

# The University of Chicago Law Review

---

Volume 77

Summer 2010

Number 3

---

© 2010 by The University of Chicago

## ARTICLES

### Preventive Adjudication

Samuel L. Bray†

*This Article identifies, justifies, and explains the parameters of a largely ignored but important category of cases—what is here called “preventive adjudication.” In this category of cases, courts offer opinions without any “command” to the parties, and these opinions are meant to avoid future harm, not remedy past harm. Despite receiving little attention in the legal literature, preventive adjudication is pervasive throughout the law. It happens in declaratory judgment actions about wills, patents, and unconstitutionally vague statutes; in paternity and maternity petitions; in petitions to have missing persons declared dead; in boundary disputes; in actions to quiet title. This Article explains what preventive adjudication is and how it should and should not be used.*

*Preventive adjudication is intuitively appealing, because it helps people avoid harm and clarifies the law. But there are downsides to deciding cases in advance instead of waiting for remedial adjudication. The argument for preventive adjudication is therefore a qualified one. This Article identifies not only the merits of preventive adjudication but also the crucial limiting principles. One limiting principle is administrative and error costs; another is the adequacy of discounting (that is, taking into account the uncertainty of future events). People discount for many kinds of uncertainty, and discounting is usually adequate for uncertainty caused by law. But discounting is inadequate when the law causes uncertainty about inescapable threshold questions for human behavior, such as legal parenthood, citizenship, marital status, or death. Discounting is also inadequate for uncertainty about property rights because of how uncertainty undermines the rationales for having property rules in the first place (such as encouraging efficient investment and information gathering by property owners). In short, where discounting is inadequate, preventive adjudication is especially valuable.*

---

† Executive Director, Stanford Constitutional Law Center, Stanford Law School.

Thanks for helpful comments to Ittai Bar-Siman-Tov, Will Baude, Noa Ben-Asher, Brett Dinkin, Elizabeth Emens, Robert Ferguson, Chad Flanders, Abbe Gluck, Jamal Greene, Adam Gustafson, Ranjit Hakim, Philip Hamburger, Joseph Landau, Jennifer Laurin, Henry Monaghan, Jessica Roberts, Bertrall Ross, Elizabeth Schneider, Henry Smith, James Stewart, Tracy Thomas, Andrew Varcoe, and workshop participants at Columbia Law School.

*This Article also shows how this normative understanding of preventive adjudication can be translated into the actual practice of courts in the United States. Legal systems in the United States have two ways of determining which cases should be decided by preventive adjudication: sometimes they rely on judicial discretion to decide if preventive adjudication is appropriate in each case ("retail sorting"); and sometimes they specify categories of cases in which preventive adjudication is available ("wholesale sorting"). An analysis of both approaches shows that wholesale sorting—which is common in state courts but not in federal courts—better aligns the actual practice of preventive adjudication with the cases in which it is justifiable.*

## INTRODUCTION

What would adjudication look like if courts decided cases without awarding damages or issuing injunctions? We do not need to imagine, because courts already perform this role. They give declaratory judgments about the validity of wills, patents, contracts, and marriage licenses. They declare statutes unconstitutionally vague. They declare legal paternity or maternity. They make determinations that missing people are dead. They decree boundary lines, and they quiet titles to real property and fine art. In all of these cases, the court's judgment is not accompanied by a remedial order that commands the parties to act; all the court does is declare how the law applies. This phenomenon could be called "preventive adjudication."

Preventive adjudication complements remedial adjudication. Generally speaking, in remedial adjudication, a plaintiff seeks damages or an injunction to correct *past* harm; in preventive adjudication, a plaintiff seeks only a declaration and does so to avoid *future* harm.

Preventive adjudication is intuitively appealing—it helps people avoid harm and provides clarity in the law, and harm reduction and legal clarity are usually good things. For this reason, we might consider making preventive adjudication available for everything, allowing a person to go to court and ask, "If I did this action, would it be a tort? Or a crime? Or a regulatory violation?" Courts would function like an Office of Clarity, answering everyone's questions about the legal consequences of future actions.<sup>1</sup> Yet there are obvious problems with deciding every case or even most cases in advance, including the administrative costs of deciding unnecessary questions and the error costs of deciding with less information, not to mention the constitutional concerns about advisory opinions. Current legal scholarship, which focuses almost exclusively on remedial adjudication,<sup>2</sup> lacks a conception of

---

<sup>1</sup> See Part II.A.

<sup>2</sup> A notable exception is William M. Landes and Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J Legal Stud 683, 685, 690–92 (1994) (developing an economic model to determine when anticipatory litigation is cost justified).

when courts in the United States should decide cases with preventive adjudication and when they should not.

The lack of a normative understanding of preventive adjudication is particularly striking given the extensive literature on courts deciding less instead of more, a literature that offers reasons for *delaying* adjudication. From “the passive virtues” of Alexander Bickel<sup>3</sup> to the “judicial minimalism” of Cass Sunstein,<sup>4</sup> and to a lesser degree the “experimentalist courts” of Michael Dorf, Charles Sabel, and William Simon,<sup>5</sup> there have been many efforts to give a normative account of when courts should decide tomorrow instead of today. But there is no body of literature on when adjudication should and should not be *accelerated*—no extensive literature on when deciding a dispute in an ordinary suit for monetary or injunctive relief would already be too late.<sup>6</sup> This absence is even more remarkable given the recent interest in the timing of legislative and executive action.<sup>7</sup> In short, we still lack a theory of preventive adjudication—an account of what it is and what it should do.

This Article offers that theory. Part I starts with a conceptual definition of preventive adjudication. In this kind of adjudication, a plaintiff seeks an opinion that has three characteristics. First, the opinion is not accompanied by a remedial order that “commands” action by the parties, such as an order to pay damages. There is no need for a command because the plaintiff is seeking only a clarification of her legal position:

---

<sup>3</sup> See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111–98 (Bobbs-Merrill 1962).

<sup>4</sup> See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 3–6 (Harvard 1999).

<sup>5</sup> See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 NYU L Rev 875, 886 (2003) (noting that experimentalist courts “give deliberately incomplete answers” to “contentious questions”). See generally Charles F. Sabel and William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv L Rev 1016 (2004); Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum L Rev 267 (1998).

<sup>6</sup> Except for the article by Landes and Posner, 23 J Legal Stud 683 (cited in note 2), there has been no general treatment of when adjudication should be accelerated since the literature in the first half of the twentieth century on the federal declaratory judgment. See, for example, Edwin Borchard, *Declaratory Judgments* 299–307 (Banks-Baldwin 2d ed 1941) (arguing that the declaratory judgment is a form of practical relief that should be employed whenever it will promote expediency, increase clarity, decrease uncertainty, or serve additional useful purposes); Edson R. Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 Mich L Rev 69, 89 (1917) (noting that declaratory judgments prevent harmful acts while also clarifying uncertainties involved in the assertion of rights). There is contemporary literature on the related but distinct and narrow question of when preliminary injunctions should be available. See, for example, Richard R.W. Brooks and Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 Stan L Rev 381, 385–86 (2005) (arguing that preliminary injunctions should be used when they will promote efficient conduct by eliminating uncertainty about the future assignment of liability).

<sup>7</sup> See generally Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the “Enrolled Bill” Doctrine*, 97 Georgetown L J 323 (2009); Jacob E. Gersen and Eric A. Posner, *Timing Rules and Legal Institutions*, 121 Harv L Rev 543 (2007).

she wants a statement that the gestational surrogate is not the legal mother, that a contract in a virtual reality world is legally binding, or that the property line is in one place rather than another. Second, an opinion in preventive adjudication is prospective. A plaintiff seeks to avoid future harm—clarification can help only going forward. Third, preventive adjudication is able to provide clarification because courts engage in a familiar task: saying how the law applies to certain facts.

Part II moves to the threshold normative question: which cases should be resolved through preventive adjudication instead of remedial adjudication? The answer turns on administrative and error costs and also on the way that preventive adjudication is valuable when people cannot rely on its usual substitute: “discounting,” or taking into consideration the uncertainty of future events.<sup>8</sup> Discounting is the ordinary way people respond to uncertainty, and it is usually an adequate response. When it is, we do not need to haul out the legal machinery of preventive adjudication.

But there are two categories of cases in which discounting is pervasively inadequate and preventive adjudication is therefore necessary: uncertainty about legal status, and “clouded” ownership of property. In the first category, a person may face uncertainty about many different legal statuses: Am I a citizen? Am I married? Am I the child’s legal mother or father? Here discounting is an inadequate response because legal status can be a threshold question that is inescapable and effectively dichotomous.<sup>9</sup> In the second category, a person in possession of property has a “clouded” or disputed title. Uncertainty about property rights undermines the rationales for having property rules in the first place (such as encouraging efficient investment and information gathering), because uncertainty weakens the incentives of the possible owners, creates coordination problems, and leads to inefficient self-help. Discounting cannot solve these problems, but preventive adjudication can. Thus, preventive adjudication should be available when discounting is inadequate and the administrative costs and error costs are relatively low.

