What is the difference between the declaratory judgment and the injunction? 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—namely that it lacks a command to the parties, lacks a sanction for disobedience, and lacks full issue-preclusive effect. This Article critiques the mildness thesis, showing how none of the offered rationales can be squared with the way the declaratory judgment and the injunction are actually used.

This Article also offers an alternative account of the relationship between these remedies—the two most important non-monetary remedies in American law. In many contexts they are functional substitutes, but they are not always perfect substitutes. This Article therefore explores the conditions under which each remedy has a comparative advantage. Central to this account is management: the injunction has, and the declaratory judgment lacks, a number of features that allow a court to conveniently and efficiently manage the parties. There is also a difference in timing: the declaratory judgment is sometimes available at an earlier stage of a dispute. Thus management and timing, not strength, offer the best explanation for the functional differences between these remedies in anticipatory litigation. The argument developed here has implications not only for the theory of remedies but also for other areas of law, including justiciability and fee-shifting.

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Introduction

In the recent litigation over the Affordable Care Act, there was a moment of curious confusion. A district court had just held the Act unconstitutional, and the remedy it had given was a declaratory judgment. In response, the Department of Justice filed an unusual “Motion to Clarify,” claiming that because the court’s decision was a declaratory judgment it could have no legal effect until appeals were concluded. That claim was considered and rejected by the district court. 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 non-monetary remedy in American law, the injunction.

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 view, 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.” The mildness thesis has been echoed by many scholars, including Owen Fiss and Peter Schuck. It has been repeatedly

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2 Id. at 1255.
4 Florida v. U.S. Dept. of Health & Human Services, 780 F. Supp. 2d 1307, 1316 & n.5, 1319 (N.D. Fla. 2011) (rejecting the claim because the declaratory judgment is a “final determination of rights,” though also granting a stay pending appeal).
embraced by federal courts. 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.8

Yet scholars and courts have not settled on a single rationale for the mildness thesis. Three have been offered. One is that the declaratory judgment lacks any command to the defendant.9 Another is that a declaratory judgment has no sanction for disobedience—in particular, when it is disobeyed, there is no threat of contempt.10 Yet another is that the declaratory judgment lacks the full precedential and issue-preclusive effect that is given to other kinds of judgments.11

This Article explores the functional similarities and differences of the declaratory judgment and the injunction, and it offers the first critical reassessment of the mildness thesis.12 To distinguish these remedies in terms of strength, as so many courts and scholars have

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8 See, e.g., Restatement (Second) of Judgments § 33 cmt. c (1980). For many other sources, see infra notes 51-64.
10 See, e.g., Fiss, supra note 6, at 1122.
12 There appears to have been only one criticism of the mildness thesis in legal scholarship, a short shrewd observation by Dick Fallon 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). Several scholars have disagreed with one of the rationales that have been given for the mildness thesis, i.e., that the declaratory judgment has less 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, 763-764 (1979). And in the specialized context of retrospective declaratory judgments, a student note criticized “the ‘milder remedy’ theory” of the declaratory judgment. Note, Declaratory Judgment and Matured Causes of Action, 53 Colum. L. Rev. 1130 (1953).
done, is to make an essentialist mistake—attributing to each remedy a formal essence apart from the contexts in which it is used. Once the declaratory judgment is considered in these 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. The mildness thesis also ignores how plastic these remedies are, for the intensity of each one in a particular case is highly dependent on drafting.

This Article offers not only criticism but also an alternative account of the relationship between the declaratory judgment and the injunction. When used prospectively, these remedies are functional substitutes, and in many cases there will be no practical difference between them. Nevertheless, there are residual differences that matter in some cases. The most important is management, in the sense of direction and control of the parties. The injunction has features that make it easier for courts to manage the parties by observing and responding to violations—features such as the requirement of specificity, explicit in personam effect, 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 all of these managerial features. Moreover, it is typically used in contexts where no management of the parties is needed. One other dimension of difference is that the declaratory judgment is sometimes available at an earlier point in the lifecycle of a dispute. Compared to the mildness thesis, the account given here better explains and justifies the differences between the declaratory judgment and the injunction, and it better reflects the plasticity of these remedies and the contingency of their current forms in American law.

In short, the mildness thesis is too formalist, and it is formalist about the wrong things. It is too formalist because it ascribes an

13 See infra Part II.

essential attribute (relative strength or weakness) to each remedial form, without taking into account the contexts in which the remedies are used. And it is formalist about the wrong things because it emphasizes a relatively inconsequential formal difference (i.e., the number of steps to contempt\textsuperscript{15}) while ignoring the formal differences that actually have functional significance—differences that primarily affect each remedy’s suitability as an instrument for managing the parties.

This Article’s argument has implications beyond the law and theory of remedies. First, courts have interpreted fee-shifting statutes from a standpoint of skepticism that a declaratory judgment is a real victory, thus limiting access to this remedy for indigent plaintiffs.\textsuperscript{16} That skepticism is called into question once the declaratory judgment is no longer seen as a milder remedy. Second, this Article illuminates the somewhat hazy constitutional status of the declaratory judgment. It shows exactly why one of the traditional objections to the declaratory judgment (i.e., that it is an advisory opinion) is misplaced. And it clarifies what is at stake in the choice about whether to have identical justiciability standards for the declaratory judgment and the injunction.\textsuperscript{17} Third, and more speculatively, in a future case the Court might transgress its constitutional bounds because it could claim with false modesty that it was “merely” giving a declaratory judgment.\textsuperscript{18} This danger of strategic deployment can be mitigated by rejecting the mildness thesis.

\textsuperscript{15} See, e.g., Fiss, \textit{supra} note 6, at 1122.

\textsuperscript{16} E.g., Rhodes v. Stewart, 488 U.S. 1, 4 (1988) (stating that a declaratory judgment “will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff”).

\textsuperscript{17} This choice is implicit in many of the Court’s standing and ripeness cases, e.g., \textit{Clapper v. Amnesty International USA}, No. 11-1025, slip op. (U.S. Feb. 26, 2013), but the Court has not yet squarely addressed it.

\textsuperscript{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”).
The remainder of 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 relationship between the declaratory judgment and the injunction, emphasizing management and timing. Part IV shows why the rejection of the mildness thesis matters.

I. The mildness thesis

When plaintiffs in an American court seek prospective relief, they usually request an injunction, a declaratory judgment, or both. The fact that plaintiffs often choose between these remedies, or decide to seek both together, raises an obvious question. What is the difference between them? The answer that will be given in Part III is that these remedies are usually interchangeable, yet there are two dimensions of difference: (1) the injunction has features better adapted to managing the parties, and (2) the declaratory judgment is available at an earlier stage than the injunction in some cases. But it is important first to consider—and clear away—the conventional wisdom about what distinguishes these two remedies.

The answer given most frequently by scholars and courts is that the injunction is the stronger remedy and the declaratory judgment is the milder one. The locus classicus for this distinction is a leading case on the declaratory judgment, Steffel v. Thompson. Richard Guy Steffel and a companion were distributing handbills opposing the

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19 415 U.S. 452 (1974). This Article considers the opinion of the Court in Steffel, since it is the canonical text, but it had antecedents. Steffel quotes lengthy passages from the separate opinion of Justice Brennan 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. That unpublished opinion, not previously cited in legal scholarship, is the fullest statement of Justice Brennan’s views on the declaratory judgment. Part I, Box 235, Folder 7, William J. Brennan, Jr., Papers, Manuscript Division, Library of Congress, Washington, D.C., hereinafter “Unpublished Separate Opinion in Younger (Brennan, J.).”
Vietnam War in a shopping center, when they were warned by police officers that they would be arrested if they did not leave. Steffel left. His companion stayed and was prosecuted for criminal trespass. 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.20 The Court held that he could seek declaratory relief, distinguishing the constraints on injunctive relief21 on the grounds that the declaratory judgment was a different remedy.

But how exactly was it a different remedy? On this question the Court was clear. Per Justice Brennan, it said that “‘[t]he express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy.’”22 Before Steffel there had been only rare references to the declaratory judgment as a milder remedy, and the great majority of those references were decades earlier and reflected the quaint idea that the declaratory judgment was a “civilized” or “gentlemanly” step in the evolution of the exercise of state power.23 Yet scholars advocating the declaratory judgment in those terms did not consider it any less powerful than other

20 Steffel also sought injunctive relief but abandoned that request on appeal. 415 U.S. at 456 n.6.


22 Id. at 467 (quoting Perez v. Ledesma, 401 U.S. 82, 111 (1971) (Brennan, J., concurring and dissenting)); 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 125-126 (Brennan, J., concurring and dissenting))). By the time Steffel was decided, four justices were already on record supporting the mildness thesis—Justices Brennan, White, and Marshall in Perez, and Justices Marshall and Douglas in O’Brien. See O’Brien v. Brown, 409 U.S. 1, 10 (1972) (Marshall, J., dissenting).

23 See, e.g., Homer H. Cooper, Locking the Stable Door Before the Horse Is Stolen, 16 ILL. L. REV. 436, 455 (1922); C.S. Potts, The Declaratory Judgment, 9 TEX. L. REV. 172, 177 (1931); Edson R. Sunderland, A Modern Evolution in Remedial Rights.—The Declaratory Judgment, 16 MICH. L. REV. 69, 88-89 (1917). In addition, the declaratory judgment was sometimes described as a milder remedy in the specialized context of retrospective declaratory judgments. E.g., Note, Declaratory Judgment and Matured Causes of Action, supra note 12, at 1131-1135.
remedies. At any rate, intellectual fashions changed and the characterization of the declaratory judgment as a milder, civilized remedy went out of style. Thus the idea that the declaratory judgment was a less powerful remedy was never 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 for the entire Court, Justice Brennan rooted the mildness thesis in a three-stage history of federalism since the Civil War.

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 federal constitutional rights. In particular, Justice Brennan pointed to the Civil Rights Act of 1871, the Judiciary Act of 1875, and the Court’s decision in Ex parte Young approving a federal injunction against a state official. Together, Justice Brennan said, these “established the modern framework for federal protection of constitutional rights from state interference.”

The second stage in Brennan’s history was backlash. In the early twentieth century, Ex parte Young provoked a “storm of controversy” that led to major restrictions on the ability of a single federal district court judge to enjoin the enforcement of a state


\[26\] Steffel, 415 U.S. at 463.

\[27\] 209 U. S. 123 (1908).

\[28\] Steffel, 415 U.S. at 464-465. For more careful assessments of Ex parte Young, see sources cited infra note 40.

\[29\] Id. at 465 (quoting Perez, 401 U.S. at 107 (Brennan, J., concurring and dissenting)).

\[30\] Id. at 465 (citing HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 967 (2d. ed. 1973)).
statute. Yet even this requirement of a three-judge court did not make the injunction palatable to the states.

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. And what accomplished this synthesis, on Justice Brennan’s account, was the Declaratory Judgment Act. The declaratory judgment was meant by Congress, he said, to be “an alternative to the strong medicine of the injunction,” allowing federal courts to offer their views on constitutional questions without the harshness of “injunctions against state officials.”

There are reasons to doubt this dialectical history of federalism. One is that it elides the chronological gap between Reconstruction and Ex parte Young, presenting them as a single constitutional moment. The period of time from 1865 to 1908 saw not one but two radical transformations in the relationship of the federal government to the states: first the expansive federal role reflected in the

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31 Id. at 465-466 & nn.16-17; see also id. at 467 (asserting that this “strong feeling . . . produced the Three-Judge Act in 1910, the Johnson Act of 1934, . . . and the Tax Injunction Act of 1937” (internal quotation marks omitted)).

32 Id. at 466. On the history and effect of the three-judge courts, see generally David P. Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. CHI. L. REV. 1 (1964).

33 The terms thesis, antithesis, and synthesis are not used in the opinion, but they are apt for the stages in the opinion’s historical narrative.

