that the right at issue is less important than other rights, or that the court has decided to speak the law softly. To those who accept the alternative account given here, the choice of a declaratory judgment might symbolize something like greater trust of the defendant, because heightened management is not needed. But this is a rather elastic way of defining the difference between these remedies, and it still leaves the hard and analytically difficult question: deciding what the symbolic difference actually is. Moreover, any symbolic difference in the remedies could be swamped by how a court wrote the accompanying opinion: the symbolism of a declaratory judgment framed by an aggressive opinion might be aggressive; the symbolism of an injunction framed by a timid opinion might be timid. Finally, symbolism fails to explain the full range of differences between these remedies that are discussed above, including practical differences such as the specificity requirement<sup>222</sup> and the possibility of modification.<sup>223</sup>

In short, relative to the other accounts on offer, the one given here more fully explains the situations in which these remedies are used and their distinguishing features. It is therefore a better account, in the sense of being more accurate. But is it also better in the sense of being more desirable?

### C. *Evaluating the Dimensions of Difference*

In thinking about the present forms of the injunction and the declaratory judgment, it is important to start with a caveat. The injunction has a long history,<sup>224</sup> and although the declaratory judgment is comparatively recent—being not quite a century old in American law—it too is well established. Nevertheless, these

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222. See *supra* note 178 accompanying text.

223. See *supra* notes 187–192 and accompanying text.

224. The Supreme Court has treated the principles of equity as being formed by that history. See, e.g., *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1548 (2013) (employing the Court’s established “historical analysis” to determine what is an equitable remedy); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) (invoking Justice Holmes’s aphorism that “a page of history is worth a volume of logic” to guide the lower courts in the granting of equitable remedies (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921))); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (“[A] major departure from the long tradition of equity practice should not be lightly implied.”).

remedial forms could change. “Congress is not confined to traditional forms or traditional remedies.”<sup>225</sup> With the caveat, then, that these forms are contingent, are their present differences desirable?

Consider first the dimension of management. Courts should be able to make heightened managerial commitments. They should also be able to decline to make them—either as a way to reduce decisionmaking and administrative costs,<sup>226</sup> or to better align the expectations of the parties with the court’s own intentions for its future role in the case. In some cases, as when a court is resolving a crossroads dilemma, there will usually be little need for highly managerial features.

At present courts make this choice by giving what is, all else being equal, a more managerial remedy (the injunction) or a less managerial one (the declaratory judgment). But one could imagine a court making, or declining to make, heightened managerial commitments without that choice being represented by different remedies. In other words, there could be a single nonmonetary remedy, such as the injunction, and courts could customize its features case by case. The court could decide which if any of the managerial features it wanted to activate, or even invent new managerial features whenever necessary in a particular case.

Even so, there are reasons to consider packaging these managerial features into remedies with somewhat predefined contours. The different managerial features of the injunction support and interact with one another. For example, modification and dissolution enable prophylaxis, and the specificity requirement tempers what could otherwise be a serious due process problem with contempt.<sup>227</sup> If courts decided, case by case, which of these features to activate—*yes* this time to prophylaxis and contempt, but *no* to the specificity requirement—equity’s built-in efficiencies in management and protections against abuse could be eroded. Moreover, when a legal system offers two prospective nonmonetary remedies, one with

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225. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937).

226. *See Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 276 (7th Cir. 1992) (Posner, J.) (“Many injunctions require continuing supervision by the court, and that is costly.”).

227. *Cf. Co-operative Ins. Soc’y Ltd. v. Argyll Stores Ltd.*, [1997] UKHL 17, [1998] A.C. 1 (H.L.) 17 (Lord Hoffman) (appeal taken from Eng.) (warning that “it is normally undesirable for judges to make orders in *terrorem*, carrying a threat of imprisonment, which work only if no one inquires too closely into what they mean”).

high-management features and one without them, it reduces the number of issues the parties must brief and the courts must resolve.<sup>228</sup>

It is desirable, then, to have both more managerial and less managerial remedies, and it can make sense to have packages of managerial features. That does not mean that the remedies in contemporary American law are perfect. The injunction has been shaped by centuries of political controversy and institutional specificity,<sup>229</sup> both of which might be taken to suggest a strong measure of path dependence and imperfection. What the desirability of more and less managerial remedies does mean, however, is that the management dimension of difference is plausibly related to the theory of remedies.