Part III asks how the actual practice of preventive adjudication in courts in the United States can be aligned with this normative theory.

---

<sup>8</sup> I focus on discounting future events because they might not happen, as opposed to discounting them because costs and benefits in the future should be given less weight than costs and benefits today. On “discounting” in the latter sense, see generally Symposium, *Intergenerational Equity and Discounting*, 74 U Chi L Rev 1 (2007).

<sup>9</sup> In being effectively dichotomous, areas of status resemble property law, and its closed list of standard forms, rather than contract law, with its almost unlimited customizability. See Thomas W. Merrill and Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L J 1, 3 (2000).

Legal systems in the United States use two approaches to determine which cases can be resolved through preventive adjudication. First, in some contexts, US legal systems allow plaintiffs to bring any kind of case for preventive adjudication, but give judges discretion to decide whether preventive resolution is appropriate. This discretionary approach could be called “retail sorting,” because it emphasizes the decisions of individual judges in individual cases. Second, in other contexts, US legal systems allow preventive adjudication only in categories of cases specified *ex ante*, but in those cases judicial consideration is mandatory. This categorical approach could be called “wholesale sorting,” because it sorts large quantities of cases instead of relying on case-by-case decisions. Wholesale sorting is common in state courts, but not in federal courts, which primarily use retail sorting, especially for cases under the Declaratory Judgment Act.<sup>10</sup> No one has explored the consequences of these different ways of allowing cases to be resolved through preventive adjudication, and the difference is striking. Wholesale sorting (whether done by the courts or the legislature) better aligns the practice of preventive adjudication with its justification.<sup>11</sup> And, compared to leaving the availability of preventive adjudication to judicial discretion, wholesale sorting tends to produce more judicial expertise, make preventive adjudication more accessible to low-income plaintiffs, and reduce forum shopping.

## I. DEFINING PREVENTIVE ADJUDICATION

At times courts are asked to do something other than award damages or issue an injunction. They are sometimes asked only to say how the law applies to a particular set of facts. In these cases—instances of what could be called *preventive adjudication*—a litigant seeks to avoid future harm by having a court resolve a legal indeterminacy without issuing a command. This kind of adjudication stands in contrast to what could be called *remedial adjudication*, the mode in which courts usually operate.<sup>12</sup> In remedial adjudication, a court is

---

<sup>10</sup> Declaratory Judgment Act, Pub L No 73-343, 48 Stat 955 (1934), codified as amended at 28 USC §§ 2201–02.

<sup>11</sup> This is particularly true in private law and with respect to public-private statuses (for example, status as a legal parent). For countervailing considerations in public law, see notes 234–38.

<sup>12</sup> The basic point has often been made that some suits—such as declaratory judgment actions and quiet title actions—are different from suits seeking damages and injunctions. This point, however, is radically underdeveloped, and a general descriptive and normative theory has not been offered. For literature noting the basic point of difference, with widely varying parameters and terminology, see James M. Fischer, *Understanding Remedies* 6 (LexisNexis 2d ed 2006) (“declaratory relief”); Douglas Laycock, *Modern American Remedies: Cases and Materials* 511 (Aspen 3d ed 2002) (“declaratory remedies”); Lord Woolf and Jeremy Woolf, *The Declaratory Judgment* 1 (Sweet & Maxwell 3d ed 2002) (“declaratory judgment” contrasted with “executory, in other words

concerned with an injury that has already happened (or will happen imminently), and it is asked to redress the injury, usually by awarding damages, issuing an injunction, or sentencing a criminal defendant to a term of imprisonment.<sup>13</sup>

Preventive adjudication, then, has three characteristics: the plaintiff seeks an opinion that (1) is not accompanied by a remedial order commanding action by the parties, (2) is prospective with respect to harm, and (3) resolves indeterminacy in the application of law. What distinguishes preventive adjudication is not the presence of only one or two of these characteristics but the presence of all three. *All* adjudication can have the third characteristic, resolving legal indeterminacy.<sup>14</sup> Some adjudication is prospective yet nevertheless outside of “preventive adjudication” because the plaintiff seeks relief that involves a command to the parties, such as a preliminary injunction or a temporary restraining order. In other adjudication, the plaintiff seeks only an opinion without any command—an opinion that is focused, however, on past harms, as in a suit for nominal damages.<sup>15</sup> These are not instances of

---

coercive, judgment”); Landes and Posner, 23 J Legal Stud at 685 (cited in note 2) (“anticipatory adjudication” contrasted with “ex post adjudication”); Lazar Sarna, *The Law of Declaratory Judgments* 1, 13 (Carswell 1978) (“declaratory relief” contrasted with “consequential relief”); Walter H. Anderson, 1 *Actions for Declaratory Judgments: A Treatise on the Pleading, Practice and Trial of an Action for a Declaratory Judgment, from Its Inception to Its Conclusion* 1 (Foote & Davies 2d ed 1951) (“preventive or anticipatory remedies”); Borchard, *Declaratory Judgments* at 24 (cited in note 6) (“declaratory judgment” contrasted with “executory judgment”). See also Amend the Judicial Code, HR Rep No 1264, 73d Cong, 2d Sess 2 (1934) (“preventive relief” contrasted with “curative relief”). The most rigorous normative treatment is by Landes and Posner, who have offered an economic model of ex ante legal decisionmaking. See generally Landes and Posner, 23 J Legal Stud 683 (cited in note 2). For the distinction between the phenomenon they model (“anticipatory adjudication”) and “preventive adjudication,” see note 100.

<sup>13</sup> In another kind of adjudication, sometimes called constitutive adjudication, courts are asked to constitute or dissolve legal relations: for example, issuing an adoption order or divorce decree, dissolving a business partnership, terminating parental rights, partitioning land, or granting a certificate of naturalization. In these cases, courts “do not pronounce upon the existence of a legal relationship but create a new one.” Woolf and Woolf, *The Declaratory Judgment* at 2 (cited in note 12). See also Borchard, *Declaratory Judgments* at 23–24 (cited in note 6); Edwin M. Borchard, *Judicial Relief for Peril and Insecurity*, 45 Harv L Rev 793, 800 & n 17 (1932) (defining a constitutive or investitive judgment as a judgment that “creates a new legal relationship” and suggesting that this type of judgment might also be “divestitive” where it will “terminate an existing status”).

<sup>14</sup> See Lawrence B. Solum, *Procedural Justice*, 78 S Cal L Rev 181, 220 & n 93 (2004) (explaining that “factual and legal determinations in every case” are “the functional equivalent of declaratory judgments”); Sarna, *The Law of Declaratory Judgments* at 22 (cited in note 12) (noting that “all judgments are declaratory in that they explicitly or implicitly recognize rights”). See also *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803) (noting that courts “say what the law is” in “particular cases”).

<sup>15</sup> Hypothetical examples of retrospective opinions without commands include a declaration that a repealed statute was unconstitutional or a declaration about the cause of past injury. Consider Gillian K. Hadfield, *Framing the Choice between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L & Socy Rev 645, 670 (2008) (reporting that slightly over half of surveyed relatives of 9/11 victims wanted the option of a “declaratory lawsuit . . . to

preventive adjudication. This Article may have relevance for such cases, but it analyzes only the central case of preventive adjudication, that is, adjudication that conforms to all three characteristics.

The paradigmatic example of preventive adjudication, at least in modern American law, is the declaratory judgment action. In this action the plaintiff asks the court to issue an opinion, usually a prospective one, that will resolve an indeterminacy in how the law applies.<sup>16</sup> But “preventive adjudication” captures significantly more than declaratory judgments. A host of other actions, many but not all rooted in equity, can involve preventive adjudication.<sup>17</sup> Many of these actions have an in rem or quasi in rem aspect.

Nor is every case involving a declaratory judgment an instance of preventive adjudication. A plaintiff sometimes asks for a declaratory judgment *and* for damages or an injunction.<sup>18</sup> Sometimes a plaintiff asks only for a declaratory judgment, but the court nevertheless chooses to give other relief because it is needed to make the declaratory judgment more effectual.<sup>19</sup> Sometimes a plaintiff seeks a declara-

---

ask a judge or jury to announce a judgment after a trial deciding whether a particular person or entity is responsible for a harm [they] suffered”). Sometimes plaintiffs seek remedial relief for past injuries but the court provides an essentially prospective opinion, because the court may conduct a two-stage analysis that can lead to a decision about rights in stage one without a decision to issue a remedy in stage two. See *Pearson v Callahan*, 129 S Ct 808, 818 (2009). See also Ted Sampsell-Jones, *Reviving Saucier: Prospective Interpretations of Criminal Laws*, 14 Geo Mason L Rev 725, 726 (2007).

<sup>16</sup> See, for example, *MedImmune, Inc v Genentech, Inc*, 549 US 118, 137 (2007). In *MedImmune*, a drug manufacturer sued a leading biotech firm for a declaration that one of the biotech firm’s patents was invalid, unenforceable, and not infringed. See *MedImmune, Inc v Genentech, Inc*, 2004 WL 3770589, \*1 (CD Cal).