34 Steffel, 415 U.S. at 466.

35 Id. at 467 (quoting Perez, 401 U.S. at 111-112 (Brennan, J., concurring and dissenting)); see id. at 463 (describing the declaratory judgment as a “less harsh and abrasive remedy than the injunction” (quoting Perez, 401 U.S. at 104 (Brennan, J., concurring and dissenting))); id. at 466 (stating that the Declaratory Judgment Act was intended “[t]o dispel these difficulties,” referring to state objections to injunctions after Ex parte Young); id. at 467 (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 111-112 (Brennan, J., concurring and dissenting)); id. at 469-470 (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 124-126 (Brennan, J., concurring and dissenting)).
Reconstruction amendments, and then the retreat by the national government after the Compromise of 1877. That retreat included the Court’s acquiescing to systematic constitutional violations in the Southern states and limiting the equitable remedies it would grant against those states. Thus it is true that *Ex parte Young* happened at a turning point in federal-state relations, but that point was a turn to a diminished, not an expansive, role for the federal courts. And in its time *Ex parte Young* was not even seen as an important case about federalism, but rather a more or less routine request for an anti-suit injunction.

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 the Act was passed, it was not seen that way. Rather, the Act was seen as an effort in law

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41 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 S.
reform. It was seen as extending to federal courts a remedial innovation that could reduce legal uncertainty, an innovation that had already been successfully adopted by most of states. And those state declaratory judgment statutes that inspired the federal Declaratory Judgment Act—there were 34 by the time the federal Act passed—had of course never been justified on the basis of federalism and the need for federal courts to be sensitive to state interests.

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 court’s decision whether to grant relief under the Act, but it had never suggested it affected 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 traditional legal materials and modes of interpretation.

Comm. on the Judiciary, Declaratory Judgments, S. Rep. No. 1005, at 3 (1934) (submitted by Mr. King). In context, however, Borchard’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.” In other words, Borchard was more concerned about what the federal courts were doing to the injunction than about what they were doing to the states.

See, e.g., H. Comm. on the Judiciary, H.R. Rep. No. 68-1441 (1925) (submitted by Mr. Montague) (citing state and foreign 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 two hearings held in Congress on bills to allow declaratory judgments: 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. (Feb. 20, 1922); Legislation Recommended by the American Bar Association, Hearing on H.R. 5030, H.R. 10141, H.R. 10142, and H.R. 10143 Before the H. Comm. on the Judiciary, 67th Cong. (Feb. 21, 1922).

Edwin Borchard, Declaratory Judgments xvii (2d. ed. 1941).


Accord 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 palliate any controversy arising from Ex parte Young”). On
Nevertheless, it would be cramped and narrow to evaluate Justice Brennan’s account in Steffel solely by the standards of historical accuracy. Just as there is an artificial reason of the law, so there is an artificial history of the law. 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.” Consistent with this, other scholars have regarded Steffel’s federalism reading as strategic. 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.

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48 See Fiss, supra note 6, at 1121-29 (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 (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 12, at 1172 (classifying Steffel, despite its invocations of federalism, as a “Nationalist” opinion). Qualified support for this position can be seen in the drafting history of the opinion of the Court in Steffel, which suggests that Justice Brennan’s view of the declaratory judgment was part of the long struggle over “Our Federalism” on the Burger Court. See supra note 19. Note, though, that Steffel is entirely consistent with a theme of Justice Brennan’s jurisprudence on federalism, namely the importance of having federal rights defined by courts. See sources cited supra note 25.

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.”\(^{50}\) No matter how doubtful its historical foundations, that conclusion has become the leading statement of the relationship between the declaratory judgment and the injunction.

As noted above, it has been embraced by many legal scholars. Owen Fiss has described the declaratory judgment as “simply an injunction without sanctions.”\(^{51}\) Peter Schuck has characterized it as a remedy that lacks any “palpable ‘bite’” and 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.”\(^{52}\) Caitlin Borgmann has said the declaratory judgment was “expressly intended as a ‘milder alternative’ to an injunction.”\(^{53}\) Matthew Adler has described the federal declaratory judgment as “intended in part as a less coercive technique for judicial invalidation of state statutes.”\(^{54}\) Other scholars have contrasted “weak remedies such as declaratory relief” with “strong remedies such as injunctions,”\(^{55}\) or have spoken of “the near-futility of declaratory judgments.”\(^{56}\) And many others have reiterated that the declaratory judgment is a milder alternative to the injunction.\(^{57}\)

\(^{50}\) Steffel, 415 U.S. at 471 (internal quotation marks omitted).

\(^{51}\) Fiss, supra note 6, at 107 n.39; see also Fiss, supra note 6, at 1122.

\(^{52}\) Schuck, supra note 7, at 15 (stating that the declaratory judgment).


\(^{55}\) Octavio Luiz Motta Ferraz, Harming the Poor through Social Rights Litigation: Lessons from Brazil, 89 Tex. L. Rev. 1643, 1649 n.22 (2011).


\(^{57}\) See, e.g., Michael J. Bednarz, Comity Bars Federal Damages for Section 1984 Discriminatory State Tax Assessments, 1 Boston U. J. Tax L. 147, 148 n.5 (1983);
numerous federal courts, treatises and practice manuals, briefs by leading practitioners, and student notes.

Nor is the reach of Steffel limited to constitutional or regulatory cases. In the Court’s last major case on declaratory judgment actions in patent law, Steffel was given pages of discussion. The mildness thesis is sometimes invoked by federal and state courts in non-


See, e.g., Alli v. Decker, 650 F.3d 1007, 1014 (3d Cir. 2011); Armstrong v. Executive Office of the President, Office of Admin., 1 F.3d 1274, 1289 (D.C. Cir. 1993); Dickinson v. Indiana 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). The claim is also made in state courts that the declaratory judgment is a milder remedy, though less frequently and without citation to Steffel. See, e.g., Donaldson v. Montana, 2012 WL 6587677, ¶ 111 (Dec. 17, 2012) (Nelson, J., dissenting).


MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129, 134 n.12 (2007); id. at 137, 143-146 (Thomas, J., dissenting). In MedImmune, Steffel was invoked with respect to the timing and availability of the declaratory judgment rather than its effect.
constitutional cases as a general statement of the difference between the declaratory judgment and the injunction.63 And it is advanced by the Restatement (Second) of Judgments as a basic statement of the difference between these remedies regardless of context.64 Nor is this reach surprising, given the trans-substantive quality of remedies.65

But what does it mean to say that the declaratory judgment is a milder remedy? What makes it milder? And if it is milder, what effect does it have?

II. Assessing the rationales for the mildness thesis

Since Steffel, scholars and courts have offered three rationales for why the declaratory judgment is a milder remedy: (1) it lacks a command, (2) it lacks a sanction, and (3) it lacks the issue-preclusive and precedential effect of other judgments. These rationales are sometimes present in the same source, and they can overlap, but each is analytically distinct.

This Part examines these rationales. It shows how each one makes an essentialist mistake, attributing to these remedies a characteristic—relative strength or relative weakness—without considering whether this attribution is correct in the contexts in which these remedies are typically used. Although these three rationales are critiqued here, it should be noted that they are not wholly baseless. The scholars and courts offering them usually start with a correct observation about a formal difference between the declaratory judgment and the injunction (e.g., the observation that a declaratory judgment cannot be the basis for contempt proceedings). But they then misapprehend the functional significance of that formal difference. As a result, none of these rationales can justify the mildness thesis.


64 RESTATEMENT (SECOND) OF JUDGMENTS § 33 cmt. c (1980) (“[D]eclaratory action is intended to provide a remedy that is simpler and less harsh than coercive relief.”).

65 See infra notes 214-219.
A. The command rationale

One suggestion that scholars and courts have made is that the declaratory judgment is milder because it lacks a command—it “only declares.” For example, Cass Sunstein has said that a declaratory judgment provides “only a conclusion of law”—it “does not by its own force require any change in the [parties’] conduct.” Similarly, Peter Schuck has described 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.” And some federal courts have said it is “generally less coercive because it ‘is merely a declaration of legal status or rights,’” imposing no “affirmative obligations.”

This rationale for the mildness thesis does pick up on a feature of the declaratory judgment. It is true that when a court grants a declaratory judgment, it does not command the parties to take any specific action. However, this does not necessarily mean that the judgment is milder in all respects. For example, it may still have significant practical effects on the parties involved.

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67 Sunstein, *supra* note 9, at 751; see also Elaine W. Shubin, 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.”).


69 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 and dissenting)); see also Clark v. United States, 691 F.2d 837, 841 (7th Cir. 1982) (“A declaratory judgment is just that: a declaration of rights. It is not a coercive remedy like an injunction or a money judgment.”).

70 Rodriguez v. Hayes, 591 F.3d 1105, 1120 (9th Cir. 2010); see also PGBA, 389 F.3d at 1228 n.6; Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052, 1055 (1st Cir. 1987) (stating 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).
declaratory judgment, no command is given to the parties. This absence of a command has been a characteristic of the declaratory judgment since it was first adopted in state and federal statutes in the United States.71

But does the absence of a command mean that the declaratory judgment is milder than the injunction? Consider the kinds of disputes that are ordinarily resolved with a declaratory judgment. State courts report that a declaratory judgment usually resolves uncertainty about the ownership of real property,72 the validity or interpretation of a contract (including insurance contracts),73 the existence of some kind of legally significant status (e.g., fiduciary, mother, father, spouse),74

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71 For example, the leading early advocate for the declaratory judgment, Edwin Borchard, defended it by arguing that “command” was not “the essence of judicial power.” BORCHARD, supra note 43, at 12; see generally Samuel L. Bray, Preventive Adjudication, 77 U. CHI. L. REV. 1275, 1282-1285 (2010).


73 See, e.g., Theisman v. City of Overland Park, 253 P.3d 798 (Kan. Ct. App. 2011) (“Insurance companies commonly bring declaratory judgment actions to test policy coverage issues after a claim has been made.”); Trinity Universal Ins. Co. v. Sweat, 978 S.W.2d 267, 271 (Tex. App. 1998) (“Construction and validity of contracts are the most obvious and common uses of the declaratory judgment action.”); Bank One Kentucky NA v. Woodfield Fin. Consortium LP, 957 S.W.2d 276, 280 (Ky. Ct. App. 1997) (“Declaratory judgment actions are frequently brought to test the validity of contracts and to determine whether they have been breached.”); Gov’t Employees Ins. Co. v. Butler, 128 N.J. Super. 492, 495-96 (N.J. Ch. Div. 1974) (“Although the range of relief which may be sought in a declaratory judgment action presents a broad spectrum indeed, more often than not the typical case filed in the Chancery Division (as here) involves the construction of an insurance policy to determine questions of coverage and the duty of the insurance carrier to defend.”); see also UDJA §§ 2, 4.

or the constitutionality or validity of administrative action. In federal court, a request for declaratory relief is routinely paired with a request for injunctive relief whenever a plaintiff challenges legislative or executive action, as in pre-enforcement challenges to agency regulations. When plaintiffs seek only a declaratory judgment in federal court, there are two typical scenarios: one involving uncertainty about intellectual property rights, the other about an insurer’s duty to defend.

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75 See, e.g., Smith v. City of Santa Fe, 142 N.M. 786, 791 (2007) (describing the state declaratory judgment statute as “specifically designed to bring an action challenging the constitutionality or validity of local laws or ordinances”); see also UDJA § 2; Pete Schenckkan, UDJA Declaratory Judgments in Texas Administrative Law, 9 TEX. TECH. ADMIN. L.J. 195 (2008) (discussing declaratory judgment actions in Texas administrative law).


In the first of these two typical scenarios in federal court, an inventor has a product design that might infringe someone else's patent. The inventor seeks a declaratory judgment about whether the patent is valid.\(^78\) If the court grants a declaratory judgment, no command is usually needed. If the inventor wins, the declaratory judgment action allows her to make the product without fear of infringing the patent. If she loses, she is almost certain to refrain from making the product, for she would be willfully infringing the patent and risking treble damages\(^79\)—the very risk that prompted her to seek a declaratory judgment in the first place.