As for the timing dimension, there are good reasons for plaintiffs to have early access to the declaratory judgment. Recall the example of a dispute over whether a patent is valid.<sup>230</sup> The inventor must choose either to begin production (which means risking treble damages for patent infringement) or to forgo bringing the invention to market (which means risking lost profits). Assume that at this point the inventor is seeking venture-capital funding and is not yet ready to begin production, much less distribution to retailers. Both sides would of course be happy to have an injunction—the patentholder would like one prohibiting the inventor from producing the product, and the inventor would like one prohibiting the patentholder from suing for patent infringement. But both injunctions would be premature, given the imminence requirement: the inventor is not yet ready to make the product. Even so, private and public costs may already be accruing

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228. These reasons for relatively established forms may help explain the tendency of courts to develop particular types of injunctions with relatively defined identities. Examples include the temporary restraining order, the antisuit injunction, the structural injunction, and the freezing order (which freezes a defendant's assets prior to judgment and is also called a *Mareva* injunction, after *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (C.A.) (Eng.)).

229. For example, “[b]ecause of equity’s political history it could not directly award discretionary remedies akin to tort and contract damages, nor could it directly set up positive rights of property; it could only restrain the wrongful application of a legal right.” Joshua Getzler, *Patterns of Fusion*, in *THE CLASSIFICATION OF OBLIGATIONS* 157, 175 (Peter Birks ed., 1997). For a brief overview of the history of equity, see F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 1–11 (John Brunyate rev. ed., 2d ed. 1936). For a more recent and extensive overview, see generally JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 267–412 (2009).

230. See *supra* notes 82–84, 139–141 and accompanying text.

from the legal uncertainty—the sort of costs that the theory of the declaratory judgment suggests it was meant to avoid.<sup>231</sup>

Or consider a declaratory judgment about the meaning or constitutionality of a criminal statute. Before arrest and prosecution are imminent, uncertainty about a criminal statute can prevent people from investing in a new business.<sup>232</sup> The uncertainty can linger without resolution. But once arrest and prosecution are imminent, there is less to be gained (from a societal perspective) from a declaratory judgment action. After all, if the uncertainty afflicting the potential criminal defendant is about to be resolved anyway, there is less reason to offer an alternative method of resolving it.<sup>233</sup> This suggests that the societal value of a declaratory judgment can actually depend on its being available at a stage *before* enforcement is imminent.<sup>234</sup>

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231. See *supra* notes 136–143 and accompanying text. For analysis of how the declaratory judgment can help persons avoid costly uncertainty, see generally Bray, *supra* note 80; Landes & Posner, *supra* note 81; and Laycock, *supra* note 56. On current Federal Circuit requirements for a declaratory judgment, see *supra* note 82.

232. Examples in recent litigation include Bitcoin, raw milk, and online poker. See SEC v. Shavers, No. 4:13-CV-416, 2013 WL 4028182, at \*2 (E.D. Tex. Aug. 6, 2013) (concluding that Bitcoin-related investments were “securities” for purposes of federal securities law); Farm-to-Consumer Legal Def. Fund v. Sebelius, 734 F. Supp. 2d 668, 698–99 (N.D. Iowa 2010) (resolving a declaratory judgment action about the legal status of buying and selling raw milk); Nate Silver, *After ‘Black Friday,’ American Poker Faces Cloudy Future*, FIVETHIRTYEIGHT (Apr. 20, 2011, 8:47 PM), <http://fivethirtyeight.blogs.nytimes.com/2011/04/20/after-black-friday-american-poker-faces-cloudy-future> (noting uncertainty about the legal status of online poker in the United States and its business repercussions).

233. Compare 520 S. Mich. Ave. Assocs., Ltd. v. Devine, 433 F.3d 961, 963 (7th Cir. 2006) (Easterbrook, J.) (recognizing the need for a federal declaratory judgment “precisely because the State’s Attorney does not promise to offer the Hotel a prompt opportunity to resolve the dispute in state court”), and Hispanic Leadership Fund, Inc. v. FEC, 897 F. Supp. 2d 407, 414–15 (E.D. Va. 2012) (granting a declaratory judgment about whether the plaintiff’s proposed advertisements would be “electioneering communications,” even though there was a procedure by which the plaintiff could have presented the question to the Federal Election Commission, because in a similar case the Commission had recently deadlocked 3–3), with Tempco Elec. Heater Corp. v. Omega Eng’g, Inc., 819 F.2d 746, 749 (7th Cir. 1987) (affirming a district court’s decision not to grant a declaratory judgment because the declaratory-judgment defendant had subsequently brought an infringement action that would resolve the question), and PSA, LLC v. Gonzales, 461 F. Supp. 2d 351, 358 (E.D. Pa. 2006) (declining to grant a declaratory judgment in part because “if, as plaintiffs contend, the DOJ is prosecuting others for the same conduct, the scope of the DEA’s power to regulate Internet pharmacies should soon be clear enough” (citation omitted)).