<sup>17</sup> A historical treatment is not possible here, but an analytical summary may be useful. These actions may (1) determine ownership (for example, in rem or quasi in rem proceedings; interpleader; actions to quiet title or to remove a cloud on title; boundary disputes; some instances of a bill of peace, a bill *quia timet*, or a suit in trespass to try title); (2) determine the existence or validity of a document (for example, probate, cancellation, reformation); (3) ascertain status (for example, petitions regarding maternity, paternity, filiation, death, competence, citizenship, marital status, gender; *quo warranto* actions regarding eligibility for public office; suits regarding recognition of foreign states under the declaratory theory of recognition); (4) determine whether conduct is ultra vires or inconsistent with binding authority (for example, declaratory judgment actions to determine the constitutionality of a statute, to determine the legality of an administrative action, or to determine the scope of a trustee’s authority; an in rem proceeding to resolve the legality of an object that reifies potentially illegal conduct); or (5) resolve abstract questions of law (for example, advisory opinions, opinions on questions certified by another court). These actions can overlap, and they also can occur outside of preventive adjudication. The declaratory judgment has been seen as the culmination of the historical development of many of these actions.

<sup>18</sup> In *MedImmune*, for example, the complaint included antitrust and unfair competition claims. 2004 WL 3770589 at \*1.

<sup>19</sup> See *Olympus Aluminum Products, Inc v Kehm Enterprises, Ltd*, 930 F Supp 1295, 1316 (ND Iowa 1996) (granting declaratory relief and, pursuant to 28 USC § 2202, undoing the redemption of property by a lienholder and ordering the return of property and money previously exchanged).

tory judgment but the defendant counterclaims for monetary or injunctive relief,<sup>20</sup> or vice versa.<sup>21</sup> And sometimes a declaratory judgment action is not prospective, because the plaintiff seeks a declaration about past conduct, perhaps to set up a later suit for damages.<sup>22</sup>

These cases involving declaratory judgments show how the line between preventive and remedial adjudication blurs in actual practice. Nevertheless, what this Article offers is a descriptive and normative account of preventive adjudication that has all three characteristics. Once we understand the theoretical bases for, and limitations of, the central case of preventive adjudication, it will be easier to analyze and assess borderline or mixed cases.

### A. Opinions That Do Not “Command” the Parties

The first characteristic of preventive adjudication is that it provides no relief except for the adjudication itself. In other words, the plaintiff (or petitioner) seeks an opinion that is not accompanied by a remedial order commanding action by the other party.<sup>23</sup> To understand this characteristic, consider what remedial and preventive adjudication have in common. Both end in a judgment—“a final determination of the rights and obligations of the parties.”<sup>24</sup> And this judgment is ordinarily accompanied by an opinion, which is meant to clarify and justify the court’s resolution of the case.<sup>25</sup> But here the similarity ends. In remedial adjudication, the court gives the successful plaintiff something more: a command to the defendant, either to pay damages or adhere to an injunction. By contrast, in preventive adjudication, there is no command: the opinion only expresses how the court has resolved the case.<sup>26</sup> Preventive adjudication is only declaratory.

<sup>20</sup> See, for example, *Snyder v Bock*, 204 P2d 1010, 1011 (Idaho 1949).

<sup>21</sup> See, for example, *Altwater v Freeman*, 319 US 359, 360–61 (1943).

<sup>22</sup> See Note, *Declaratory Judgment and Matured Causes of Action*, 53 Colum L Rev 1130, 1143 (1953).

<sup>23</sup> See Fischer, *Understanding Remedies* at 6 (cited in note 12) (noting that declaratory relief “lack[s] an ‘operative command’” and “does not . . . require or demand that the parties do anything”).

<sup>24</sup> *Black’s Law Dictionary* 858 (West 8th ed 2004). See generally William Baude, *The Judgment Power*, 96 Georgetown L J 1807 (2008).

<sup>25</sup> See, for example, Frederick Schauer, *Opinions as Rules*, 62 U Chi L Rev 1455, 1465–67 (1995) (explaining that “it is part of our understanding of judicial practice that judges’ opinions should be reached by a process of ‘reasoned elaboration,’ and that judges should explain, justify, and give reasons for their decisions”).

<sup>26</sup> This Article usually describes the further relief provided in remedial adjudication as a “remedial order” or a “command.” Sometimes the phrase “coercive relief” has been used, but this is less apt for three reasons. First, the coerciveness of preventive and remedial adjudication is a matter of degree; both are “coercive” in the sense that someone is usually losing. Second, “rights declaration and remedial formulation” are “interdependen[t].” Sabel and Simon, 117 Harv L Rev at 1054–55 (cited in note 5). Third, the practical coerciveness of the two kinds of adjudication can be contingent on the details of the case: a lengthy and detailed declaratory judgment might “coerce”



This lack of a command to the parties has been roundly misunderstood. Some early critics of the declaratory judgment thought that this form of relief was meaningless because of the absence of a command. In 1920, the Michigan Supreme Court struck down a declaratory judgment statute,<sup>27</sup> relying on an opinion by Chief Justice Roger Taney in *Gordon v United States*,<sup>28</sup> which maintained that an “award of execution” is “an essential part of every judgment passed by a court exercising judicial power.”<sup>29</sup> A court, Taney said, may not give “merely an opinion.”<sup>30</sup> Taney and the Michigan Supreme Court were wrong, at least as a descriptive matter. For centuries English and American courts had exercised the power of issuing opinions without a command to the parties. Actions to remove clouds on title or to quiet title were well established,<sup>31</sup> as was a court’s power in equity to do no more than “decree what and where the boundary of a farm, a manor, province, or a state, is and shall be.”<sup>32</sup> When Taney wrote his opinion in *Gordon*, English courts had been issuing declaratory judgments pursuant to statute for more than a decade, and Scottish courts had been

---

the losing litigant more than a narrowly worded injunction. For authorities distinguishing between coercive and noncoercive relief, see, for example, *Powell v McCormack*, 395 US 486, 517 (1969) (contrasting declaratory judgments with “coercive relief”); Owen M. Fiss, *Dombrowski*, 86 Yale L J 1103, 1122 (1977) (contrasting declaratory judgments and injunctions).

<sup>27</sup> See *Anway v Grand Rapids Railway Co.*, 179 NW 350, 361 (Mich 1920) (voiding a declaratory judgment statute for exceeding the “power of the Legislature . . . to require [of courts] the performance of functions not judicial in character”).

<sup>28</sup> 117 US 697 (1864).

<sup>29</sup> *Id.* at 702.

<sup>30</sup> *Id.* Chief Justice Taney’s opinion has a highly irregular history. Taney wrote the opinion for the Court but died before argument, and the Court resolved the case summarily. See *Gordon v United States*, 69 US (2 Wall) 561, 561 (1864). Taney’s opinion was mislaid for twenty years and then published with a note that “the surviving members of the court” recalled “carefully consider[ing]” it “in reaching the[ir] conclusion.” *Gordon*, 117 US at 697. See also *United States v Jones*, 119 US 477, 477–78 (1886) (noting that Taney died before the decision in *Gordon*, and that the published opinion “must have been prepared by him before the decision was actually made”); David P. Currie, *The Constitution in Congress: Democrats and Whigs, 1829–1861* 199 n 94, 200 n 103 (Chicago 2005) (noting that Taney’s mislaid opinion was a draft opinion and that the Court’s actual decision “took a narrower ground”).

<sup>31</sup> See, for example, *Ward v Chamberlain*, 67 US (2 Black) 430, 445 (1862) (“Jurisdiction in equity to remove a cloud from the title of the complainant is fully maintained by the modern decisions of the Courts, and so generally is the principle acknowledged, that all doubt upon the subject may be considered as put at rest.”). See also David P. Currie, *Federal Courts: Cases and Materials* 63 n 4 (West 4th ed 1990) (criticizing Taney’s objection as making “little sense in light of the established jurisdiction to remove clouds from and to quiet titles to land, and to resolve interstate boundary disputes”).