In the second typical scenario, an insurer seeks a declaratory judgment about whether it is required to defend an insured in state court.\(^80\) If the court declares that the insurer does have a duty to defend, the insurer will be virtually certain to fulfill that duty (after all, avoiding liability for failing to do so was the entire point of seeking a declaratory judgment\(^81\)). 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

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78 See generally Lorelei Ritchie de Larena, Re-evaluating Declaratory Judgment Jurisdiction in Intellectual Property Disputes, 83 IND. L.J. 957 (2008); see also infra note 129. The question considered here is the remedy before there has been infringement. A much larger literature exists on remedies after infringement, where the choice is usually between an injunction and damages. See, e.g., 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); see also Shyamkrishna Balganesh, Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions, 31 HARV. J. L. & PUB. POL’Y 593 (2008).


80 Unlike the patent scenario, the insurance scenario is frequent not only in federal court but also state court, which is unsurprising given that the federal cases fall under diversity jurisdiction. See, e.g., Harleysville Ins. Group v. Omaha Gas Appliance Co., 278 Neb. 547 (2009) (insurer sought declaratory judgment regarding whether a pollution exclusion in insurance policy absolved it of a duty to defend the insured); Troelstrup v. Dist. Court In & For City & County of Denver, 712 P.2d 1010 (Colo. 1986) (insurer sought declaratory judgment that the homeowner’s insurance policy it had issued to the insured did not require it to defend him against tort suit alleging sexual assault of a minor).

81 For the scope of this liability, see infra notes 89-90 and accompanying text.
not put on a defense. Either way the court has no need to order the parties to do anything.

The bottom line is that in these two scenarios there is no need for a command—everyone knows what to do. And this point can be generalized to the other kinds of legal uncertainties that are typically resolved in state and federal declaratory judgment actions. For example, when a court tells an executive official that certain conduct is required or forbidden, it is presumed that the official will comply. Or 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 not-owner. Where 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 have offered for the mildness of the declaratory judgment is that it lacks a sanction. Most prominently, Owen Fiss has said 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.”

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82 See, e.g., Republic Nat. Bank of Miami v. United States, 506 U.S. 80, 97 (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); 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 Judiciary of U.S. House of Representatives v. Miers, 542 F.3d 909, 911 (D.C. Cir. 2008) (“[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.”). There will of course be exceptional cases where officials disobey a declaratory judgment, see infra notes 105 & 107, just as there are with injunctions.

83 Fiss, supra note 6, at 1122; see also Adler, supra note 54, at 143 (citing Steffel’s description of “differences between declaratory judgments and injunctions, in particular less coercive cast of former”); Currie, supra note 32, 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
identified the missing “threat of sanction” as contempt proceedings: “if the defendant disobeys” a declaratory judgment, “the plaintiff cannot get a contempt order.”\(^{84}\) Along similar lines, Ralph Whitten has argued 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.”\(^{85}\) Or as the Court said about the declaratory judgment in \textit{Steffel}, “noncompliance with it may be \textit{inappropriate}, but it is not contempt.”\(^{86}\)

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 contempt proceedings.\(^{87}\) As Fiss put 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.”\(^{88}\)

It is certainly blackletter law that a declaratory judgment cannot be the basis for contempt proceedings. But this distinction does not make the declaratory judgment a milder remedy, at least in the circumstances in which the remedy is usually sought and obtained.\(^{89}\) As noted in the discussion of the command rationale, a declaratory judgment is usually given when the parties will know what to do

\(^{84}\) Fiss, \textit{supra} note 6, at 1122.


\(^{87}\) Fiss, \textit{supra} note 6, at 1122.

\(^{88}\) \textit{Id.}

\(^{89}\) \textit{See supra} notes 72-77.
afterwards, and in such circumstances, no contempt power is needed. For example, the insurer who is told that it has a duty to defend does not need to be threatened with contempt, since compensatory damages, punitive damages,90 and attorneys’ fees91 provide ample incentives to comply with the court’s declaratory judgment.

Again the point can be generalized beyond the common federal scenarios involving intellectual property and insurance. When a person seeks a declaratory judgment, she is often trying to resolve legal uncertainty in order to avoid making a mistake that would result in some kind of supra-compensatory liability. In the patent context this is treble damages, and in the insurance context it is the combination of punitive damages and attorney’s fees. Elsewhere, it may be agency-imposed fines and other regulatory consequences,92 or criminal prosecution.93 In these cases there is little need for an additional contempt sanction: the very sanction that motivated a person to get a declaratory judgment is a sufficient deterrent.94 Indeed, a losing declaratory judgment plaintiff has made the imposition of that sanction even more likely, because by the act of

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91 See, e.g., Korte Const. Co. v. Am. States Ins., 322 Ill. App. 3d 451, 456, 750 N.E.2d 764, 768 (2001) (upholding an award of compensatory damages, punitive damages, and attorney’s fees against an insurer that chose neither to defend its insured nor to seek a declaratory judgment on the question of whether it was legally obligated to make such a defense).


94 In other cases, such as disputes over the ownership of real property, a person may be seeking a declaratory judgment not to avoid supra-compensatory liability but to avoid large pointless expenses, such as the costs of 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 does not own the property, she hardly needs the threat of contempt to ensure that she does not spend money improving it.
seeking a declaratory judgment she has brought herself conspicuously to the attention of the relevant officials or private claimants.95

Moreover, even if declaratory judgments were actually being given in circumstances where a greater sanction would be helpful, it would hardly matter that one additional step to contempt was needed. Imagine two people,96 one of whom is genuinely trying to obey the law and one of whom is a Holmesian bad man thinking only of legal sanctions.97 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 short-sighted as to ignore the police officer he knows is only two steps around the corner.98

There is a further way to see the irrelevance of contempt for the declaratory judgment being a milder remedy in actual practice. Section 2202 of the federal Declaratory Judgment Act is the statutory authorization for successful declaratory judgment plaintiffs to go back to court to get an injunction. It gives federal courts the authority to grant “further necessary or proper relief based on a declaratory judgment.”99 (Similar provisions are found in state declaratory judgment statutes.)100 Yet careful analysis of the history of Section 2202 in the federal courts shows that it is hardly ever invoked. Over

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95 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 (2009).

96 For recognition of such heterogeneity in contract law, see Kenneth Ayotte, Ezra Friedman, & Henry E. Smith, A Safety Valve Model of Equity as Anti-Opportunism (working paper); Rebecca Stone, Economic Analysis of Contract Law from the Internal Point of View (working paper); and in the design of sanctions, see Samuel L. Bray, Announcing Remedies, 97 CORNELL L. REV. 753, 776-786 (2012).


98 Cf. Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 782 (7th Cir. 2010) (Easterbrook, 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.”), cert. denied, 131 S. Ct. 1604 (2011).


100 In fact, the language in the federal statute is taken almost verbatim from the Uniform Declaratory Judgments Act, which has been widely adopted by states. See UDJA § 8.
the past three-quarters of a century, the federal courts have issued thousands of declaratory judgments, but the statutory authorization of further relief has been considered in published opinions in only about 70 cases—less than one per year. And, under Section 2202, the most requested form of “further relief” is attorneys’ fees. Other cases raising Section 2202 have involved plaintiffs who sought a declaratory judgment and an injunction at the same time, or insurers who obtained a declaratory judgment that a policy was void and then sought restitution of money that had been paid out under the policy. What is quite rare is the fact pattern implicit in Fiss’s explanation for the mildness of the declaratory judgment—the situation where a plaintiff wins a declaratory judgment, the defendant disobeys, and the plaintiff goes back to court to get an injunction. In fact, the total number of cases with published opinions involving that fact pattern under Section 2202 appears to be roughly a dozen. In some of these cases the district court granted further injunctive relief, and in some it did not. The meager use of this provision

101 E.g., Key Const., Inc. v. State Auto Property & Cas. Ins. Co., 2008 WL 940797 (D. Kan. Apr. 7, 2008). The likely explanation is the federal courts’ skepticism about the declaratory judgment when interpreting fee-shifting statutes. See infra Part IV.
102 E.g., Doe v. Gallinot, 657 F.2d 1017, 1025 (9th Cir. 1981) (relying on Section 2202 in affirming the simultaneous grant of declaratory and injunctive relief). Sometimes plaintiffs request declaratory and injunctive relief at the same time, citing Section 2202, but receive only declaratory relief. See, e.g., J.R. v. Utah, 261 F. Supp. 2d 1268 (D. Utah 2002).
104 Fiss, supra note 6, at 1122.
throughout its nearly eighty-year history shows that there is no pattern of disregarded declaratory judgments.107 Instead, declaratory judgments are usually complied with, but on rare occasions they are disobeyed. This is of course the precise situation that obtains with

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 (N.D. Tex. 1990) (granting injunction against the creditors of losing defendant in a declaratory judgment action, and noting Section 2202 as one possible ground), aff’d in part and rev’d in part, 960 F.2d 1286 (5th Cir. 1992); Babbitt v. McCann, 320 F. Supp. 219 (E.D. Wis. 1970) (granting injunction against state prosecutors refusing to abide by declaratory judgment that statute was unconstitutional), vacated, 402 U.S. 903 (remanding in light of Younger v. Harris and Samuels v. Mackell); cf. Conley v. Dauer, 463 F.2d 63 (3d Cir. 1972) (declining to grant injunction where compliance with a declaratory judgment by state officials had been tardy but was claimed to be imminent, but remanding for further proceedings). The cases cited in this footnote and the preceding one suggest another point: the lack of requests for injunctions under Section 2202 cannot be explained on the basis of those injunctions being too hard for the plaintiff to obtain, because in none of these cases did the court deny a follow-on injunction against an obdurately disobedient defendant.

106 See Heartland By-Pros., Inc. v. U.S., 568 F.3d 1360 (Fed. Cir. 2009) (declining to grant injunction because defendant had ceased its activities); Heights Community Congress v. Hilltop Realty, Inc., 774 F.2d 135, 144 (6th Cir. 1985) (affirming denial of injunction where defendants were unlikely to commit additional violations); Comprehensive Care v. Katzman, 2011 WL 5080303 (M.D. Fla. 2011) (denying injunction because it was not needed to effectuate declaratory judgment); Kemp v. TysonSeafood Group, 2004 WL 741590 (D. Minn. 2004) (denying injunction because movant had not established prerequisites for injunctive relief); Ladd v. Thomas, 14 F. Supp. 2d 222 (D. Conn. 1998) (denying injunction because defendant had made changes in accordance with the declaratory judgment). The cases cited in this footnote and the preceding one suggest another point: the lack of requests for injunctions under Section 2202 cannot be explained on the basis of those injunctions being too hard for the plaintiff to obtain, because in none of these cases did the court deny a follow-on injunction against an obdurately disobedient defendant.

107 There are undoubtedly a few additional cases where 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 injunction after declaratory judgment without specifying authority); Vermont Structural Slate Co., Inc. v. Tatko Bros. Slate Co., Inc., 149 F. Supp. 139, 140 (N.D.N.Y. 1957) (granting injunction after declaratory judgment and suggesting that this was an exercise of “inherent power”) aff’d sub nom. Vermont Structural Slate Co. v. Tatko Bros. Slate Co., 253 F.2d 29 (2d Cir. 1958). And 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 County, 396 U.S. 320, 327-328 & n.4 (1970) (referring to unpublished declaratory judgment given in Coleman v. Barton, No. 63-4, N.D. Ala., June 10, 1964).
injunctions—they are usually, but not always, obeyed.\footnote{108} In short, there is no reason to think that in actual operation the declaratory judgment lacks the coerciveness of the injunction.