234. See Laycock, *supra* note 118, at 222–23; Whitten, *supra* note 92, at 618–19, 622–23. But see Steffel v. Thompson, 415 U.S. 452, 476 (1974) (Stewart, J., concurring) (glossing “a genuine threat of enforcement” as essentially an “objective[] showing” of “the threat of imminent arrest” (quotation mark omitted)); Fraser, *supra* note 81, at 640 (suggesting that “a coercive action must be imminent” for a declaratory judgment to be available).

These examples show that the declaratory judgment needs early timing if it is to be effective in solving crossroads dilemmas. But does it need *earlier* timing than the injunction? Put differently, why impose a special ripeness requirement on the injunction?

Like other aspects of equitable remedies, the special requirement of equitable ripeness was not deduced from first principles. Instead, it was shaped by the contingency of English legal development—especially by the political economy of a jurisdiction aligned with royal power, and by the chancellors' role as supplementing the common-law courts in exceptional cases.<sup>235</sup>

Nevertheless, even today in the United States there can be a practical value to requiring imminence for the injunction, a value that relates to the injunction's capacity for management. When a court issues an injunction, it is committing itself to manage the parties. It should not make this commitment rashly.<sup>236</sup> Courts must keep a watchful eye on their outstanding obligations, their "uncashed checks" for judicial management. Accordingly, it is reasonable to expect that a court will and should require somewhat more factual development before issuing an injunction.<sup>237</sup> It may also be desirable to require imminent harm for doctrinal reasons: at a very early stage it may be hard for a court to meet the specificity requirement, and it may be unclear whether legal remedies would be inadequate.<sup>238</sup>

More could be said about whether there is any reason to maintain a distinct set of equitable remedies in modern American

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235. See *supra* note 229 and accompanying text.

236. Cf. DiSarro, *supra* note 65, at 753 ("Injunctions . . . impose significant burdens on courts by requiring them . . . to entertain applications to enforce, modify, or vacate [the] decree.").

237. Cf. *MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695, 714 (E.D. Va. 2003) (denying an injunction because, among other reasons, the court expected that the acrimony of the parties would lead to "contempt hearing after contempt hearing" with "extraordinary costs to the parties, as well as considerable judicial resources"), *aff'd in part, rev'd in part, vacated in part*, 401 F.3d 1323 (Fed. Cir. 2005), *vacated*, 547 U.S. 388 (2006); *Co-operative Ins. Soc'y Ltd. v. Argyll Stores Ltd.*, [1997] UKHL 17, [1998] A.C. 1 (H.L.) 13–14 (Lord Hoffman) (appeal taken from Eng.) (analyzing the difficulty of supervision for decrees of specific performance); 1 DOBBS, *supra* note 185, at 143–44 (noting the fear that complex decrees will turn judges into "administrators," though also suggesting that the fear is exaggerated); Chayes, *supra* note 173, at 1292 ("[B]y issuing the injunction, the court takes public responsibility for any consequences of its decree that may adversely affect strangers to the action.").