<sup>32</sup> *Rhode Island v Massachusetts*, 37 US (12 Pet) 657, 734 (1838). In this case, almost thirty years before *Gordon*, Chief Justice Taney dissented on grounds that were consistent with, but did not necessitate, his later conclusion that opinions without an “award of execution” were invalid. *Id.* at 752 (Taney dissenting). For a discussion of state-boundary cases in the Supreme Court, see Charles Warren, *The Supreme Court and Disputes between States, Address at the College of William and Mary*, 34 Wm & Mary Bull 3, 13–14 (June 1940) (noting that *Rhode Island v Massachusetts* was the third such case—there were more than thirty by 1940).

hearing “declarator” actions for three centuries.<sup>33</sup> In 1927, the United States Supreme Court corrected Taney’s mistaken pronouncement about the necessity of an “award of execution,”<sup>34</sup> and in 1930, the Michigan Supreme Court reversed course and upheld a state statute authorizing declaratory judgments.<sup>35</sup> Since the 1930s, it has been well settled that courts in the United States may decide cases involving only declaratory relief.<sup>36</sup>

The absence of a command was also misunderstood by supporters of declaratory judgment statutes. In particular, early advocates of the declaratory judgment sometimes claimed that it would allow plaintiffs to be modest, to ask for less than the maximum available relief.<sup>37</sup> Asking for only declaratory relief when more is available may perhaps be useful in public law cases, where courts are sometimes reticent or constrained in giving monetary or injunctive relief.<sup>38</sup> But in most cases, and certainly most private law cases, this notion of litigant modesty is hard to square with the observable truths that clients nearly always want as much relief as possible and that they often choose law firms for their willingness to be aggressive.<sup>39</sup> In other words, even if

<sup>33</sup> See Borchard, *Declaratory Judgments* at 125–31 (cited in note 6); Woolf and Woolf, *The Declaratory Judgment* at 12–24, 297–99 (cited in note 12). Declaratory actions had also been available in Upper Canada since 1853. See Sarna, *The Law of Declaratory Judgments* at 6 (cited in note 12).

<sup>34</sup> See *Fidelity National Bank and Trust Co v Swope*, 274 US 123, 132 (1927) (“While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function.”). In *Swope*, the Court listed examples of adjudication without an award of execution: “[n]aturalization proceedings,” “suits to determine a matrimonial or other status,” “suits for instructions to a trustee or for the construction of a will,” “bills of interpleader,” and “bills to quiet title where the plaintiff rests his claim on adverse possession.” *Id.* Some of these are preventive adjudication and some constitutive adjudication. See note 13.

<sup>35</sup> See *Washington-Detroit Theater Co v Moore*, 229 NW 618, 621 (Mich 1930).

<sup>36</sup> See, for example, *Aetna Life Insurance Co v Haworth*, 300 US 227, 240 (1937); *San Luis Power and Water Co v Trujillo*, 26 P2d 537, 540 (Colo 1933); Borchard, 45 Harv L Rev at 799 (cited in note 13) (arguing that it is the determination of legal relations, rather than the ability to compel parties to obey commands or orders, that “is the essence of judicial power”).

<sup>37</sup> See, for example, Borchard, *Declaratory Judgments* at 341–42 (cited in note 6) (“[T]he court should not insist that a plaintiff adopt his most drastic and expensive remedy when a simple, mild, and inexpensive remedy will determine the issue and preserve his rights.”). But see Note, 53 Colum L Rev at 1130–35 (cited in note 22) (critiquing the “milder remedy theory”); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 Va L Rev 1141, 1239 (1988) (cautioning that the relative intrusiveness of a declaration or injunction depends on its drafting and the number of plaintiffs).

<sup>38</sup> See notes 234–40 and accompanying text.

<sup>39</sup> One assistant general counsel put it this way:

I don’t always want to hear the most risk-averse advice. The thing that really bugs me is [when] we’re in litigation . . . and outside counsel tells me, “Well, I think we can do that without getting sanctioned.” What I tell outside counsel is, “I’ve been sanctioned before, and I got over it. And I think you can, too.”

it were actually true that a declaratory judgment is “a much milder form of relief than an injunction,”<sup>40</sup> that would hardly be a reason for a plaintiff to prefer it.

Contrary to these misunderstandings, preventive adjudication is useful primarily in circumstances where the nature and timing of the case are not amenable to affirmative relief. A routine example is a quiet title action brought by a plaintiff in possession of real property. What the plaintiff asks for is a declaration that her claim to title is superior to the defendant’s claim. The plaintiff needs nothing more than a declaration because the problem she is trying to solve is one of recognition—she already possesses the land. This recognition can usually be provided by a judgment and opinion without a command.<sup>41</sup>

## B. Opinions That Prevent Harm

A second characteristic of preventive adjudication is that the opinion the plaintiff seeks is prospective with respect to harm. In some cases the plaintiff seeks to avoid harm that lies entirely in the future, and in other cases the harm has already begun. There may or may not yet be a dispute between the parties. But in every case of preventive adjudication, the opinion the plaintiff seeks would not redress harm already experienced—it would only prevent harm in the future.<sup>42</sup> Future harm can be avoided in two distinct kinds of cases.

First, preventive adjudication can happen before someone suffers a harm for which the law provides a remedy. In this kind of case, typically a dispute has already arisen, but legally cognizable harm has not occurred and is not imminent.<sup>43</sup> Later, when harm *is* imminent, a suit for injunctive relief may be available; and after harm occurs there

---

Katheryn Hayes Tucker, *Blunt Advice from Five In-House Counsel*, 119 *Fulton County Daily Rep* 4, 5 (May 14, 2008).

<sup>40</sup> *Steffel v Thompson*, 415 US 452, 471 (1974) (quotation marks and citation omitted).

<sup>41</sup> Thus, in any given dispute, the availability of preventive adjudication may be asymmetrical: preventive adjudication includes an action to quiet title by the possessor, who needs only recognition, but not an action to quiet title by a person out of possession, who needs recognition *and* an order to transfer the property.

<sup>42</sup> See Landes and Posner, 23 *J Legal Stud* at 699 (cited in note 2) (noting that “anticipatory adjudication” is aimed at cases “in which the facts bearing on legal entitlement are in existence rather than contingent *even though no one has yet been injured*”) (emphasis added). See also HR Rep No 1264 at 2 (cited in note 12) (contrasting “preventive relief” with “curative relief” that “is incapable of [giving] redress until an injury has occurred or the contract [is] broken”); Robert F. Wagner, *Declaratory Judgments in New York, Address to the Otsego County Bar Association* 2 (July 2, 1927) (observing that declaratory judgment actions allow “judicial determination . . . before any damage has been done and before any wrong has been threatened”).

<sup>43</sup> We could characterize the condition of uncertainty as “harm” because it, too, imposes costs on decisionmakers. But we would still need terms to distinguish the anticipation of an event (the Damoclean sword hangs) and the event itself (the sword falls). This Article uses “uncertainty” for the former and “harm” for the latter. See note 87.

could be a suit for damages. Consider a party to a contract of uncertain validity. Before the date specified for performance, the party can sue for a declaration that the contract is valid.<sup>44</sup> After the date specified for performance, a suit to ascertain validity would be unnecessary, because the injured party could sue for damages. But before performance or breach it would be useful to have an opinion clarifying validity. And only a judgment and opinion would be needed: if the contract were declared invalid, no one would need to be told to tear it up;<sup>45</sup> if it were declared valid, future remedies would be sufficient for future breaches.<sup>46</sup>

Second, preventive adjudication can help people avoid future harm that would *not* be legally cognizable in a suit for damages. Consider a suit to decide legal maternity. An individual or a couple may contract with a gestational surrogate to carry a fetus conceived in vitro. The woman who is the genetic provider will want to know if she will be recognized as the legal mother.<sup>47</sup> Early adjudication of her status is prospective in the sense that it allows the genetic provider to plan her future and avoid harms, such as the harm of raising a child subject to the risk that the gestational surrogate will claim legal maternity and

---

<sup>44</sup> See, for example, 10 Del Code Ann §§ 6502–03 (providing that a declaratory judgment action may “determine[] any question of construction or validity arising under . . . [a] contract,” “either before or after there has been a breach thereof”); *Village of Wagon Mound v Mora Trust*, 62 P3d 1255, 1260 (NM App 2002) (involving a suit to determine the validity of a contract and indenture conveying water rights); *Crossley v Staley*, 988 SW2d 791, 798 (Tex App 1999) (affirming the validity of a proposed settlement of claims to an estate).

<sup>45</sup> The situation becomes more complicated when there has been partial performance or when the return of consideration is not straightforward; in such cases the court may need to spell out exactly what actions the parties must take to return to the status quo ante. See, for example, *Olympus Aluminum Products*, 930 F Supp at 1316 (explaining that the Declaratory Judgment Act allows courts to “grant ‘further necessary or proper relief’ based on a declaratory judgment . . . to return the parties to the status quo ante”).

<sup>46</sup> One important reason to allow preventive adjudication is to avoid giving litigants an incentive to inflict harm in order to secure adjudication of their disputes. See Thomas W. Merrill and Henry E. Smith, *Property: Principles and Policies* 8 (Foundation 2007) (explaining the lack of a harm requirement for an action for trespass to land).