\section*{C. The preclusion rationale}

The third rationale for the declaratory judgment being a milder remedy is that it has reduced issue-preclusive and precedential effect.\footnote{109} In \textit{Steffel}, Justice Brennan described a declaratory judgment as “persuasive” though “not ultimately coercive,” and said it “may have some res 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.”\footnote{110} In a concurring opinion, then-Justice Rehnquist argued that a declaratory judgment had no legal force at all, even in a future prosecution of the declaratory judgment plaintiff,\footnote{111} and should not serve as the basis for an injunction.\footnote{112}

\footnotetext{108}{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 Mitchell J. Frank, \textit{Modern Odysseus or Classic Fraud - Fourteen Years in Prison for Civil Contempt Without A Jury Trial, Judicial Power Without Limitation, and an Examination of the Failure of Due Process}, 66 U. MIAMI L. REV. 599 (2012); Doug Rendleman, \textit{Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor}, 48 WASH. & LEE L. REV. 185 (1991).}

\footnotetext{109}{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. \textit{See Restatement (Second) of Judgments} § 33 cmt. c (1980).}

\footnotetext{110}{\textit{Steffel}, 415 U.S. at 470-471 (quoting Perez v. Ledesma, 401 U.S. 82, 125 (1971) (Brennan, J., concurring and dissenting)). In Justice Brennan’s unpublished \textit{Younger} opinion and in \textit{Perez} (but not in \textit{Steffel}) he included a footnote recognizing contrary legislative history on this point. \textit{See Unpublished Separate Opinion in Younger} (Brennan, J.), supra note 19, at *19; Perez v. Ledesma, 401 U.S. 82, 126 n.16 (1971).}

\footnotetext{111}{\textit{Steffel}, 415 U.S. at 480-484 (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”); \textit{contra id.} at 452}
Since Steffel, the Court’s doubts about the issue-preclusive effect of a declaratory judgment have received only slender support among courts and scholars. Justice Rehnquist would abruptly change his position a year later, and over the next several decades he would zigzag on the effect of a declaratory judgment. The doubts raised

112 Steffel, 415 U.S. at 480–481 (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 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 Arizonans for Official English v. Arizona, 520 U.S. 43, 58 n.11 (1997); Lockhart v. Fretwell, 506 U.S. 364, 375-376 (1993) (Thomas, J., concurring).

113 Justice Stevens noted these doubts in a later concurrence, see Edgar v. MITE Corp., 457 U.S. 624, 650–651 & nn.2-3 (1982) (Stevens, concurring in part and in the judgment); and Justice Souter has suggested that a decision quieting title to real property—whether formally styled that way or as a declaratory judgment—would not have generous issue-preclusive effect, see Idaho v. Coeur d’Alene Tribe of Idaho, 521 U.S. 261, 305-306 (1997) (Souter, J. dissenting). See also SHOBEN, TABB, & JANUTIS, supra note 67, at 1021 (“Although a declaratory judgment is not coercive in the same sense as an injunction, the effect of a determination of rights or legal relations often will strongly influence parties to take steps to avert incurring liability or prosecution.”) (emphasis added)); John E. Kennedy & Paul D. Schoonover, Federal Declaratory and Injunctive Relief under the Burger Court, 26 Sw. L. J. 282, 333-334 (1972) (seeming to endorse Justice Brennan’s doubts about “the res judicata effect of a declaratory judgment”); cf. FALLON ET AL., supra note 49, at 1111-1112 (noting these doubts without endorsing them); RESTATEMENT (SECOND) OF JUDGMENTS § 33 reporter’s note to cmt. b (1980) (same).

114 Compare his concurrence in Steffel with his majority opinions in Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (noting that “ordinarily . . . the practical effect of injunctive and declaratory relief will be virtually identical” (internal quotation marks and alterations in original omitted)); Green v. Mansour, 474 U.S. 64, 64 & 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”); Calderon v. Ashmus, 523 U.S. 740, 749 (1998) (holding that in that case a declaratory judgment would be unconstitutional since it would not have “coercive impact on the legal rights or obligations of either party”).
by *Steffel* have been decisively rejected by scholars of remedies and federal courts. And in the lower courts there has been no great debate about the declaratory judgment’s effect. The only way this idea of diminished issue-preclusive effect seems to have lived on is the form it took in the litigation over the Affordable Care Act, where, as noted above, the Department of Justice argued that a declaratory judgment has no legal effect until appeals are concluded. Yet even in this form the idea has met with only limited success.

It is not surprising that there has been such little 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, for example, authorizes declaratory judgments and then says: “Any such


116 See RESTATEMENT (SECOND) OF JUDGMENTS § 33 reporter’s note to cmt. b (1980); see also, e.g., U.S. v. Doherty, 786 F.2d 491, 499, 502 (2d Cir. 1986) (Friendly, J.) (refusing to grant a declaratory judgment but recognizing that it would have had “preclusive effect”).

117 See *supra* text accompanying notes 1-3.


declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”120 This express statement dooms any effort to give the declaratory judgment less “force and effect” than other judgments.121 To be doubly sure, the Act uses the old language for decisions at law (judgment) and equity (decree), indicating that a declaratory judgment does not fall short of either one.122 Not only that, the Act even specifies that a declaratory judgment has this effect while under review,123 thus ruling out 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.124

120 28 U.S.C. § 2201(a); see also UDJA § 1 (“such 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).


122 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 S.5304, 65th Cong. (1919), reprinted in S. Comm. on the Judiciary, 65th Cong., The Declaratory Judgment 2 (Comm. Print 1919) (Brief by Edwin M. Borchard) ("and such declaration shall have the force of a final judgment"); H.R. 5194, 68th Cong. (1924) ("and such declarations shall have the force of a final decree and be reviewable as such").

123 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 UDJA § 7 (“All orders, judgments and decrees under this act may be reviewed as other orders, judgments and decrees.”).

124 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 24, at 175. See also 2 WALTER H. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS 1070 (1951); SAMUEL W. EAGER, THE DECLARATORY JUDGMENT ACTION: NOTES, CASES AND FORMS 2, 315 (1971) (New York law); Developments in the Law—Res Judicata, supra note 109, at 881; Developments in the Law, 62 HARV. L. REV. 787, 841-42 (1949). A declaratory judgment is also given issue-preclusive effect in the law of the United Kingdom and of Canada. See WOOLF & WOOLF, ZAMIR & WOOLF’S THE DECLARATORY JUDGMENT 3 (4th ed. 2011); LAZAR SARNA, THE LAW OF DECLARATORY JUDGMENTS 220 (1978).
Second, the idea that the declaratory judgment has less issue-preclusive effect is incompatible with the remedy’s normative theory. The declaratory judgment action is meant to resolve legal uncertainty—not every condition of legal uncertainty, but rather a particular kind. It resolves a dilemma about legal consequences, which could be called “the tragedy of the crossroads.” 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 one road must be chosen.

To see how the declaratory judgment can resolve this 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 costs and social costs. If she manufactures an infringing product, the costs include her risk of treble damages for patent infringement as well as the administrative costs of a patent-infringement trial. If she decides not to manufacture a product that a court would have found to be non-infringing, then she will lose the profits that would have covered the cost of this invention and subsidized other inventions, thus reducing innovation for the

125 Doug Laycock and other scholars have recognized that this dilemma is central to the theory of the declaratory judgment, and they have emphasized its existence in criminal and regulatory contexts. See Laycock, supra note 48, at 641-649, 684-688 (referring to the choice to risk prosecution or forgo conduct as “the Young dilemma”); Kenneth Culp Davis, Ripeness of Governmental Action for Judicial Review, 68 HARV. L. REV. 1122, 1151-1153 (1955); see also DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 583-586 (4th ed. 2010). Leading cases recognizing this dilemma in those contexts include Steffel itself, see 415 U.S. at 462; and Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967). As indicated by the examples below, this dilemma is also pervasive in private law. Accord MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 134 n.12 (2007).

126 Cf. Bray, supra note 71, at 1306-1309 (describing a person with unclear legal status facing a crossroads that can be resolved through preventive adjudication).

public. And she must choose one of the roads, and has no viable intermediate options: she will or will not make the product.\textsuperscript{128}

In American law the tragedy of the crossroads is routinely resolved with a declaratory judgment that liquidates the uncertainty about one of the roads. In the patent illustration, a declaratory judgment lets the inventor know whether she is exposing herself to legal risk by manufacturing and distributing the product.\textsuperscript{129} \textsuperscript{129} (As in the patent example, the plaintiff seeking the declaratory judgment would often be the defendant in a later action.) But the declaratory judgment is able to liquidate this uncertainty \textit{only} because it has conclusive effect in later litigation on the question the court decides. If it lacked such effect it would offer no certainty to the person at the crossroads. Such a declaratory judgment would be costly\textsuperscript{130} and pointless.\textsuperscript{131}

\textsuperscript{128} The example is representative, and other similar examples could be given where an actor must decide which of the legally consequential roads to take, without any possibility of evasion or splitting the difference. 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.

\textsuperscript{129} Domain-specific legal rules can heighten the desirability of a declaratory judgment. To continue the example from patent law, a possible infringer who seeks a declaratory judgment can choose the forum. \textit{See} Chester S. Chuang, \textit{Offensive Venue: The Curious Use of Declaratory Judgment to Forum Shop in Patent Litigation}, 80 GEO. WASH. L. REV. 1065 (2012).

\textsuperscript{130} \textit{See} Rendleman, \textit{supra} note 12, at 167 (noting the administrative costs of Justice Rehnquist’s position in \textit{Steffel} that the declaratory judgment has no binding effect in subsequent cases).

\textsuperscript{131} \textit{See} Pub. Serv. Comm’n of Utah v. Wycoff Co., Inc., 344 U.S. 237, 247 (1952) (concluding that if a declaratory judgment were not “res judicata” it would “serve[] no useful purpose as a final determination of rights”); Shapiro, \textit{supra} note 12, at 764 (“The very purpose of the declaratory judgment proceeding would appear to be thwarted were this determination to be regarded, in a subsequent proceeding between the same parties, as no more than the view of a coordinate court.”); Elizabeth L. Hisserich, \textit{The Collision of Declaratory Judgments and Res Judicata}, 48 U.C.L.A. L. REV. 159, 161 (2000) (“[D]eclaratory judgments must be accorded some preclusive effect or they will be virtually meaningless.”); cf. Henry M. Hart, Jr., \textit{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”).
Despite these arguments from the statutory law and normative 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 insurance and intellectual property, 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.”¹³² 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.¹³³ Moreover, any attempt to draw a difference between the issue-preclusive effect of 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,¹³⁴ Roe v. Wade,¹³⁵ Buckley v. Valeo,¹³⁶ Bowers v. 

¹³² Lewis Donald Asper & Sanford Jay Rosen, Comment on Powell v. McCormack, 17 U.C.L.A. L. Rev. 58, 71. On this point 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 (2d. ed. 1986) (not discussing the declaratory judgment); Alexander M. Bickel, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40 (1961) (same).

¹³³ E.g., Ma Chuck Moon v. Dulles, 237 F.2d 941 (9th Cir. 1956), cert. denied, 352 U.S. 1002 (1957). 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 Pub. Serv. Comm’n of Utah v. Wycoff Co., Inc., 344 U.S. 237, 243, 73 S. Ct. 236, 240, 97 L. Ed. 291 (1952) (Jackson, J.); Eccles v. Peoples Bank of Lakewood Vill., Cal., 333 U.S. 426, 431 (1948) (Frankfurter, J).


Hardwick,\textsuperscript{137} and U.S. Term Limits, Inc. v. Thornton.\textsuperscript{138} 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 be the challenge of explaining how much effect it should actually have. No one has yet articulated a way that the declaratory judgment could have some kind of intermediate, 65% issue-preclusive effect. 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.\textsuperscript{139} Two of these rationales start with correct observations about the formal features of the declaratory judgment, namely that the declaratory judgment has neither a command to the parties nor an

\textsuperscript{137} 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring).


\textsuperscript{139} See supra notes 72-77.
The instantcous sanction. But the wrong inference is then drawn. The mistake is in thinking that the meaning and effect of the declaratory judgment can be determined solely by reference to formal features, without considering the interaction of those features within 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[ing] pain and death.” Or they can talk, merely talk. Although there are circumstances where this hierarchy obtains, it is too simplistic. Words have their own power, and when spoken by a court they can create or dissolve relations between people, legitimize what would otherwise be theft or violence, or justify the ways of courts to those outside. Of course a declaratory judgment is not purely “word” and an injunction purely “deed.” For every decision by a court, no matter what remedy accompanies it—whether damages or restitution or an injunction—carries with it an implicit declaratory judgment stating what the law is. Thus an injunction is both word and deed; there is no absolute dichotomy between the remedies. But

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140 This Article argues that these formal features have a different significance in practical operation, being more about management than strength. See infra Part III.A.