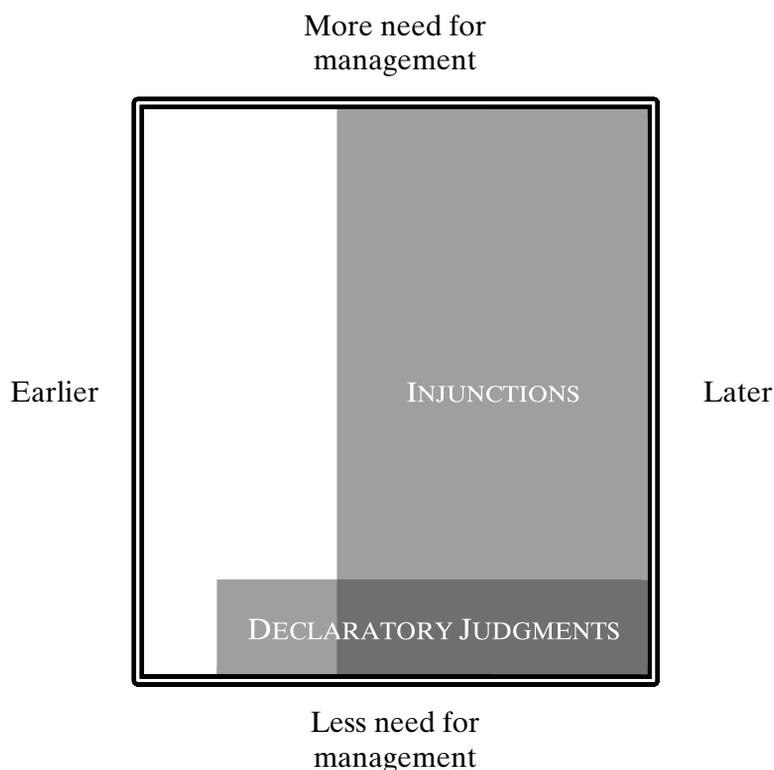
238. For a sustained critique of the traditional requirement that a permanent injunction may issue only upon a showing that legal remedies would be inadequate, see LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE*, *supra* note 74. For the Court's recent entrenchment of that requirement, see *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756–57 (2010); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

law. All that is necessary here is to show that the dimensions of difference described in this Part—management and timing—have a substantial relation to the concerns of remedial theory. In contrast, the mildness thesis has no such relation.

*D. Summary*

The declaratory judgment and the injunction are rough substitutes. In many cases in which a plaintiff seeks prospective relief, it does not matter at all which form of relief a court grants. But the remedies do have some residual differences, as seen by their usage patterns and features. These differences can be explained along two dimensions, management and timing:

*Figure 1. Mapping the Declaratory Judgment and the Injunction along Two Dimensions*



Courts issue injunctions in situations in which a high degree of management is needed. Moreover, the injunction has a number of

features that allow courts to observe and respond to violations: the requirement of specificity, the information generated by the contempt process, the prospect of modification and dissolution, the permissibility of prophylaxis, and the use of monitors and receivers.<sup>239</sup>

The declaratory judgment lacks those features, and it is used in situations in which little management is needed. In addition, the declaratory judgment is available at an earlier stage than the injunction in some disputes, which helps it resolve legal uncertainty in crossroads dilemmas.

This account more accurately describes these remedies than the mildness thesis does. One could, it is true, take the account given here and recast it in terms of mildness: one could say that the declaratory judgment is milder, and the injunction is stronger, *with respect to management*. That exercise in labeling would avoid all the criticisms of the mildness thesis given in Part II—those criticisms were after all directed to the conceptual claims of the mildness thesis, not to the word *mildness*. But whatever terms are used, the mildness thesis and the two-dimensional account given here represent fundamentally different ideas about what distinguishes the declaratory judgment from the injunction.

#### IV. IMPLICATIONS FOR REMEDIES AND FOR RIPENESS

The straightforward policy implication of the account offered here is a set of principles for the prospective use of these two remedies. When the injunction is not yet available, the declaratory judgment is the appropriate prospective remedy. When both remedies are available,<sup>240</sup> the decisive consideration is management. If the court foresees a need for heightened management of the parties, it should grant an injunction. Alternatively, if the court wants to disclaim any such heightened management, the declaratory judgment is preferable. If the case falls into a category for which a declaratory judgment usually provides all the guidance the parties need (for example, a decision whether an insurer has a duty to defend), there should be a slight preference for the declaratory judgment, to let courts conserve their management resources for the cases in which

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239. In addition the preliminary injunction is an important instrument that courts use to manage the parties. As noted above, preliminary injunctions can be given before either an injunction or a declaratory judgment. *See supra* note 205.

240. On the assumption that the other prerequisites for these remedies are met, *see supra* note 204.

they are more likely to be needed. Even so, it is often true that nothing of consequence will turn on a judge's decision to grant one of these remedies instead of the other.