<sup>47</sup> See, for example, *In re Roberto d.B.*, 923 A2d 115, 118–19 (Md 2007) (involving a petition by the genetic father and the gestational surrogate for the court to issue a birth certificate without the name of the gestational surrogate); *Doe v New York City Board of Health*, 782 NYS2d 180, 181 (NY S Ct 2004) (hearing an action by the genetic parents, the gestational surrogate, and the gestational surrogate’s husband for a declaration that the genetic parents’ names should appear on the birth certificate). See also *J.R. v Utah*, 261 F Supp 2d 1268, 1271–72 (D Utah 2002) (considering a suit by the genetic parents and the gestational surrogate after birth to challenge a state statute that preempted surrogacy contracts and granted legal maternity to surrogate mothers). Actions to ascertain legal maternity can result in the court’s ordering a hospital or government health agency to issue a new birth certificate. Nevertheless, these actions are best characterized as preventive adjudication because the court’s only command is for someone to issue a document expressing the court’s own resolution of the legal indeterminacy. Presumably the reason the court could not issue the birth certificate itself is lack of the necessary paper, machinery, seal, and printing expertise.

seek custody. The question of legal maternity could also be raised in a later suit; imagine a suit when the child is ten years old. But the decision in that case would also be prospective: the court would declare legal status going forward, and if necessary the court might provide future-focused relief that involves a command (for example, ordering a transfer of custody), but it is hard to imagine any circumstance in which the genetic provider could recover for the harm of raising a child later declared to be someone else's.<sup>48</sup> In this second kind of case, then, preventive adjudication helps the parties avoid future harms that, once suffered, could never be effectively remedied.

In both of these examples, the contract-validity case and the gestational-surrogacy case, the plaintiff seeks a prospective opinion without a command to the parties. In the contract case, an opinion without a command is all the plaintiff needs and all the court can give *at the present time*. In the surrogacy case, an opinion without a command is all the plaintiff needs and is the core of what the court could provide *no matter when* it decides the question.

### C. Opinions That Resolve Legal Indeterminacy

Thus far preventive adjudication has been defined by what distinguishes it from remedial adjudication—absence of commands and prospectiveness with respect to harm. What preventive adjudication has in common with remedial adjudication is that it resolves legal indeterminacy. Nevertheless, the resolution of legal indeterminacy deserves extended treatment here for two reasons. First, it is the very reason that plaintiffs seek preventive adjudication. Second, understanding how preventive adjudication resolves particular kinds of indeterminacies is important for answering the normative question of which indeterminacies preventive adjudication should resolve.<sup>49</sup>

I discuss two illustrative kinds of legal indeterminacy. One is lexical indeterminacy: indeterminacy regarding which meaning an expression has (where two or more discrete meanings are possible). The other is fact-based indeterminacy: indeterminacy about how to apply an expression to factual situations (for example, line drawing in the application of a vague expression).

---

<sup>48</sup> This hypothetical suit about legal maternity of the ten-year-old child may or may not be a request for preventive adjudication, depending on the asymmetry noted above. See note 41.

<sup>49</sup> See Parts II and III.

### 1. Two kinds of indeterminacy.

In a particular legal system, how the law applies to certain facts is sometimes indeterminate.<sup>50</sup> The application of law to facts may be indeterminate for many reasons and in many ways,<sup>51</sup> but here I consider only lexical indeterminacy and fact-based indeterminacy. Both are unavoidable and sometimes even desirable; my discussion of these kinds of indeterminacy does not suggest that they should or even could be eradicated.<sup>52</sup>

“Lexical indeterminacy” requires a choice among the meanings an expression may have in a particular context.<sup>53</sup> Words such as “suit” and “arms” and “table” have more than one discrete meaning, but the context usually makes clear whether a “suit,” for example, is something worn to or filed in court. In some contexts, though, two or more discrete meanings for an expression are plausible. In a criminal statute, “marijuana” might mean only the subspecies of *Cannabis sativa* that is celebrated for its psychotropic properties. Or it might mean *Cannabis sativa* generally, including the subspecies that is undesirable for use as a drug but suitable for “industrial hemp” (the making of rope and so on).<sup>54</sup> To take another example, if a divorce decree gives one spouse half of the other spouse’s “retirement pension,” the expression could refer to “pension benefits accrued during the marriage” or to “total pension

---

<sup>50</sup> For one conception of legal indeterminacy, see Timothy A.O. Endicott, *Vagueness in Law* 7–11, 29 (Oxford 2000).

<sup>51</sup> See id. at 7; Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 Cal L Rev 509, 512–21 (1994); Jules L. Coleman and Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U Pa L Rev 549, 564–78 (1993). The context in which indeterminacies occur includes legal institutions and actors, and their practices affect the incidence and significance of legal indeterminacy. Consider Robert A. Kagan, *Adversarial Legalism: The American Way of Law* 9 (Harvard 2001) (noting that “legal uncertainty” can come from joining “malleable and complex” legal norms with “potent adversarial advocacy” and “fragmented, relatively non-hierarchical decisionmaking authority”); Duncan Kennedy, *Toward a Critical Phenomenology of Judging*, in Allan C. Hutchinson and Patrick Monahan, eds, *The Rule of Law: Ideal or Ideology* 141, 166 (Carswell 1987) (describing how seemingly objective rules appear manipulable “within the practice of legal argument”).

<sup>52</sup> See sources cited in note 89.

<sup>53</sup> “Lexical indeterminacy” includes what is sometimes called “ambiguity” or “lexical ambiguity.” See, for example, Lawrence B. Solum, *Semantic Originalism* \*71 (Illinois Public Law and Legal Theory Research Papers Series No 07-24, Nov 2008), online at <http://ssrn.com/abstract=1120244> (visited Apr 2, 2010); Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T Jefferson L Rev 167, 171–72 (2002); Waldron, 82 Cal L Rev at 512 (cited in note 51). See also *Amcast Industrial Corp v Detrex Corp*, 2 F3d 746, 751 (7th Cir 1993) (Posner) (noting that “to monopolize a conversation doesn’t mean the same thing as to monopolize the steel industry—even in the same statute”).

<sup>54</sup> See *New Hampshire Hemp Council, Inc v Marshall*, 203 F3d 1, 3–4 (1st Cir 2000) (seeking a declaration that Congress’s use of the term “marijuana” in a federal statute criminalizing the growth of *Cannabis sativa* was not meant to prohibit cultivation of “non-psychoactive” *Cannabis sativa* plants).

benefits at retirement,” including benefits accrued *after* the divorce.<sup>55</sup> Lexical indeterminacy also occurs when a definite noun has more than one referent, as in the famous case of the two ships *Peerless*.<sup>56</sup> In each of these examples, an expression is lexically indeterminate because in a particular context it could have at least two different meanings.

“Fact-based indeterminacy” comes from the difficulty of applying an expression to something in the world.<sup>57</sup> For any given expression, there is a continuum of cases to which it might be applied. A compelling example is Timothy Endicott’s “case of the million raves.”<sup>58</sup> A statute in the United Kingdom makes it an offense for the organizers of a “rave”<sup>59</sup> to refuse a police request for silence. The statute applies to

<sup>55</sup> See *In re Marriage of Chavez*, 909 P2d 314, 315 (Wash App 1996). The familiar examples of lexical indeterminacy in the United States are *Nix v Hedden*, 149 US 304, 306 (1893) (“The single question in this case is whether tomatoes, considered as provisions, are to be classed as ‘vegetables’ or as ‘fruit,’ within the meaning of the Tariff Act of 1883.”); *Frigalment Importing Co v B.N.S. International Sales Corp*, 190 F Supp 116, 117 (SDNY 1960) (Friendly) (“The issue is, what is chicken? Plaintiff says ‘chicken’ means a young chicken, suitable for broiling and frying. Defendant says ‘chicken’ means any bird of that genus that meets contract specifications on weight and quality, including what it calls ‘stewing chicken’ and plaintiff pejoratively terms ‘fowl.’”). Less widely noted examples of lexical indeterminacy are *Florida State Racing Commission v McLaughlin*, 102 S2d 574, 576 (Fla 1958) (finding that “racing plant” referred to a place where either horses or dogs race); *Aetna Casualty and Surety Co v Brethren Mutual Insurance Co*, 379 A2d 1234, 1239–43 (Md App 1977) (discussing whether the breeding, training, and selling of horses constitutes “farming” for the purposes of an insurance contract); *White City Shopping Center v PR Restaurants*, 2006 WL 3292641, \*3 (Mass Super Ct 2006) (deciding whether tacos, burritos, and quesadillas fall within the meaning of “sandwiches”); *Alexander v Railway Executive*, 2 Eng Rep 882, 888 (KB 1951) (noting ambiguity in the term “misdelivery”); *Barwick v S.E. and Chatham Railway Co*, 2 Eng Rep 387, 393–94 (KB 1920) (resolving a dispute about the meaning of “accretion from the sea”); Tom McArthur, ed, *The Oxford Companion to the English Language* 33 (1992) (providing the examples of “running the marathon,” “They can fish,” and “MCARTHUR FLIES BACK TO FRONT” as ambiguous sentences that can be resolved conversationally based on context or inflection and tone).

<sup>56</sup> *Raffles v Wichelhaus*, 2 H & C 906, 159 Eng Rep 375, 375 (Ex 1864). See also *In re Soper's Estate*, 264 NW 427, 428–29 (Minn 1935) (noting that a trust agreement that referred to the beneficiary as “the wife of the deceased Depositor” could mean either legal wife or a person living as and intended by the deceased to be his wife); *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children*, 1915 App Cas 207, 208 (HL 1915) (involving a dispute over the title “National Society for the Prevention of Cruelty to Children”); Lawrence Lessig, *Fidelity in Translation*, 71 Tex L Rev 1165, 1175–80 (1993) (noting the ambiguity of the phrase “Meet me in Cambridge”).