141 Robert Cover, Violence and the Word, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 213 (Martha Minow, Michael Ryan & Austin Sarat, eds. 1993). Although the quoted phrase is from Cover, he did not make this mistake.

142 The word merely and cognates show up with some regularity with respect to the declaratory judgment. E.g., Liberty Warehouse Co. v. Burley Tobacco Growers’ Co-op. Mktg. Ass’n, 276 U.S. 71, 89 (1928) (“This court has no jurisdiction to review a mere declaratory judgment.”); New Jersey Peace Action v. Bush, 379 F. App’x 217, 222 (3d Cir. 2010) (“plaintiffs stress that they . . . ‘are merely seeking a declaratory judgment’”); Rayder v. AHTNA Governmental Services Corp., 2006 WL 335626 (E.D. Va. Feb. 13, 2006) (“the Alaska matter is at this stage merely a declaratory action”).


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 real consequences, being only an exhortation to the parties or advice to future courts, it would be an impermissible advisory opinion. In fact, this constitutional objection was raised almost a century ago. In *Aetna Life Insurance Co. v. Haworth*, the Supreme Court rejected the claim that a declaratory judgment was an advisory opinion, on the grounds that the requested declaratory judgment would instead be “an adjudication of present right” that was “final and conclusive as to the matters thus determined.” 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. To pull at the thread of that effect would be to

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145 See, e.g., SCHUCK, supra note 7, at 15 (Declaratory judgments “merely pronounce[] particular practices or conditions to be illegal, leaving defendants free to respond as they see fit.”).

146 See, e.g., Steffel, 415 U.S. at 482 (Rehnquist, J., concurring).

147 See Currie, supra note 12, at 346 n.199; Rendleman, supra note 12, at 168; Shapiro, supra note 12, at 764 n.28; see also ERWIN CHEMERINSKY, FEDERAL JURISDICTION 837 (5th ed. 2007) (recognizing 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).

148 For secondary sources, see Doernberg & Mushlin, supra note 42, at 554-561, 566-569; 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 (2006). For a subsequent invocation of this same concern, see South Carolina v. Katzenbach, 301 U.S. 383, 357-358 (Black, J., 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.

149 300 U.S. 227 (1937).

150 Id. at 242.

151 Id. at 243.

152 Note that retrospective declaratory judgments raise different and not fully resolved questions. Cf. Jonathan D. Varat, Variable Justiciability and the Duke Power Case, 58
unravel this constitutional settlement, creating new and wholly unnecessary doubts about the constitutionality of the declaratory judgment.

* * *

Thus the rationales for the mildness thesis are not persuasive. Even apart from its historical failings, the myth given in Steffel is inadequate as a present-day description of how the declaratory judgment works and as a normative account of how it 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 bold confidence in asserting the claim. Another is the early enthusiasm that scholars showed for Steffel, perhaps as a way to limit the reach of Younger v. Harris’s abstention principles. Still another is that Steffel presented itself as drawing out only the “highlights” of the federal statute’s legislative history, and it said that the history had previously been “traced in full detail.” That description lent Steffel’s history more weight than it deserved, especially for readers who did not follow the citation. Yet another fact is the relative lack of influence for the third rationale (i.e., less issue-preclusive effect). 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 normative theory of the declaratory judgment, that closer examination of Steffel would have been inevitable. As it is, the courts and commentators have tended to adopt the first two rationales.

TEX. L. REV. 273, 313-314 (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 tragedy of the crossroads.

153 See Fiss, supra note 6. On Younger, see supra note 21.

154 On the earlier opinion from which Steffel extensively drew—a separate opinion by Justice Brennan in Perez v. Ledesma, 401 U.S. 82 (1971)—see supra note 19. Steffel quoted at length the relevant passages from that opinion.
for the mildness thesis—still mistaken, but less harmful. And a final
fact explaining the reception of the mildness thesis is the
fragmentation of scholarship on remedies. Some scholars write about
non-monetary remedies in constitutional and regulatory cases, and
other scholars write about them in intellectual property cases. It is
easier to detect the descriptive and normative weakness of the
mildness thesis when the declaratory judgment is considered trans-
substantively.

III. Rethinking the differences between declaratory
judgments and injunctions

If the relationship between the declaratory judgment and the
injunction should not be understood as a hierarchy of strength, how
should it be understood? This Part offers an alternative account of the
differences between the declaratory judgment and the injunction. As
noted above, in many cases where a plaintiff seeks prospective relief,
a declaratory judgment and an injunction are functionally
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 anti-war protestor who fears prosecution, it will
ordinarily make no difference at all whether the court gives a
declaratory judgment or an injunction.

But despite these functional similarities, these two remedies are
not perfectly interchangeable. There are situations where each tends
to predominate, and each has a distinctive feature set. In particular,
the injunction has a number of features that make it better suited, all
evertheless being equal, to management of the parties. The declaratory
judgment lacks these features. And the declaratory judgment is
available at an earlier stage in some disputes. These dimensions of
difference—management and timing—best explain the residual
differences between the declaratory judgment and the injunction.

\footnote{Some of the managerial features discussed in this Part are characteristic of equitable
remedies more generally, but only the injunction is here in view.}
A. The dimension of management

This Article argues that the central functional difference between the declaratory judgment and the injunction in contemporary American law is management, in the sense of continuing direction and oversight of the parties. Management is characteristic of the injunction; its absence is characteristic of the declaratory judgment. As a result, the decision to grant one or the other of these remedies should chiefly be a decision about the degree to which the court needs to insist on this continuing direction and oversight.

In thinking about this dimension, it is important to distinguish two analytical categories. The first 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 make management more feasible or less feasible. As will be seen, the injunction is used in situations where 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 where management of the parties would be unnecessary or impracticable, and it pervasively lacks features for management.

To recognize the interaction of both analytical categories is to avoid a mistake implicit in the mildness thesis, which is thinking of a remedy as having some kind of essence apart from the contexts in which it is used. Rather, the meaning of a remedy is constructed through the interaction of its formal features with the ways it is situated within the life of a jurisdictional community.

1. Situations

The starting point, then, is the situations in which these two remedies are given, but this can be treated briefly here because of the discussion in the preceding Parts. As noted above, 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. 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. 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, then the parties to the dispute will ordinarily know how they should act. When this clarification is all that is needed, management by the court would be superfluous. It would also, in many of these cases, be infeasible—when an insurer sues to determine whether it has a duty to defend, surely the judge does not want to supervise the insurer and tell it how many depositions would be necessary to fulfill that duty.

In contrast, for an injunction there is no typical situation. The elusiveness of 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. And it is due to the pervasiveness of the injunction as the central non-monetary 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 take-over of

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156 See supra notes 76-77 and accompanying text.

157 See supra notes 72-75 and accompanying text.

158 I am grateful to Steve Yeazell for suggesting this point.

159 See, e.g., Ayotte, Friedman, & Smith, supra note 96. A substantive example is equity’s traditional concern for alleviating fraud: because “fraud is infinite,” no one could ever “lay down as a general proposition what constitutes fraud, or establish any invariable rule which should define it.” 2 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 408 (Richmond, Shepherd & Colin 3d ed. 1846) (quoting a letter from Lord Hardwicke to Lord Kaimes). For examples of equity’s aversion to rules laid down in advance even in procedural matters, see chapter twenty-two of Lord Nottingham’s late seventeenth-century Prolegomena of Chancery and Equity, aptly titled “The Chancery Is Not Tied to Its Own Forms.” LORD NOTTINGHAM’S ‘MANUAL OF CHANCERY PRACTICE’ AND ‘PROLEGOMENA OF CHANCERY AND EQUITY’ 292 (D.E.C. Yale ed. 1965) (hereinafter LORD NOTTINGHAM’S ‘MANUAL’).
operational control of an institution such as a school or prison. Even though there are no paradigmatic scenarios, amid all of this variety, whenever management of the parties is required and feasible, the injunction is the remedy of choice.

2. Features

The declaratory judgment and the injunction also differ in the extent to which they have formal features that are useful for management. In particular, the injunction has many features that strengthen a court’s ability 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.” The specificity requirement makes it easier for a court to observe whether there has been a violation, because the terms of the injunction will tell the court exactly what to look for.

Observing violations is made slightly easier, too, because an injunction is explicitly in personam. It is addressed to, and binds, certain identifiable persons, and not the entire world. As Learned

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160 The use of more or less managerial remedies is only one way that a court can direct and oversee the parties. On the broader phenomenon of judicial management, see Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374 (1982).

161 FED. R. CIV. P. 65(d)(1); see also FISS, supra note 6, at 12.

162 For the multiple meanings of the old equitable maxim that “equity acts in personam,” see LAYCOCK, supra note 125, at 818-820; see also Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 YALE L.J. 710, 713-715 (1917) (distinguishing different senses of in rem versus in personam).

163 Again this feature is explicit in the Federal Rules of Civil Procedure, which specifies that when a court gives an injunction, “[t]he order binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties’ officers, agents, servants, employees, and attorneys; and (C) other persons
Hand said, equity “cannot lawfully enjoin the world at large, no matter how broadly it words its decree. . . . It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.”\textsuperscript{164} That \textit{in personam} quality should not be overstated, because over the last several centuries its significance has been unmistakably eroded.\textsuperscript{165} But it remains true that this habit of thinking of equity as operating \textit{in personam} is conducive to a court subsequently determining whether there has been compliance with the decree, because the court need review the compliance only of the persons identified in the decree and those acting in concert with them.\textsuperscript{166}

Moreover, it will be easier for the court to learn about noncompliance with an injunction, because there are more flows of information to the court. The reason is contempt—considered here not in terms of sanctions but in terms of information. If the losing party violates the injunction, contempt proceedings can be initiated by multiple actors: the court itself, the winning party, or a prosecutor.\textsuperscript{167} 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

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\item who are in active concert or participation with\textquotesingle these persons. \textsc{Fed. R. Civ. P. 65(d)(2).}
\end{itemize}


\textsuperscript{165} \textit{See} D.E.C. Yale, \textit{Introduction}, in \textit{Lord Nottingham’s ‘Manual’}, \textit{supra} note 159, at 17-18 (“Like many other generalizations, the maxim that Equity acts \textit{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.”). To see the shift, compare \textit{J.R. v. M.P.}, 37 Henry 6, 13, pl. 3 (Ct. Comm. Pleas 1459) with \textit{Dobson v. Pearce}, 12 N.Y. 156 (1854).

\textsuperscript{166} For the complexities involving persons in privity with an enjoined party, see Dobbs, \textit{supra} note 164, at 254-255.

\textsuperscript{167} A useful overview of contempt proceedings is found in \textit{Laycock}, \textit{supra} note 125, at 766-768.
even turn the losing party into such a source, by imposing on it various record-keeping and reporting requirements, including a duty to report to the court any violations that occur.168 There can therefore be as many five sources of information and investigation about violations: the court, a court-appointed monitor or receiver, a prosecutor, the winning party, and the losing party.

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.169 There is no habit of thinking of declaratory judgments as operating in personam.170 There is no broadened flow of information to the court, for there is only one obvious way for a court to issue further relief—if the winning party comes back to court under Section 2202 or an analogous state statute that permits subsequent relief after a declaratory judgment.171 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.

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168 See, e.g., Int'l Union, United Mine Workers of America 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”).

169 Contrast Federal Rule of Civil Procedure 57, which authorizes the declaratory judgment and contains no specificity requirement, with Rule 65(d)(2).

170 Additionally, a declaratory judgment may be in rem, as when a court decides ownership of real or personal property. See RESTATEMENT (SECOND) OF JUDGMENTS § 33 reporter’s note to cmt. b (1980) (recognizing that a declaratory judgment “may be binding vis-à-vis the world or named parties”); but cf. Sarna, supra note 124, at 220-221 (noting approvingly that in Canadian law a declaratory judgment does not have in rem effect); supra note 164 (noting contestable category of in rem injunctions).