Beyond this practical guidance there is a precautionary benefit. The Supreme Court has a history of making basic mistakes about the law of remedies.<sup>241</sup> When the Court makes a mistake about remedies, it is hard to cabin it to only one domain. The origins of a change may be forgotten, and the law of remedies, like the law of procedure, works across substantive areas. At other times the Court may change the law of remedies without recognizing that it is doing so. For example, in a case on the requirements for an injunction, *eBay Inc. v. MercExchange, L.L.C.*,<sup>242</sup> the Court seems to have thought it was making only a modest ruling, merely requiring federal courts to apply “well-established principles of equity” in patent cases.<sup>243</sup> Yet some commentators have described the decision as “a remarkable legal juggernaut” that has “overrun and abrogated prior judicial approaches” to equitable remedies in various areas of the law.<sup>244</sup> In the view of some scholars, as if by a kind of Gresham's Law of Remedies, the bad law seems to drive out the good.

The reception of *Steffel* has not followed these patterns. Yes, the Court misunderstood basic aspects of the law of remedies by inventing a new federalist purpose for the declaratory judgment and creating unnecessary doubts about its preclusive effect. Yet it is obvious from the preceding argument that the mildness thesis has not fundamentally misshaped what the lower courts do. In fact, this Article has critiqued the mildness thesis precisely because it is inconsistent with how the declaratory judgment is actually used. Nevertheless, because the law of remedies is trans-substantive, and

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241. *E.g.*, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (describing restitution as equitable). For critique, see John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1348–55 (2003).

242. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

243. *Id.* at 390–91. The *eBay* test for permanent injunctions came as a surprise to many scholars of remedies. *See, e.g.*, LAYCOCK, MODERN AMERICAN REMEDIES, *supra* note 74, at 427 (“There was no such test before, but there is now.”); Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 793 (2012) (noting that before *eBay* “the test did not exist”). *But see* Rachel M. Janutis, *The Supreme Court's Unremarkable Decision in eBay Inc. v. MercExchange, L.L.C.*, 14 LEWIS & CLARK L. REV. 597 (2010).

244. Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 206 (2012).

because the Supreme Court continues to treat *Steffel* as a leading case on the declaratory judgment—even in patent cases<sup>245</sup>—all of this could change. The analysis here shows why such a change should not happen.

Moreover, scholars need to discard the mildness thesis to make progress in the theoretical foundations of these remedies. As long as the declaratory judgment is characterized as a “milder remedy,” this will be a verbal formulation in search of a rationale, and scholars will try to find some way to make sense of it. The many attempts to date—commands, sanctions, preclusion, symbolism—testify to scholarly ingenuity. Yet no insights have come from these efforts to explain the mildness thesis. That road was a wrong turn, and it has led to a dead end. In contrast, the account given here of the similarities and differences of these remedies can illuminate other legal questions. Consider two practical implications.

First, the analysis here clarifies an unsettled question that the Court will eventually have to resolve: whether ripeness applies in the same way no matter what remedy is requested. At times the Court has said that Article III itself requires actual or imminent harm in all cases, irrespective of remedy. In effect that means that “equitable ripeness” applies even to nonequitable remedies. Familiar cases in this line of thinking include *Lujan v. Defenders of Wildlife*,<sup>246</sup> *City of Los Angeles v. Lyons*,<sup>247</sup> and most recently *Clapper v. Amnesty International USA*.<sup>248</sup>

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245. See, e.g., *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 33 (2008); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007).

246. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (requiring the plaintiff to show an injury that is “actual or imminent, not conjectural or hypothetical” (quotation marks omitted)).

247. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) (requiring the plaintiff to show that he was “immediately in danger of sustaining some direct injury” and that the injury was “real and immediate” (quotation marks omitted)). Note that in *Lyons*, a case frequently cited for the constitutional requirement of imminent harm, the plaintiff dropped his initial request for declaratory relief and received from the district court an emphatically managerial injunction—a restriction on certain police chokeholds, a training program, a reporting requirement, and a recordkeeping requirement. *Id.* at 99–100; Fallon, *supra* note 124, at 10 n.44. The Court’s insistence on imminent harm is understandable given the remedy the plaintiff sought, and one could reasonably distinguish *Lyons* on that ground. *Cf. Lyons*, 461 U.S. at 111–13 (emphasizing that the plaintiff sought an equitable remedy). Nevertheless, the Supreme Court and the lower courts have not drawn this distinction and have applied *Lyons* to declaratory judgment actions. See, e.g., *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 730 (2013); see also Little, *supra* note 213, at 942 & n.51 (collecting cases).

248. *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (requiring plaintiffs seeking declaratory and injunctive relief to show that harm was “imminent” and “certainly impending”).