<sup>57</sup> What I am describing as fact-based indeterminacy travels under various labels and is often considered in connection with vagueness, the tolerance principle, and the Sorites paradox. See, for example, Endicott, *Vagueness in Law* at 31–37 (cited in note 50) (describing “vagueness” in the sense of “imprecision”); Waldron, 82 Cal L Rev at 517 (cited in note 51) (glossing “Sorites-vagueness” as “classificatory terms confronting a given continuum”); Joseph Raz, *Legal Reasons, Sources, and Gaps*, in Joseph Raz, ed, *The Authority of Law: Essays on Law and Morality* 53, 73 (Oxford 1979) (observing that “a central type” of vagueness involves “cases where vagueness is ‘continuous’”).

<sup>58</sup> Endicott, *Vagueness in Law* at 57–58 (cited in note 50).

<sup>59</sup> A rave is a “large (often illicit) party or event at which electronic dance music is played, usually held in a warehouse or open field and frequently associated with the use of recreational drugs such as Ecstasy.” *Oxford English Dictionary*, online at <http://www.oed.com> (visited May 29, 2010).

any nighttime gathering with music that, “by reason of its loudness and duration and the time at which it is played, is likely to cause *serious distress* to the inhabitants of the locality.”<sup>60</sup> Endicott asks us to imagine one million raves. At each one the organizer “played the same music in the same way under the same conditions, except that each successive rave organizer played the music at an imperceptibly lower volume—until the one millionth rave organizer played it at a hush that undeniably caused no distress to anyone.”<sup>61</sup>

In the case of the million raves, there will be (1) some instances in which the law clearly *does* apply, (2) other instances in which it is *unclear* if the law applies, and (3) still other instances in which the law clearly *does not* apply.<sup>62</sup> Some raves are clearly loud enough to be “likely to cause serious distress,” and others are clearly not; an organizer of a rave in the first group will be convicted, and an organizer of a rave in the last group will be acquitted.<sup>63</sup> The trouble is in the middle. More specifically, the problem is that in the middle group of cases there will be two cases that are not materially different but that the law will nevertheless treat in materially different ways.<sup>64</sup> And the law is indeterminate about *exactly* where the turning point should be. In other words, the law is indeterminate regarding exactly which one of the million raves (each separated from the next by a trivial and imperceptible difference in sound)<sup>65</sup> is the last one loud enough to be “likely to cause serious distress.”

By outlining two kinds of indeterminacy—lexical and fact-based—I am not suggesting a sharp line between them. Both involve different meanings of words; both involve contexts to which and in which words are applied. In some cases a judge might plausibly approach an indeterminacy as either lexical or fact based, and whether an indeterminacy is perceived as being one or the other can be contingent

---

<sup>60</sup> Endicott, *Vagueness in Law* at 57 (cited in note 50), quoting Criminal Justice and Public Order Act 1994, ch 33, § 63(1) (emphasis added).

<sup>61</sup> Endicott, *Vagueness in Law* at 57 (cited in note 50).

<sup>62</sup> This stipulation of three categories is sufficient for present purposes; it does nothing, however, to eliminate the indeterminacy because the distinction between the three categories also involves fact-based indeterminacy. See *id.* at 77, 83–91; Waldron, 82 Cal L Rev at 520–21 (cited in note 51) (noting that “if the division into these three categories is clear and uncontroversial, we are arguably not really dealing with vagueness at all” because “[t]rue vagueness arises when there is hesitation or uncertainty about how to establish these three categories or where there is a general uncertainty about whether a given case is a borderline case or not”); Raz, *Legal Reasons, Sources, and Gaps* at 73–74 (cited in note 57) (arguing that it is difficult to draw boundary lines between these three categories because vagueness is continuous).

<sup>63</sup> See Endicott, *Vagueness in Law* at 57 (cited in note 50).

<sup>64</sup> See *id.* at 58.

<sup>65</sup> See *id.* at 57 (“Somewhere between the silent and the seismic, there is music to which the police power is not clearly applicable, and not clearly inapplicable.”).



on cultural context (for example, a society's botanical classification system might distinguish discrete subspecies of *Cannabis sativa* or it might describe marijuana in a spectrum of plants without any sharp subdivisions). But these two kinds of indeterminacy nevertheless point to a significant distinction. As developed below, lexical indeterminacy describes cases where judges have discrete options, though these options are sometimes overlapping ("one subspecies of *Cannabis sativa*" versus "all *Cannabis sativa*"). Fact-based indeterminacy represents cases where a judge must confront a point on a continuum not easily divided into discrete options (the million raves). This distinction is relevant to the normative questions taken up in Parts II and III.<sup>66</sup>

## 2. Resolution, preclusion, and precedent.

Like remedial adjudication, preventive adjudication resolves indeterminacies. The kind of indeterminacy being resolved in a particular case is highly significant: it affects what "resolution" looks like<sup>67</sup> and what effect that resolution has in subsequent cases. As explained below, the resolution of lexical indeterminacy tends to have stronger preclusive and precedential effect than the resolution of fact-based indeterminacy.

a) *Resolution in a case.* When preventive adjudication resolves lexical indeterminacy, a court chooses between the meanings a disputed expression may have. The court decides whether "marijuana" in a federal drug statute includes the subspecies of *Cannabis sativa* used for industrial hemp (it does),<sup>68</sup> or whether "retirement pension" in a divorce decree includes pension benefits accrued after the divorce (it does not),<sup>69</sup> or to which ship *Peerless* a contract refers.<sup>70</sup> These decisions may be difficult, in the sense of being close calls, but they do not strain judicial competence. Each is a matter of close reading of a legal text, consideration of extrinsic evidence, and employment of legal conventions (such as canons and clear statement rules) for the resolution of hard cases. For decades scholars have debated the judicial capacity for

---

<sup>66</sup> This distinction is to some degree analogous to Robert Cooter's differentiation between legal rules that cause "a jump or discontinuity in the private costs" of individual actors and rules that cause a smooth or continuous increase. See Robert Cooter, *Prices and Sanctions*, 84 Colum L Rev 1523, 1552 (1984).

<sup>67</sup> For a similar point, see Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation*, in Vijay K. Bhatia, et al, eds, *Vagueness in Normative Texts* 73, 74–75 (Peter Lang 2005).

<sup>68</sup> See *Marshall*, 203 F3d at 8.

<sup>69</sup> See *Chavez*, 909 P2d at 315.

<sup>70</sup> As an instance of preventive adjudication, the last example is hypothetical; the actual *Peerless* case was a suit for breach of contract.

and legitimacy of these activities,<sup>71</sup> but they are at the core of what judges routinely do.

The resolution of fact-based indeterminacy is in certain ways quite different. For lexical indeterminacy there is a limited set of options and outcomes: “marijuana” does or does not include the subspecies used for industrial hemp. But fact-based indeterminacy involves cases along a continuum. And yet law still insists on treating each particular case with one of two possible outcomes. When a court decides if a rave is one to which the noise pollution statute applies (whether in preventive or remedial adjudication), the court treats the rave not as a point on a continuum to which the statute applies to some degree but rather as a rave to which the statute *does* or *does not* apply. This characteristic of the legal process, that it takes inputs on a continuum and gives outputs that are binary, is “juridical bivalence.”<sup>72</sup> All adjudication uses juridical bivalence as a “technical device” for resolving cases;<sup>73</sup> what preventive adjudication offers is *accelerated* juridical bivalence. Adjudication in a case of fact-based indeterminacy is not, however, a resolution of all cases on the continuum, like some imaginary prism for dispersing a dichromatic gradient into two monochromatic bands. Instead, in a case of fact-based indeterminacy, adjudication (whether preventive or remedial) says something narrower: wherever the line may be, this is the side on which *this* rave falls.<sup>74</sup>

*b) Preclusion and precedent in the next case.* What kind of indeterminacy is being resolved also matters for how the resolution is given effect in later cases. Whether described in terms of preclusion or precedent,

<sup>71</sup> See, for example, Lawrence M. Solan, *The Language of Judges* 59–63 (Chicago 1993) (“Why Judges Do Not Make Good Linguists”).

<sup>72</sup> See Endicott, *Vagueness in Law* at 72 (cited in note 50) (“Lawyers talk as if everyone were either guilty or not guilty, either liable or not liable. And courts yield one outcome or the other. We can call this way of treating people’s legal position ‘juridical bivalence.’”); John Finnis, *Natural Law and Natural Rights* 279–80 (Oxford 1980). Sometimes law allows for more possibilities, as in Scottish criminal trials, which may result in a verdict of guilty, not guilty, or not proven. See Samuel Bray, Comment, *Not Proven: Introducing a Third Verdict*, 72 U Chi L Rev 1299, 1299–1300 (2005). “Juridical trivalence” and juridical bivalence raise similar theoretical issues. On vagueness and trivalence generally, see sources cited in note 62.