171 See, e.g., 28 U.S.C. § 2202 (allowing a court to grant “further necessary or proper relief based on a declaratory judgment”); 14 Maine Rev. Stat. Ann. § 5960 (“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). See Royal Ins. Co. of Am. v. Quinn-L Capital Corp., 759 F. Supp. 1216, 1228 (N.D. Tex. 1990), aff’d in part and rev’d in part, 960 F.2d 1286 (5th Cir. 1992).
B. Responding to violations. The injunction also has features that make it easier to respond after a violation has occurred. One, of course, is the contempt power. Supporters of the mildness thesis have rightly pointed to this as a difference between the injunction and the declaratory judgment. But, as argued above, in the cases in which the declaratory judgment is actually given, the absence of contempt does not make it a milder remedy. Rather, it makes it a less managerial one. When an injunction has been issued, what the threat of criminal contempt gives the court is leverage to control the parties—the sort of leverage that one would expect from penalties that are highly discretionary and tailored to the circumstances in a “changing future.” Moreover, the availability of contempt means that the court has committed itself to manage the parties’ compliance with the decree and has put its own prestige on the line to back up this commitment. In short, although contempt can be a punitive means, it is for a managerial end.

Furthermore, the injunction has features that allow a court to better adapt to changing circumstances. The outer example is the structural injunction, where the court has taken over the operation of a prison, school, or hospital. There it is obvious that the court, or a special

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172 See supra Part II.B.

173 The phrase is from Rendleman, supra note 12, at 163, describing injunctions as “guid[ing] conduct in a changing future.”

174 See Timothy Stoltzfus Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101, 1105 (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”).

175 See Doug Rendleman, The Inadequate Remedy at Law Prerequisite for an Injunction, 33 U. Fla. L. Rev. 346, 356-358 (1981). As Rendleman also notes, sometimes contempt provides future process but not future punishment. See Rendleman, supra note 12, at 169 (noting that courts “may enter a judgment of contempt without sanctions, observing that there is no sufficient reason to prosecute further”).

176 See Rendleman, supra note 12, at 169 (“Courts employ contempt to attain compliance, not to display retribution.”).

177 On structural injunctions, the still canonical source is Fiss, supra note 6. For entry points to the extensive literature on structural injunctions, see Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Colin
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. 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.”\textsuperscript{178} No such means of adaptation is available for the declaratory judgment.\textsuperscript{179}

The effect of this power of modification and dissolution is important. A court granting prospective relief—whether an injunction

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\textsuperscript{178} United States v. Swift & Co., 286 U.S. 106, 114 (1932); see also Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 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, 298 Pa. 487, 500 (1930) (“The decree is an ambulatory one, and marches along with time[.]”); Jost, \textit{supra} note 174, at 1105; \textit{cf.} DiSarro, \textit{supra} note 57, at 753 (“Injunctions, moreover, impose significant burdens on courts by requiring them . . . to entertain applications to enforce, modify, or vacate [the] decree.”).

\textsuperscript{179} \textit{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, \textit{inter alia}, it is not clear that a declaratory judgment could be modified in the same way as the underlying injunction). Note, however, that there is authority for the proposition that change in circumstances can be considered in giving a declaratory judgment preclusive effect in other cases. \textit{See} Restatement (Second) of Judgments § 33 cmt. e (1980).

\end{footnotesize}
or a declaratory judgment—cannot know what the future will hold.\textsuperscript{180} But when giving an injunction, the possibility of modification allows the court a fuller range of drafting choices, since the court can choose to be either less specific or more specific than would otherwise be necessary: less specific because the court has a pencil to later add more terms, or more specific because the court has an eraser.\textsuperscript{181}

In the shadow of modification, it also makes more sense that courts are able to issue injunctions that are prophylactically overbroad.\textsuperscript{182} This ability to overstate and overprescribe is possible

\textsuperscript{180} Jost, supra note 174, at 1101-1102; see also John H. Langbein, The Disappearance of Civil Trial in the United States, 122 YALE L.J. 522, (2012) (describing specific remedies, such as injunctions and specific performance, as “often require[ing] continuing supervision and modification as circumstances change”).

\textsuperscript{181} See 1 DOBBS, supra note 164, 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 too demanding.”). This ability to add or erase is probably more important for mandatory injunctions than for prohibitory injunctions, because the former may need to spell out not only what must be done but also how it must be done, and the court may need to modify these additional instructions as events unfold. Cf. id. at 224 (giving as a reason courts may be less likely to grant mandatory injunctions that they may be “more difficult to supervise and enforce”); SCHUCK, supra note 7, 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 § 1.2.2 (2d ed. 2012 supp.) (distinguishing mandatory and prohibitory injunctions with respect to the difficulty of judicial supervision). Whether this difference holds in a particular case depends on how the injunction is drafted, and in some circumstances the distinction is purely one of characterization. See HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 32 (2d ed. 1948) (describing Lord Eldon’s granting of effectively mandatory injunctions in prohibitory form); see also LAYCOCK, supra note 125 (expressing skepticism about the distinction between prohibitory and mandatory injunctions).

\textsuperscript{182} See generally Tracy A. Thomas, The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief, 52 BUFFALO L. REV. 301 (2004); Tracy A. Thomas, The Continued Vitality of Prophylactic Relief, 27 REV. LITIG. 99 (2007). As an example of this prophylactic scope, Daryl Levinson notes that “a plaintiff who proves hostile work environment sexual harassment in violation of Title VII might get an injunction forbidding sexual harassment of other women in the office and, additionally, ordering the employer to implement a training program and a complaint procedure—steps that are not required by Title VII, but that may be
with the injunction precisely because the court expects to undo the prophylaxis in time. How soon the court should undo this prophylaxis is often highly controversial, 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 has no such power of temporary prophylactic 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 . . . .

With the declaratory judgment there is still flexibility in drafting, but there are fewer possibilities for compromise and experimentation.

Similarly, there can be consent decrees and time-limited

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incorporated into a preventive injunction to decrease the risk of future Title VII violations.” Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 COLUM. L. REV. 857, 885 (1999).

183 This can be seen, for example, in disagreements over the termination of structural injunctions. See, e.g., Horne v. Flores, 129 S. Ct. 2579 (2009); 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 (1993); Schlanger, supra note 177, at 630 n.121 (listing cases involving the termination of injunctions under the Prison Litigation Reform Act).

184 MCCLINTOCK, supra note 181, at 391.

185 See Developments in the Law, supra note 124, at 883 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.”).
injunctions, 186 but a “consent declaratory judgment” or a time-limited declaratory judgment would be highly aberrational.

Thus these two critical aspects of managing the parties—observation and response—are supported to a greater degree by the features of the injunction than by those of the declaratory judgment. As Tim Jost has aptly put it, “an injunction is the judicial ordering of a relationship in conflict.”187 The features described here allow the injunction to perform this function, ordering and reordering the relationship of the parties until compliance is achieved. In contrast, the declaratory judgment is a non-managerial remedy. 188 It lacks the features needed for management, and it is primarily used in situations where continuing direction and oversight of the parties is unnecessary.

186 See, e.g., Merck & Co. Inc. v. Lyon, 941 F. Supp. 1443, 1465 (M.D.N.C. 1996) (injunction with one- and two-year provisions); SEC v. First Wisconsin Mortgage Trust, Litigation Release No. 6519 (S.E.C. Release No.), 5 S.E.C. Docket 178, 1974 WL 161663 (twenty-five year injunction, with 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, 2 STAT. AT LARGE 418. More recent statutes have also specified termination points for injunctions they cover. See 18 U.S.C.A. § 3626(b)(1)(A) (West).

187 Jost, supra note 174, at 1101 (emphasis added). An analogy can 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. See, e.g., 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. But the analogy can easily be overstated because this is a matter of degree and is affected by drafting.

188 A rare case that makes this point explicitly is Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 782 (7th Cir. 2010), cert. denied, 131 S. Ct. 1604 (2011). 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.
B. The dimension of timing

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

The temporal distinction between these two remedies has been recognized by several scholars. David Currie described the declaratory judgment as “a substitute for the injunction” that “may possibly be available before there is cause for traditional relief.”\(^{189}\) Doug Rendleman has described one category of the plaintiffs seeking declaratory judgments as “people embroiled in an actual controversy that has not developed to the stage at which someone could seek damages or an injunction.”\(^{190}\) And Douglas Laycock has written: “We are left with a 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.”\(^{191}\) But Laycock immediately added a serious

\(^{189}\) Currie, supra note 32, at 19.

\(^{190}\) Rendleman, supra note 12, at 161.

\(^{191}\) LAYCOCK, supra note 167, at 586. For further recognition of the possibility that the declaratory judgment may be obtained sooner than the injunction, see DAVID I. LEVINE, DAVID J. JUNG, & TRACY A. THOMAS, REMEDIES: PUBLIC AND PRIVATE 415 (5th ed. 2009); Thomas E. Baker, Thinking About Federal Jurisdiction—Of Serpents and Swallows, 17 ST. MARY’S L.J. 239, 40 & n.41 (1986); Doernberg & Mushlin, supra note 42, 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. Larena, supra note 78, at 962 (observing that a declaratory judgment “is most useful when sought early in the process, before either party suffers grave or irreparable damage”); but see Fiss, supra note 6, at 1122 (saying that the distinction between the declaratory judgment and the injunction does “not seem relevant to the imminency requirement” traditionally associated with injunctive relief). In one of his final opinions, Judge Friendly surveyed various statements of the
qualification: “No 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.”192 What is this difference, and why is it so hard to articulate?

The answer to these questions can be found in the normative theory of the declaratory judgment, and in particular in the kind of legal uncertainty it is meant to solve. Consider again the example of a dispute over whether a patent is valid.193 The inventor must choose: either begin production (which means risking treble damages for patent infringement), or give up on bringing the invention to market. 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 patent-holder would like one prohibiting the inventor from producing the product, and the inventor would like one prohibiting the patent-holder from suing for patent infringement. But both injunctions would be premature, because the inventor is not yet ready to make the product. Even so, private and social costs may already be accruing from the legal uncertainty, the sort of costs that the theory of the declaratory judgment suggests it was meant to avoid.194 To speak a little loosely, one could say that in this kind of case the injunction is a fruit that ripens more slowly than the declaratory judgment.

And in some circumstances the social value of prospective relief largely depends on its being granted before any other form of legal resolution is imminent. Consider a declaratory judgment about the

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<td>192</td>
<td>LAYCOCK, supra note 167, at 586.</td>
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<td>See supra notes 78-79 and 127-128 and accompanying text.</td>
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<td>See supra notes 127-128 and accompanying text; see generally Bray, supra note 71; Landes &amp; Posner, supra note 77; Laycock, supra note 48.</td>
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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, and the problem is exacerbated where the uncertainty lingers 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, such as a declaratory judgment action. This suggests that the value of a declaratory judgment can depend on its being available at a stage before enforcement is imminent. The same could of course be said of injunctions in such cases—they are most valuable when prosecution is not imminent. Yet it is a blackletter requirement, sometimes honored in the breach, that injunctions may issue only when there is imminent harm. There is no such requirement of equitable ripeness for the declaratory judgment, giving it a comparative advantage at this early stage.

Nevertheless, as David Currie and Doug Laycock have recognized, it is hard to define this stage in the lifecycle of a dispute where only the declaratory judgment is available. In many disputes this stage will never even exist. Where it does exist, it is fragile. For example, in the patent scenario it can be brought to an end by the voluntary

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196 See Laycock, supra note 115, at 222-223; Whitten, supra note 85, at 618-19, 622-23; contra Steffel, 415 U.S. at 476 (Stewart, J., concurring) (glossing a "genuine threat of enforcement" as essentially an "objective[] showing . . . of imminent arrest"); Fraser, supra note 77, at 640 (suggesting that "a coercive action must be imminent" for a declaratory judgment to be available).


198 See Currie, supra note 32, at 19; LAYCOCK, supra note 125, at 586.
actions of either party (i.e., the inventor can manufacture and distribute the product, thus allowing a suit for damages by the patent-holder; or the patent-holder can threaten to sue for infringement, thus allowing a suit for an injunction by the inventor). Furthermore, the boundaries of this stage are fuzzy on both sides. On one side, at the beginning, it is bounded by the strictures of Article III, which are famously incapable of precise, rule-like expression. On the other side, at the end, this stage is bounded by the availability of the injunction. And the imminence requirement for injunctive relief is an indistinct standard suffused with judicial discretion. Nevertheless, though it exists between imprecision and indistinctness, this stage where the only available remedy is a declaratory judgment does exist for some disputes.