Nevertheless, the American constitutional tradition has long made room for adjudication to resolve specific kinds of legal uncertainty before injury is imminent (along with a sense that these kinds of cases are somewhat exceptional<sup>249</sup>). These well-established kinds of adjudication for which imminence has not traditionally been required include boundary disputes between states,<sup>250</sup> interpleader,<sup>251</sup> and the declaratory judgment, which, as discussed above, can be used to resolve crossroads dilemmas before there is an imminent threat of legally cognizable injury.<sup>252</sup>

A case consistent with this second line of thinking is *MedImmune*, in which the Court noted that the Federal Circuit's requirement of a "reasonable apprehension of *imminent* suit" conflicted with the more generous standard it had used in declaratory judgment cases.<sup>253</sup> In such cases, the Court has often required not imminence, but rather only "sufficient immediacy and reality to warrant the issuance of a declaratory judgment."<sup>254</sup> This standard has

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249. See Hart, *supra* note 143, at 1366.

250. See DAVID P. CURRIE, *FEDERAL COURTS: CASES AND MATERIALS* 63 n.4 (4th ed. 1990); Charles Warren, *The Supreme Court and Disputes Between States*, 103 *WORLD AFF.* 197, 201-02 (1940).

251. See, e.g., *Aaron v. Mahl*, 550 F.3d 659, 663 (7th Cir. 2008) (requiring only "a real and reasonable fear of double liability or conflicting claims"); *Pan Am. Fire & Cas. Co. v. Revere*, 188 F. Supp. 474, 480 (E.D. La. 1960) ("The danger need not be immediate; any possibility of having to pay more than is justly due, no matter how improbable or remote, will suffice."); 7 *WRIGHT ET AL.*, *supra* note 67, § 1707, at 568 (2001) ("Of course, interpleader is inappropriate when the claims *not only are remote in time but actually fall below any meaningful threshold level of substantiality . . .*" (emphasis added)).

252. See *supra* Part III.B.

253. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 132 n.11 (2007); see also *Ord v. District of Columbia*, 587 F.3d 1136, 1146-53 (D.C. Cir. 2009) (Brown, J., dissenting in part) (critiquing circuit precedent for requiring *imminent* enforcement before giving a declaratory judgment when the Supreme Court precedents require only a credible threat of enforcement); *520 S. Mich. Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 962-63 (7th Cir. 2006) (Easterbrook, J.) (reviewing Supreme Court decisions that allow pre-enforcement review long before enforcement is imminent "based on the potential cost that compliance (or bearing a penalty) creates"). Note that some of the Supreme Court cases that take this more generous approach involved injunctions, such as *Pierce v. Society of Sisters*, 268 U.S. 510, 553 (1925). Neither the declaratory judgment cases nor the injunction cases are entirely consistent.

254. *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2115 n.3 (2013) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (quotation mark omitted)); cf. *Steffel v. Thompson*, 415 U.S. 452, 478 (1974) (Rehnquist, J., concurring) (describing the "primary purpose" of the Declaratory Judgment Act as "enabl[ing] persons to obtain a definition of their rights before an actual injury had occurred"); *Pub. Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111, 116 (1962) (per curiam) (Douglas, J., concurring) ("What are courts for, if not for removing clouds on title, as well as adjudicating the rights of those against whom the law is aimed, though not immediately applied?").

also been invoked in a number of federal appellate cases that recognize the distinctive ripeness considerations in declaratory judgment actions.<sup>255</sup> Indeed, when Congress passed the Declaratory Judgment Act it was understood that one of a declaratory judgment action's "distinctive characteristics" was that it is not "necessary that an actual wrong, giving rise to action for damages, should have been done, or be immediately threatened."<sup>256</sup>

A practical example of how this works is *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,<sup>257</sup> in which the Court held that an energy company could bring a declaratory judgment action about the preemption of a state

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255. See, e.g., *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669–71 (9th Cir. 2005) (declining to extend *Abbott Labs* "to cases in which a private party to a contract seeks a declaratory judgment on a contract" and instead applying "the traditional ripeness standard, namely, whether 'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment'" (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941))); *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 388 (2d Cir. 2005) ("The standard for ripeness in a declaratory judgment action is that 'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" (quoting *Md. Cas. Co.*, 312 U.S. at 273)); *Khodara Envtl., Inc. v. Blakey*, 376 F.3d 187, 193–94 (3d Cir. 2004) (Alito, J.) ("A plaintiff seeking a declaratory judgment . . . has Article III standing if 'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" (quoting *The St. Thomas–St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232, 240 (3d Cir. 2000))); *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 646–50 (3d Cir. 1990) (Becker, J.) (gleaning principles for the ripeness of declaratory judgment actions, namely "the adversity of the interest of the parties, the conclusiveness of the judicial judgment and the practical help, or utility, of that judgment"). Similarly, in declaratory judgment actions it usually unhelpful and circular to ask whether the situation is "hypothetical." As Justice Scalia correctly said in a recent oral argument, "The Declaratory Judgment Act posits a hypothetical situation. It always does." Transcript of Oral Argument at 49, *Medtronic, Inc. v. Bos. Scientific Corp.*, No. 12-1128 (U.S. Nov. 5, 2013).