<sup>73</sup> Finnis, *Natural Law* at 280 (cited in note 72).

<sup>74</sup> Although I use the familiar metaphor of line drawing, Endicott argues that a boundary model of imprecise expressions (that is, one that asks where the line is between the cases in which the expression applies and the cases in which it does not) is inferior to a similarity model (that is, one that asks whether a case is sufficiently similar to a paradigm). See Endicott, *Vagueness in Law* at 137–57 (cited in note 50). Endicott’s argument is normatively persuasive, but I describe the judicial resolution of fact-based indeterminacy in the language of line drawing and borderline cases because it is the language the judges themselves use. The question a judge will ask and answer is, “On which side of the line does this rave fall?” not, “Is this rave sufficiently similar to the paradigm case to which the statute applies?”

the resolution of lexical indeterminacy will generally have a stronger effect for future cases than will the resolution of fact-based indeterminacy.

Legal doctrine about the preclusive effect of different forms of preventive adjudication is muddled and contradictory. Take, for example, the declaratory judgment in the United States. Many courts and commentators have said that it has the same claim-preclusive effect as any other judgment.<sup>75</sup> And yet this view has probably always been wrong and is certainly wrong today in the vast majority of US jurisdictions. A request for purely declaratory relief has issue-preclusive effect for what was actually decided, at least between the parties, but it has essentially no claim-preclusive effect at all.<sup>76</sup> Thus a party who wins a declaratory judgment is not prevented from bringing a subsequent suit on the same facts for further relief (in the old language, there is no “merger”).<sup>77</sup> And a declaratory judgment does not dispose of claims and arguments that could have been made by the *losing* party (that is,

---

<sup>75</sup> See, for example, *State v Joseph*, 636 NW2d 322, 326–29 (Minn 2001) (applying claim preclusion to a declaratory judgment); *Howe v Nelson*, 135 NW2d 687, 691–92 (Minn 1965) (concluding that “[t]he res judicata effect” of a declaratory judgment action “is essentially no different from the res judicata effect of any other judgment” and noting yet honoring in the breach the Restatement (First) of Judgments’ “salutary caution in granting the effect of res judicata to declaratory judgments”); *Great Northern Railway Co v Mustad*, 33 NW2d 436, 441 (ND 1948) (stating that a declaratory judgment “carries the same weight as any other judgment under the principles of res judicata” and citing an array of distinguished secondary authorities); *Ellsworth-William Cooperative Co v United Fire and Casualty Co*, 478 NW2d 77, 80 (Iowa App 1991) (stating with only slight qualification that “[p]rinciples of claim preclusion apply to declaratory judgment proceedings in much the same manner as in other litigation”); Elaine W. Shoben, William Murray Tabb, and Rachel M. Janutis, *Remedies: Cases and Problems* 982 (Foundation 4th ed 2007) (“Declaratory judgments . . . have res judicata effect.”); Landes and Posner, 23 J Legal Stud at 700–01 (cited in note 2) (observing that “an important feature of anticipatory judgments is that they can be pleaded as res judicata in a subsequent case”); Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 Harv L Rev 1122, 1128 n 23 (1955) (“Of course, today no lawyer would seriously consider the notion that a declaratory judgment is somehow lacking in the same res judicata effect that is given to other judgments.”).

<sup>76</sup> See *Andrew Robinson International, Inc v Hartford Fire Insurance Co*, 547 F3d 48, 55–57 (1st Cir 2008) (noting that “[t]he vast majority of states that have addressed this problem unapologetically apply a special rule of claim preclusion, consistent with that of section 33 of the Second Restatement, in the declaratory judgment context”); Restatement (Second) of Judgments § 33, comments c and e (1982); Richard H. Fallon, Jr, et al, *Hart and Wechsler’s The Federal Courts and the Federal System* 1313–14 (Foundation 6th ed 2009). See also *Giannone v York Tape and Label, Inc*, 548 F3d 191, 193–94 (2d Cir 2008) (noting the “declaratory judgment exception to ordinary res judicata principles”); *Allan Block Corp v County Materials Corp*, 512 F3d 912, 916 (7th Cir 2008) (Posner) (explaining that there is an “exception to res judicata for cases in which the only relief sought in the first suit is a declaratory judgment”).

<sup>77</sup> See, for example, *Kaspar Wire Works, Inc v Leco Engineering and Machine, Inc*, 575 F2d 530, 534–37 (5th Cir 1978) (providing a careful discussion of this point); *Louisiana Riverboat Gaming Commission v Louisiana State Police Riverboat Gaming Enforcement Division*, 696 S2d 645, 647 (La App 1997) (explaining that a declaratory judgment action did not preclude a damages suit on the same facts).

there is no “bar”).<sup>78</sup> In addition to the surprising confusion about the claim-preclusive effect of declaratory judgments, there is a variety of puzzles and disagreements about their force.<sup>79</sup> Given this disorder, it is not surprising what Justice William Brennan said about federal declaratory judgments regarding state criminal statutes: the effect of such a judgment “is not free from difficulty and the governing rules remain to be developed.”<sup>80</sup>

And yet the law in actual practice appears more stable than the doctrinal disorder would suggest.<sup>81</sup> One part of the reason may be that the preclusive effect of a declaratory judgment is more intelligible once we know just what kind of indeterminacy the court has resolved. Lexical indeterminacy cases are “chunky”: lots of different people could grow industrial hemp, but for purposes of deciding whether “marijuana” in the federal statute includes industrial hemp, all these cases are alike. Once the legal process has culminated in a juridically bivalent result about whether industrial hemp is “marijuana,” the same result will likely be reached for the other cases that are relevantly identical, regardless of the parties involved. This is true as a predictive matter, and it will carry the normative weight of other individuals’ reasonable expectations about the law. We would not expect variance from case to case as to whether industrial hemp is “marijuana” under a federal criminal statute. And this is so regardless of whether courts characterize the basis for the consistency as *stare decisis*, nonmutual issue preclusion, or persuasive authority.<sup>82</sup> There may be provisional disagreements among courts,

---

<sup>78</sup> See Restatement (Second) of Judgments § 33, comment c (“The effect of such a declaration . . . is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action.”).

<sup>79</sup> These include (1) whether the declaratory judgment exception applies if the plaintiff also requested monetary or injunctive relief; (2) the issue-preclusive effect of a declaratory judgment for nonparties (especially offensive nonmutual issue preclusion); (3) whether preclusion varies if the declaratory judgment action could have been filed as another kind of suit (for example, an action to quiet title); (4) whether it matters that *the subsequent suit* is also a declaratory judgment action; and (5) what effect a federal declaratory judgment has in a subsequent state prosecution.

<sup>80</sup> *Steffel*, 415 US at 470 (quotation marks and citation omitted).

<sup>81</sup> For example, it has been thirty-five years since *Steffel* left open the effect of a federal declaratory judgment regarding the constitutionality or construction of a state statute in a subsequent state prosecution. Compare *id.* at 477 (White concurring) (insisting on “res judicata effect in any later prosecution of that very conduct”) with *id.* at 479, 482 & n 3 (Rehnquist concurring) (discounting a federal declaratory judgment as something that could be raised “in the state court for whatever value it may prove to have”). Nevertheless, the Supreme Court has not been flooded with certiorari petitions to resolve the issue. Consider Fallon, et al, *Federal Courts* at 1109–12 (cited in note 76) (noting that suits to declare statutes unconstitutional are frequent and reiterating questions raised by *Steffel* about the preclusive effect of such a declaration).

<sup>82</sup> See *Howe*, 135 NW2d at 692 (noting that, as a matter of preclusion, after “a declaratory judgment action to construe an insurance policy or a will,” neither the prevailing nor the losing party can seek a different construction); *Pan American Petroleum Corp v Vines*, 459 SW2d 911,

such as among courts of appeals or between state and federal courts,<sup>83</sup> but even these disagreements will be rare.

The resolution of fact-based indeterminacy, however, has less effect in subsequent cases. The main reason is that with fact-based indeterminacy there are no “chunks,” or large groups of similar cases; instead, no two cases are ever really the “same.” Each of the million raves is different from the others in volume, which is a relevant difference for deciding whether a rave is “likely to cause serious distress.” And real raves would be distinguishable from one another for many reasons other than volume. What if the music at one rave was a little louder, but the music at another was played a little longer? Which would be more “likely to cause serious distress”?<sup>84</sup>

A second reason that the resolution of fact-based indeterminacy has less preclusive or precedential force is that the parties are not locked in: they have time to change their conduct. Imagine a rave organizer who sues for a declaration that the statute would not apply to a planned rave. If the rave organizer prevails, the result would have effect for this rave, as well as for any future raves that are identical (assuming for the sake of argument that there would be identical ones). But if the rave organizer *loses* the suit for a declaratory judgment, the decision might have little impact. The organizer would make changes to the planned rave—we can imagine a smallish reduction in volume. Now the fact-based indeterminacy problem returns. The application of the statute to *this* planned rave has not been litigated, only

---

913 (Tex Civ App 1970) (explaining that, as a matter of stare decisis and not preclusion, when an appellate court gives “a definite effect to a specific writing” it “is binding and conclusive in all subsequent suits involving the same subject-matter, whether the parties and the property are the same or not”). See also *Anderson v City of Park Ridge*, 72 NE2d 210, 214 (Ill 1947) (holding that a decision on the validity and construction of a tax statute bound “the parties to [the] proceeding and serve[d] as a precedent and guide for those officials whose duty it is to extend the taxes”); Restatement (Second) of Judgments § 30, comment d, illustration 3 (concluding that a judgment about the validity of a deed conveying Blackacre and Whiteacre, in an action to quiet title to Blackacre, is binding in subsequent actions regarding title to Whiteacre). For the overlap in these doctrinal categories and persuasive authority’s “gravitational pull,” see Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 Okla L Rev 55, 58, 74–85 (2009).