This timing difference is related to the management difference. A court issuing an injunction is committing itself to manage the parties—it should not make this commitment rashly. It is therefore reasonable to expect that a court will (and should) require somewhat more factual development before issuing an injunction. (Again, there is no clear line.) Courts must keep a watchful eye on their outstanding obligations, their uncashed checks for judicial management.

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201 In the patent context this space was preserved by the Court’s decision in MedImmune, Inc. v. Genentech, Inc., 549 US 118, 137 (2007), which rejected a Federal Circuit test that made it impossible to get a declaratory judgment until an injunction was available.

202 Cf. 1 DOBBS, supra note 164, at 143-144 (noting judicial fears about complex decrees turning them into “administrators rather than judges,” though also suggesting that the “fear of long supervisory problems is probably overdone”)
Thus, as other scholars have noted, there is a temporal space that belongs to the declaratory judgment but not the injunction, though it is hard to define with any precision. The advance made here is to ground this temporal space in the normative theory of the declaratory judgment, and to connect it to the difference in management. Thus, though incapable of rule-like definition, timing is a dimension of difference between these remedies.

* * *

So far, this Part has offered an alternative account of the functional differences between the declaratory judgment and the injunction. That account emphasizes management and timing, not strength. Relative to the mildness thesis, it better fits the pattern of situations in which these remedies are used. For example, an insurer who is seeking a declaratory judgment about whether it has a duty to defend is seeking an earlier, non-managerial remedy, but it is not seeking a milder one.

This alternative account is also better than the mildness thesis at explaining the differences in the feature set 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 might suggest that it is a strong remedy (e.g., contempt, prophylaxis), while other features might suggest that it is a weak or narrow remedy (the specificity requirement, dissolvability, the possibility of compromise, explicit in personam effect). But these characterizations are strained, and they do not aptly describe the interaction of these features with the situations where 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 federal courts casebook notes that even if Steffel is wrong about this remedy’s preclusive effect, “it would not follow that the distinction [between the declaratory judgment and the

203 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 (2d ed. 1883).
injunction] is wholly chimerical.” 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?” Although that suggestion is not developed, it should be noted that it would fail to explain the differences between the declaratory judgment and the injunction delineated here. These differences are practical: Does the court need to direct and control the parties? Is the declaratory judgment the only available remedy at this stage? Any symbolism that might arise out of these differences in management and timing is at best epiphenomenal. And any such symbolic difference would be easily swamped by the way the court wrote the accompanying opinion: the symbolism of a declaratory judgment framed by an aggressive opinion is aggressive; the symbolism of an injunction framed by a timid opinion is timid.

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 more descriptively accurate. But is it also better in a normative sense?

C. Contingency and the normative theory of remedies

In assessing the present forms of the injunction and the declaratory judgment, it is important to start with a caveat. The injunction has a long history, and the statutes authorizing the declaratory judgment,

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204 FALLON ET AL., supra note 49, at 1112.
205 Id.
206 The Supreme Court has treated the principles of equity as being determined by that history. See eBay v. MercExchange, 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” as guidance for the lower courts in the granting of equitable remedies (internal quotation marks omitted)); Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982). In two relatively recent cases the Court divided over whether a remedy was permitted in equity. Both sides agreed that the principles of equity were determined by its history, even though they disagreed about the extent to which the applications of those principles are similarly fixed. See Great-West Life & Annuity
although comparatively recent, have not been significantly amended. Nevertheless, there is no reason these remedial forms cannot be changed in the future, for “Congress is not confined to traditional forms or traditional remedies.”207 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 managerial commitments. They should also be able to decline to make managerial commitments—either as a way to reduce decisionmaking and administrative costs, 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 tragedy of the crossroads, there will usually be no need for managerial features.

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

Even so, there are reasons to “bundle” the managerial features of a remedy together into pre-set forms. First, doing so reduces error costs. 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. 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. Second, for a legal system

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to offer two prospective non-monetary remedies, one with the full bundle of managerial features and one without, reduces administrative costs. It does so for the obvious reason that the court has fewer decisions to make. But it also does so for a more subtle reason, one familiar to property law scholars from the work of Tom Merrill and Henry Smith on the *numerus clausus*: 208 having free customization of remedial features would mean that every time a court invented a new feature, it would be imposing a cost on every *other* court, the cost of specifying in future cases that this feature was not activated. Third, bundling the managerial features together reduces information costs for the public, fostering more precise and stable expectations about judicial action (at least among the attorneys who guide the public). 209

As a normative matter, therefore, it is desirable to have both more managerial and less managerial remedies, and also to have remedies with “bundles” of managerial features. That does not mean that the bundles in contemporary American law are perfect. The development of the injunction in particular has been marked by centuries of political controversy and institutional diversity, both of which would suggest a strong measure of path-dependence and imperfection. And of course it hardly matters what terms are used for the managerial and non-managerial remedies—they could just as easily be Injunction I and Injunction II.

As for the timing dimension, there are good reasons for plaintiffs to have early access to the declaratory judgment. These reasons, grounded in the normative theory of the declaratory judgment, have already been discussed. 210 The bottom line is that the declaratory

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208 Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. J. 1 (2000). In Merrill and Smith’s work, the application of this insight is to property: if someone could freely invent a new form of property, it would impose additional specification costs on every other property owner.

209 These reasons for relatively set forms may help explain the tendency for courts to develop particular types of injunctions with relatively distinctive features. Examples include the temporary restraining order, the anti-suit injunction, the structural injunction, and the *Mareva* injunction.

210 See supra notes 193-202 and accompanying text.
judgment needs early timing if it is to be effective in solving the tragedy of the crossroads. Yet this need for early timing does not mean that the declaratory judgment (as an abstract matter) needs earlier timing than the injunction. Any argument for differential timing would have to come from a theory of the injunction or a theory of equity. It may, for example, be desirable to require imminent harm before a court gives an injunction because it will be hard at a very early stage to meet the specificity requirement. And it may be consistent with equity’s supplementary role for the injunction not to be available at the earliest possible point that is consistent with Article III of the U.S. Constitution—at such a point, it may often be unclear whether legal remedies will prove to be inadequate.

Much more could be said about the normative theory of the declaratory judgment and the injunction, and various scholars have criticized the existing doctrine for each remedy. 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 and the symbolism suggestion have no support in the theory of these remedies. It is true that there are some remedies that are distinguished by strength (e.g., punitive damages), while there are other remedies that trade primarily in symbolism and signification (e.g., nominal damages and apologies). But strength and symbolism are not good explanations—either historically or functionally—for the existence of the injunction and the declaratory judgment.

D. Summary

The declaratory judgment and the injunction are often functional substitutes. In many cases where a plaintiff seeks prospective relief it

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211 In other words, if there were no imminence requirement for the injunction, the fact that the declaratory judgment and the injunction were always available simultaneously would not be inconsistent with the declaratory judgment’s normative theory.

212 See, e.g., LAYCOCK, supra note 200 (critiquing the irreparable injury rule).
does not matter at all which one a court grants. But they do have some residual differences, as seen by their different usage patterns and their distinctive feature sets. These residual differences can be explained along two dimensions, management and timing:

**Figure 1: Mapping the Declaratory Judgment and the Injunction on Two Dimensions**

management is needed, and it has a number of features that allow the court to observe and respond to violations: the requirement of specificity, explicit *in personam* effect, 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 features, and it is used in situations where no 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 problems.

Relative to the alternatives—especially the mildness thesis—this account better fits the circumstances in which each remedy is used. It also better comports with normative theory about remedies.

IV. So what?

This Article has argued that scholars and courts should reject the mildness thesis. The straightforward policy implication is a set of principles for the use of these two remedies in anticipatory litigation. Where the injunction is not yet available, the declaratory judgment is the appropriate prospective remedy. Where both remedies are available,\(^{213}\) the decisive consideration is management. If the court foresees some need to manage the relationship of the parties, it should grant an injunction. Alternatively, if the court wants to disclaim management of the parties, or if the case is in a category for which management is essentially never needed, the declaratory judgment is preferable. Outside of these situations, it is usually true in anticipatory litigation that nothing turns on a judge’s decision to grant one or the other of these remedies.

Beyond this practical guidance there is a precautionary benefit. The Supreme Court has a history of making basic mistakes that change the law of remedies, seemingly without any recognition that a change is being made. Examples more recent than *Steffel* include

\(^{213}\) Here and throughout this Article, the assumption is made that other prerequisites for both remedies are met, such as the absence of equitable defenses for the injunction.
Great-West Life & Annuity Ins. Co. v. Knudson\textsuperscript{214} and eBay v. MercExchange.\textsuperscript{215} In the latter, for example, the Court confidently asserted what it called “the traditional four-factor test” for a permanent injunction\textsuperscript{216}—a test which was not traditional and which came as a surprise to most scholars of remedies.\textsuperscript{217}

When the Court makes these mistakes, it is hard to cabin them to only one domain, because the law of remedies is trans-substantive.\textsuperscript{218} Even though in eBay the Court seems to have thought it was making only a modest ruling, one limited to patent law, its decision has been “a remarkable legal juggernaut” that has “overrun and abrogated prior judicial approaches” to equitable remedies in every area of the law.\textsuperscript{219}

In these cases it is easy to notice, after the fact, the Court’s insufficient grasp of the doctrines and normative coherence of the law of remedies. And yet as if by a kind of Gresham’s Law of Remedies, the bad law drives out the good.

The reception of Steffel has not followed this pattern. Yes, the Court misunderstood basic aspects of the law of remedies, inventing a new federalist purpose for the declaratory judgment and creating


\textsuperscript{216} 547 U.S. at 393.

\textsuperscript{217} See, e.g., LAYCOCK, supra note 125, at 427 (“There was no such test before, but there is now.”); Gergen, Golden & Smith, supra note 215, at 205 (“Remedies scholars have said that, before eBay, they were unfamiliar with any traditional four-factor test for permanent injunctions.”); Rendleman, supra note 215, at 76 n.71 (“Remedies specialists had never heard of the four-point test.”).

\textsuperscript{218} The same is true of changes in the law of procedure—compare the unsuccessful efforts to confine Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) to antitrust.

\textsuperscript{219} Gergen, Golden & Smith, supra note 215, at 206.
unnecessary doubts about its preclusive effect. Yet it should be obvious from the preceding argument that the mildness thesis has not fundamentally misshaped what the lower courts do. In patent cases district courts do not struggle with the mildness of the declaratory judgment. Nor do they deliberate over whether a declaratory judgment about an agency rule or an insurer’s duty is merely provisional. 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 because the Supreme Court continues to treat Steffel as a leading case on the declaratory judgment—even in patent cases—220—all of this could change. The analysis here shows why such a change should not happen.

Moreover, the mildness thesis needs to be discarded to make progress in the normative theory of remedies. As long as the declaratory judgment is characterized as a “milder remedy,” this will be a doctrinal formulation in search of a rationale, and scholars will to try to find some way to make sense of it. The many attempts to date—commands, sanctions, preclusion, symbolism—testify to scholarly ingenuity. And 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 functional account given here of the similarities and differences of these remedies can illuminate other legal questions. Consider three practical implications.

First, rejecting the mildness thesis reveals a failure in the law governing attorneys’ fees. Courts are sometimes reluctant to count successful declaratory judgment plaintiffs as “prevailing parties”221—a characterization that is necessary for them to receive attorneys’ fees under various federal fee-shifting statutes. This reluctance probably stems from a sense that the declaratory judgment is a milder remedy


221 See DiSarro, supra note 57, at 789-792.
and that to really prevail a plaintiff needs something more. In federal
court, the doctrinal test that expresses this reluctance is that a
successful declaratory judgment plaintiff is considered a prevailing
party only if she forces some change in the behavior of the other
party.