256. BLACK'S LAW DICTIONARY 531 (3d ed. 1933) (emphasis added); see also EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 155 (2000) ("Because the declaratory judgment allowed parties to sue prior to actual or imminent injury, it brought the judiciary into disputes earlier than was otherwise possible."); Fallon, *supra* note 124, at 34 (describing "Congress's decision to adopt the Declaratory Judgment Act" as "an apparent loosening of the ripeness doctrine"); Harrison, *supra* note 48, at 1000 (describing the view of Edwin Borchard, the tireless advocate for the passage of the federal Declaratory Judgment Act, that the declaratory judgment would often "be available even when the declaratory plaintiff could not show the kind of imminent and irreparable injury required for an injunction"); WAGNER, *supra* note 27, at 3 (comparing the injunction, which protects against a "threatened violation of a right," with the declaratory judgment, which is available "before any wrong has been threatened").

257. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

statute restricting the operation of nuclear power plants.<sup>258</sup> The application of the statute to the company was not imminent—first the company would have to construct a nuclear power plant, and that process could take twelve to fourteen years.<sup>259</sup> In the meantime, however, the company would have to make costly decisions about whether to proceed with construction.<sup>260</sup> Thus, even though there was no imminent threat that the statute would be applied to the company, the Court found its declaratory judgment action ripe.<sup>261</sup>

Moreover, in all three of these examples—state boundary disputes, interpleader, and declaratory judgment actions—the resolution of legal uncertainty is generally more valuable well before the feared adverse event is imminent. It is most valuable when the feared harm is a little cloud on the horizon and not yet a great storm almost overhead.<sup>262</sup>

At present the Court prefers to apply constitutional ripeness rather than other forms of ripeness (for example, prudential or equitable), and it tends to do so in a way that tacitly ignores the differences between the injunction and the declaratory judgment.<sup>263</sup> If this tendency were to harden into a rule, and if the Court were to consistently apply to the declaratory judgment a ripeness standard developed for the injunction, it would eliminate the declaratory judgment's earlier availability. But that need not happen. Instead, the Court could expressly recognize, in Professor Richard Fallon's words,

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258. *Id.* at 200–02.

259. *See id.* at 201 (“The construction of new nuclear facilities requires considerable advance planning—on the order of 12 to 14 years.”).

260. *See id.* at 200–02 (noting that any “postponement of decision would likely work substantial hardship on the utilities,” because “for the utilities to proceed in hopes that, when the time for certification came, either the required findings would be made or the law would be struck down, requires the expenditures of millions of dollars over a number of years, without any certainty of recovery if certification were denied”).

261. The company faced a crossroads dilemma: On one hand was the risk of not building a plant that the company needed for its energy portfolio and could have operated legally (if federal law preempted the state statute). On the other hand was the risk of building a plant that the company would eventually learn could not be legally operated (if the state statute were not preempted).

262. For a discussion on how the societal value of a declaratory judgment can depend on the adverse event not being imminent, see *supra* notes 233–234 and accompanying text. A similar observation is the basis for the overbreadth doctrine in First Amendment law.

263. *See, e.g., Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (not distinguishing the plaintiffs' request for declaratory and injunctive relief). *But see id.* at 1163 (Breyer, J., dissenting) (noting that “ordinary declaratory judgment actions” do not “always involve the degree of certainty upon which the Court insists here”).

that “ripeness doctrine responds to remedial considerations.”<sup>264</sup> There are multiple doctrinal paths this recognition could take. One is to apply the “fitness” aspect of ripeness analysis with remedial sensitivity; another is to read “injury” broadly enough to include the present costs of future uncertainty.<sup>265</sup> To date the Court has taken neither path. But either would be consistent with the long tradition in English and American law that there are categories of cases that “assume such a form that the judicial power is capable of acting on [them]”<sup>266</sup> even before harm is imminent.

A second implication of the argument in this Article is more speculative: rejecting the mildness thesis could prevent courts from deploying it strategically. There is precedent for this concern. In *Powell v. McCormack*, the Court intruded on congressional self-government in a way almost unique in the history of the United States, and it did so with the justification that it was merely providing a declaratory judgment.<sup>267</sup> Similarly, today a federal court could interfere with the exclusive prerogatives of the legislative or executive branches, or strike down a statute it might otherwise uphold, justifying its overreach with the rhetoric of the declaratory judgment being a milder and less intrusive remedy. In other words, the mildness thesis reduces the costs, at the margin, for the Court to engage in a certain kind of strategic behavior (that is, “active” strategic behavior rather than Bickel-style “passive” strategic behavior). After all, the Court continues to cite *Steffel*’s characterization of the declaratory

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264. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 680 (2006); cf. *Super Tire Eng’g Co. v. McCorkle*, 416 U.S. 115, 121–22 (1974) (distinguishing between the injunction and the declaratory judgment for mootness purposes); *Moore v. Middletown*, 975 N.E.2d 977 (Ohio 2012) (applying distinct standing requirements for mandamus and the declaratory judgment).

265. See *Ord v. District of Columbia*, 587 F.3d 1136, 1146–53 (D.C. Cir. 2009) (Brown, J., dissenting in part) (distinguishing the imminence of injury from the imminence of the enforcement action that causes the injury); *520 S. Mich. Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006) (Easterbrook, J.) (noting that the Supreme Court often talks about “imminence” but that what it really requires is “probability of harm, not its temporal proximity”). *But cf.* *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1150–53 (2013) (rejecting, as an effort to “manufacture standing,” the plaintiffs’ “contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm”).

266. *Osborn v. Bank of the United States*, 22 U.S. 738, 819 (1824).

267. See *Powell v. McCormack*, 395 U.S. 486, 517 (1969) (“We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment . . .”). For contemporaneous commentary, some of which sharply criticized this claim to modesty, see generally *Comments on Powell v. McCormack*, *supra* note 144.

judgment.<sup>268</sup> If the Court were to use the mildness thesis more aggressively in a future case, it could affect the resolution of an important constitutional question.<sup>269</sup>

In sum, rejecting the mildness thesis corrects a fundamental mistake about the difference between the declaratory judgment and the injunction. This correction allows a better understanding of these remedies and has other practical benefits. One is clarifying the stakes in the interaction of ripeness with remedies. More speculatively, rejecting the mildness thesis protects against the danger that courts will strategically deploy it in ways inconsistent with our constitutional structure.

### CONCLUSION

What is the difference between the declaratory judgment and the injunction? The standard answer is that the relationship between these two remedies is hierarchical. The declaratory judgment is a milder remedy, and the injunction is a stronger one. That answer has been given by the Supreme Court, numerous lower federal courts, leading scholars, and the Restatement (Second) of Judgments. But that answer is mistaken. As this Article has shown, the rationales that have been given for the mildness thesis are incompatible with the law, practice, and theory of the declaratory judgment.

There is a better way to think about the differences between the declaratory judgment and the injunction. In many cases they are substitutes. But sometimes they are only imperfect substitutes, and the differences between them matter. These differences involve management and timing. The injunction is much better suited to heightened management of the parties because it has features—such as the specificity requirement, contempt, modification and dissolution, prophylaxis, and monitors and receivers—that make it easier for a judge to observe and respond to violations. The declaratory judgment lacks all of these features; it is not well adapted

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268. See *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 33 (2008) (“Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction . . . .” (quoting *Steffel v. Thompson*, 415 U.S. 452, 466 (1974))).

269. This is especially so given that a declaratory judgment may be granted *sua sponte*. See FED. R. CIV. P. 57 advisory committee’s notes (1937); *Katzenbach v. McClung*, 379 U.S. 294, 295 (1964) (treating a request for an injunction as if it were a request for a declaratory judgment); see also FED. R. CIV. P. 54(c) (noting that for every final judgment except a default judgment the court “should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings”).

to intense continuing management of the parties. But it does have a comparative advantage on timing, for it is available sooner than the injunction in some disputes.

This understanding of the declaratory judgment and the injunction is more accurate, because it better fits the circumstances in which each remedy is actually given by federal courts. It underscores each remedy's comparative advantages, and it provides a foundation for future scholarship on the law of remedies.