But this test fits awkwardly with the purpose and practical use of
the declaratory judgment. Such a judgment usually resolves legal
uncertainty about which the two parties disagree before they have
taken concrete behavioral steps that commit them to a course of
conduct (i.e., before the person at the crossroads has chosen a road).
After all, once the parties are locked into their behaviors, there is less
to be gained from deciding the case now, with a declaratory
judgment, instead of waiting until there is a suit for damages or an
enforcement action.

If the mildness thesis is rejected, and it is understood that the
declaratory judgment can fully resolve a set of problems where no
management by a court is needed, then a new prevailing-party test
will be needed for federal declaratory judgment cases. What exactly
that test should be is a subject for further investigation, but several
questions specific to the declaratory judgment should be taken into
account. Was legal uncertainty resolved in the plaintiff’s favor? This
is what it means to win a declaratory judgment action. Was there
sufficient adversity? This matters because there is a spectrum of

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222 In contrast, some states more freely grant attorneys’ fees to successful declaratory
any proceeding under this chapter [on declaratory judgments], the court may award
costs and reasonable and necessary attorney’s fees as are equitable and just.”); LG Ins.
the trial court to determine attorney’s fees under Section 37.009).

223 See Rhodes v. Stewart, 488 U.S. 1, 4 (1988) (stating that a declaratory judgment “will
constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the
defendant toward the plaintiff”); see also Farrar v. Hobby, 506 U.S. 103, 112-13
(1992) (holding that nominal damages make the recipient a prevailing party, but also
stating that “[n]o material alteration of the legal relationship between the parties
occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or
settlement against the defendant” (emphasis added)); DiSarro, supra note 57, at 789-
792.
adversity in declaratory judgment actions and other forms of preventive adjudication (e.g., interpleader), and where there is minimal adversity it would be inappropriate to award attorneys’ fees. And was the declaratory judgment non-obvious? This is needed because if a plaintiff could get a declaratory judgment on an obvious question of law and attorneys’ fees, it would invite abuse.

Changes in this direction could alter the incentives of public-interest attorneys, making declaratory judgment actions somewhat more attractive than they presently are. This, in turn, could help disadvantaged populations who face legal uncertainty (e.g., about lease terms, holographic wills, or family status) and are now effectively excluded from access to the declaratory judgment.


225 There would also be a potential for abuse if a sophisticated repeat player could collect attorneys’ fees from bringing declaratory judgment actions against relatively hapless defendants. Think of an insurance company suing an insured for a declaratory judgment that it had no duty to defend the insured in a state court suit. If the insurer could collect attorneys’ fees, the mere threat of this happening would often allow it to escape its contractual obligations, because the insured would not be in a position to bear the risk of losing in the declaratory judgment action. Cf. Herbert M. Kritzer, Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?, 80 TEX. L. REV. 1943, 1957 (2002) (noting that in a two-way fee-shifting regime where a plaintiff sues an insurer, the “repeat-player insurance company has an enhanced advantage,” for it “can refuse to make an offer in the hope that the plaintiff will withdraw the claim rather than run the risk of a cost award”).

226 The relation of fee-shifting to litigation incentives is complicated, and it depends on among other things whether the fee-shifting is one-way or two-way and whether one side is a repeat player. For a review of the literature, see Avery Wiener Katz, Indemnity of Legal Fees, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 64-65 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000). Design considerations for one-way fee-shifting are found in Harold J. Krent, Explaining One-Way Fee Shifting, 79 VA. L. REV. 2039 (1993).
A second implication is that the analysis here clarifies the history of constitutional concerns about the declaratory judgment, and it reveals the stakes of a justiciability question the Court has yet to squarely decide. In the past, concerns about the constitutional status of the declaratory judgment have been raised under several different Article III-related headings—not only standing and ripeness, but also the prohibition on advisory opinions and a general sense of judicial restraint. Yet there are two distinct constitutional concerns, each of which can be presented in the terms used in this Article. One concern, about advisory opinions, is an objection that the declaratory judgment is too mild to be a real judgment. If the mildness thesis were actually true, this objection would be a serious one. But once that thesis is rejected, the advisory-opinion concern disappears, at least for prospective declaratory judgments.

The other constitutional concern, about ripeness and standing and restraint, is really an anxiety about the timing dimension that distinguishes the declaratory judgment from the injunction. This concern is of more than historical importance—it affects the decision the Court must make about whether to apply identical ripeness

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228 E.g., Note, Declaratory Relief in the Supreme Court, 45 HARV. L. REV. 1089 (1932). When Congress was considering bills that would allow the declaratory judgment in federal court, there were several student notes published in support (at Yale) and in opposition (at Harvard). See, e.g., id.; Comment, The Constitutionality of the Proposed Federal Declaratory Judgment Act, 38 YALE L.J. 104 (1928). It is not hard to see a kind of proxy war between an advocate of the declaratory judgment, Professor Edwin Borchard of Yale Law School, and a skeptic, Professor Felix Frankfurter of Harvard Law School. Cf. PURCELL, supra note 77, at 130. Frankfurter’s skepticism toward the declaratory judgment persisted into his time on the bench, and it can be seen especially in his commitment to giving district courts broad discretion to deny declaratory relief, see, e.g., Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491 (1942), and also in his efforts to prevent declaratory judgments from being given a distinct justiciability analysis, see Colegrove v. Green, 328 U.S. 549, 552 (1946).

229 See supra notes 147-152 and accompanying text (discussing Aetna Life Insurance Co. v. Haworth and the advisory-opinion objection to the declaratory judgment).
requirements for all remedies. At times the Court has suggested that Article III requires imminent harm in all cases, irrespective of remedy. Familiar cases in this line of thinking include *Lujan v. Defenders of Wildlife*,\(^{230}\) *City of Los Angeles v. Lyons*,\(^{231}\) and most recently *Clapper v. Amnesty International USA*.\(^{232}\)

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\(^{233}\)). These kinds of adjudication that do not require imminence include boundary disputes between states,\(^{234}\) bills *quia timet*,\(^{235}\) interpleader—and the declaratory judgment, which is routinely used to resolve legal uncertainty before there is an imminent

\(^{230}\) 504 U.S. 555, 560 (1992) (requiring plaintiff to show an injury that is “actual or imminent, not conjectural or hypothetical” (citations and internal quotation marks omitted)).

\(^{231}\) 461 U.S. 95, 102 (1983) (requiring plaintiff to show that he was “immediately in danger of sustaining some direct injury” and that the injury was “real and immediate” (citations and internal quotation marks omitted)). Note that in *Lyons*, a case frequently cited for a 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 record-keeping requirement. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. Rev. 1, 75 n.44 (1984). The Court’s insistence on imminent harm is more understandable given the highly managerial remedy. Nevertheless, *Lyons* has been applied to declaratory judgment actions by the Supreme Court and the lower courts. See *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 730 (2013); Little, *supra* note 197, at 942 & n.51.

\(^{232}\) No. 11-1025, slip op. (U.S. Feb. 26, 2013) (requiring plaintiffs seeking declaratory and injunctive relief to show that harm was “imminent” and “certainly impending”).

\(^{233}\) See Hart, *supra* note 131, at 1366.


threat of injury. Indeed, when the federal Declaratory Judgment Act was passed 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.” In all of these examples, the resolution of legal uncertainty is often most valuable well before the feared adverse event is imminent, when the feared harm is a small but clearly visible cloud on the horizon and not yet a huge rain cloud

236 See MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 132 n.11 (2007) (noting that the Federal Circuit’s requirement of a “reasonable apprehension of imminent suit” (emphasis in MedImmune) conflicted with the more generous standard in the Supreme Court’s declaratory judgment cases); Steffel, 415 U.S. at 478 (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 Associates, Inc. v. Rickover, 369 U.S. 111, 116 (1962) (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?”); Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941) (“[T]he question in each case is whether the facts alleged, under all the circumstances, 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.”); Nat’l Rifle Ass’n of Am. v. Magaw, 132 F.3d 272, 279 (6th Cir. 1997) (“Declaratory judgments are typically sought before a completed ‘injury-in-fact’ has occurred”); Farrell Lines Inc. v. Columbus Cello-Poly Corp., 32 F. Supp. 2d 118, 125 (S.D.N.Y. 1997) (not requiring “imminent danger of a suit” against the declaratory judgment plaintiff but rather only “a controversy of sufficient immediacy that a ruling on the merits would substantially alleviate uncertainty surrounding the legal issues”) aff’d sub nom. Farrell Lines Inc. v. Ceres Terminals Inc., 161 F.3d 115 (2d Cir. 1998); see also Stabler v. Ramsay, 32 Del. Ch. 547, 555, 88 A.2d 546, 550 adhered to on reh’g, 33 Del. Ch. 1, 89 A.2d 544 (1952) (noting that “sometimes, in harmony with the spirit of the declaratory judgment remedy, the courts have found it necessary to seize time by the forelock and define rights which are not yet in plaintiff’s possession, but are only future or contingent”).

237 HENRY CAMPBELL BLACK, BLACK’S LAW DICTIONARY 531 (3d ed. 1933) (emphasis added); see also PURCELL, supra note 77, at 155 (“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 231, at 34 (describing “Congress’s decision to adopt the Declaratory Judgment Act” as “an apparent loosening of the ripeness doctrine”).
almost overhead. Nor is it surprising that remedies would affect justiciability analysis. As Dick Fallon has noted “ripeness doctrine responds to remedial considerations.”

At present the Court prefers to apply constitutional ripeness rather than other forms of ripeness (e.g., prudential, equitable), and it tends to do so in a way that tacitly ignores the differences between the injunction and the declaratory judgment. The argument in this Article does not speak to whether that tendency is right or wrong as a matter of constitutional law. But it does suggest an important cost as a matter of the law of remedies. 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.

A third implication of the argument in this Article is more speculative: a court could improperly deploy the mildness thesis in a future case, for strategic purposes, to reach a decision about which it would otherwise hesitate. Remember Powell v. McCormack, where the Court intruded on congressional self-government in a way almost unique in the history of the United States, and did so with the justification that it was merely providing a declaratory judgment.

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238 See supra notes 195-196 and accompanying text (discussing how the social value of a declaratory judgment can depend on the adverse event not being imminent).


240 See, e.g., Clapper v. Amnesty International USA, No. 11-1025, slip op. (U.S. Feb. 26, 2013) (not distinguishing the plaintiffs’ request for declaratory and injunctive relief); but cf. id. at *16 (Breyer, J., dissenting) (noting that “ordinary declaratory judgment actions” do not “always involve the degree of certainty upon which the Court insists here”).


242 See id. at 517 (“We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment . . . .”).
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 strategic behavior. Consider again The Health Care Cases. Although by the narrowest of margins the Court did not strike down the Affordable Care Act, because the Chief Justice gave a saving construction to the individual mandate, it is not hard to imagine that the Court could have taken a different path—striking down the Act with a declaratory judgment and appealing to the remedy’s ostensible mildness as proof that its decision was restrained and deferential. The Court continues to cite Steffel’s characterization of the declaratory judgment, and if it were to use the mildness thesis more aggressively it could affect at the margins the resolution of important constitutional questions.

In sum, rejecting the mildness thesis corrects a fundamental mistake about the relationship between the declaratory judgment and the injunction. This allows progress in the normative theory of remedies and has a number of practical benefits. These include revealing flaws in the application of fee-shifting statutes to declaratory judgment actions, and clarifying the stakes in the interaction of justiciability with remedies. More speculatively, rejecting the mildness thesis protects against the danger that courts


244 This is especially so since a declaratory judgment may be granted sua sponte. See FED. R. CIV. P. 57 advisory cmt. n (1937); cf. 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).

245 See Winter v. Natural Resources Defense 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)).
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 courts, leading scholars, and the Restatement (Second) of Judgments. Yet that answer is wrong.

As this Article has shown, the mildness thesis is incompatible with the law, practice, and theory of the declaratory judgment. The declaratory judgment and the injunction are in many cases functional substitutes. Nevertheless, there are residual differences. These differences are best explained in terms of management and timing. The declaratory judgment is sometimes available sooner than the injunction, and it is used and should be used in cases where management by the court is unnecessary. This understanding of the declaratory judgment and the injunction allows each remedy to function more effectively, and it provides a solid foundation for future scholarship on the law of remedies.