<sup>83</sup> See, for example, *United States v B.H.*, 456 F3d 813, 818 (8th Cir 2006); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw U L Rev 759, 768 n 51 (1979).

<sup>84</sup> Endicott, *Vagueness in Law* at 41 (cited in note 50) (describing “incommensurability”). Adjudicating chunky cases has a rough parallel in property law, where many questions are answered ex ante for the entire system rather than through a fine-grained ex post balancing of interests. See Henry E. Smith, *Mind the Gap: The Indirect Relation between Ends and Means in American Property Law*, 94 Cornell L Rev 959, 963–71 (2009). One advantage of resolving chunky cases (either in preventive adjudication or through property law rules) is that there are fewer borderline cases that a party can manipulate by altering its underlying behavior. See Henry E. Smith, *Property and Property Rules*, 79 NYU L Rev 1719, 1764–67 (2004).

its application to *that* slightly different one.<sup>85</sup> Thus, preventive adjudication has less issue-preclusive effect when it resolves fact-based indeterminacy than when it resolves lexical indeterminacy.<sup>86</sup>

\* \* \*

In preventive adjudication, therefore, a plaintiff seeks an opinion that (1) is not accompanied by a command to the parties, (2) is prospective with respect to harm, and (3) resolves an indeterminacy in the application of law. What that resolution looks like, as well as its effect in subsequent cases, varies based on the kind of indeterminacy. This descriptive account of preventive adjudication has important implications for the question of which cases should be decided through preventive adjudication (Part II) and for the question of how this normative understanding should be translated into the actual practice of courts in the United States (Part III).

## II. THE QUALIFIED ARGUMENT FOR PREVENTIVE ADJUDICATION

Preventive adjudication is a response to uncertainty—it removes uncertainty by clarifying the application of law.<sup>87</sup> An increase in legal clarity is intuitively appealing, but we need limiting principles, ways to distinguish the cases in which preventive adjudication should clarify

<sup>85</sup> Declaratory judgments lack even issue-preclusive effect if circumstances change. See *Hialeah Race Course, Inc v Gulfstream Park Racing Association*, 210 S2d 750, 753–54 (Fla App 1968); cases cited in Restatement (Second) of Judgments § 33, Reporter’s Note to comment e. See also Restatement (Second) of Judgments § 31, comment d (stating that determinations of a child’s best interests or a person’s mental condition are necessarily provisional). Consider *Steffel*, 415 US at 470 (suggesting that a declaratory judgment may change the way *the government* acts in a second iteration, since a federal declaratory judgment about a state criminal statute may cause “state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute”) (quotation marks and citation omitted).

<sup>86</sup> Another framing: one could imagine a class action to resolve a lexical indeterminacy in a criminal statute, but there would almost never be a similarly situated class to resolve a fact-based indeterminacy. Consider Fallon, et al, *Federal Courts* at 1111 n 6 (cited in note 76) (noting that a class action for declaratory judgment regarding a criminal statute could extend the preclusive effect of a favorable judgment).

<sup>87</sup> A technical distinction is often made between “risk,” in which the probability distribution is known but the outcome is not (for example, a coin toss), and “uncertainty,” in which neither the probability distribution nor the outcome is known (for example, a horse race). For the canonical formulation, see Frank H. Knight, *Risk, Uncertainty and Profit* 19–20, 197–232 (Riverside 1921). For a recent account of the distinction between uncertainty and risk, see Mark J. Machina and Michael Rothschild, *Risk*, in Steven N. Durlauf and Lawrence E. Blume, eds, 7 *The New Palgrave Dictionary of Economics* 190 (Palgrave Macmillan 2d ed 2008) (defining risk as “randomness . . . in the form of *objective probabilities*” in contrast to uncertainty, which involves “randomness . . . in the form of alternative possible *events*”). I use “uncertainty” in this narrower, Knightian sense and note the distinction where it is especially relevant. See text accompanying note 141.

the law from the cases in which individuals should act under uncertainty. I offer two limiting principles. The first is the relative cost of clarifying the law. The second is the adequacy of the usual way people respond to uncertainty: “discounting,” or taking into consideration the uncertainty of future events. Once these limiting principles are established, the value of legal clarity offers a persuasive but qualified rationale for preventive adjudication.

#### A. The Appeal of Legal Clarity

Preventive adjudication removes uncertainty by clarifying the law. In the words of a Kentucky congressman in the debate on a federal bill to authorize declaratory judgments, “Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step.”<sup>88</sup> Wrapped in this homespun metaphor is a serious argument: individuals should not bear the costs of uncertainty caused by legal indeterminacy.

To see how attractive and immoderate this argument can be, imagine a government agency called the Office of Clarity. This agency has been established because of widespread complaints about vagueness and ambiguity in the law. It answers any question about how the law applies to facts. You state the facts, ask how the law in some relevant aspect applies to them, and the Office of Clarity will, within sixty days, send you a clear answer, on pages that have generous margins and large print. No one is excluded. Questions may be asked by the government and by the people, by citizens and by noncitizens. When the agency was first contemplated, there was some concern that the questions would not be given serious consideration, and that the agency might prove lacking in rigor, professionalism, and élan. To allay these concerns, the legislature has made every effort to ensure that the agency’s answers matter. One such effort is the rule that a person who receives an answer may introduce it as conclusive authority in any court proceeding. But the answer is conclusive *only* for the person to whom it was issued—it has no weight at all in another person’s case. The Office of Clarity has been functioning for the last five years, during which time it has answered 97,315 questions on every subject, from parental status to contractual obligations to title in real property. It is regarded as an enormous success by the people, though somewhat less

---

<sup>88</sup> Borchard, *Declaratory Judgments* at 58 (cited in note 6), quoting 70th Cong, 1st Sess, in 69 Cong Rec H 2030 (Jan 25, 1928) (Rep Gilbert). See also Borchard, *Declaratory Judgments* at 58 n 24 (cited in note 6) (noting that without declaratory judgments “the only way to determine whether the suspect is a mushroom or a toadstool is to eat it”).

so by judges and lawyers. It is widely praised for bringing clarity to the law and allowing everyone a simple way to remove uncertainty about how the law applies.

There is no Office of Clarity. It is easy to see its appeal, however, because there will always be legal indeterminacies. Every legal system must, for example, use rules and standards that are susceptible to the problem illustrated by the case of the million raves.<sup>89</sup> Yet indeterminacies in the application of law are costly: it is hard for people to act and plan when they do not know the precise legal consequences of their actions. These costs could be mitigated by an Office of Clarity, because once the law is clarified, it is better able to guide a person's behavior.<sup>90</sup> Why is there no Office of Clarity? Aside from constitutional concerns,

<sup>89</sup> See notes 58–65 and accompanying text. For arguments that vagueness is unavoidable, and in fact even desirable, in law generally or in particular legal contexts, see Samuel W. Buell, *The Upside of Overbreadth*, 83 NYU L Rev 1491, 1493–96 (2008); Timothy Endicott, *The Value of Vagueness*, in Bhatia, et al, eds, *Vagueness in Normative Texts* 27, 27–48 (cited in note 67); Tom Baker, Alon Harel, and Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 Iowa L Rev 443, 479–81 (2004). See also David Mellinkoff, *The Language of the Law* 398 (Little, Brown 1963) (arguing that concerns such as durability, intelligibility, and brevity should win out over precision in some cases). Consider also Aristotle, *Nicomachean Ethics* 1137b28–29 (Hackett 2d ed 1999) (Terence Irwin, trans) (“[O]n some matters legislation is impossible, and so a decree is needed.”). For useful cautions about the perils of vagueness in a specific context, see Jack M. Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 Am J Intl L 271, 273 (2007) (arguing that the Biological Weapons Convention is ineffective, in part because its indeterminate language makes it difficult for states to identify the requirements for compliance).

<sup>90</sup> There are numerous conceptions of the rule of law, but in most of them—from the structural conceptions of Lon Fuller, Joseph Raz, and John Finnis to the procedural strain identified by Jeremy Waldron, to the older substantive conceptions of Albert Dicey and Friedrich Hayek, to the noninstrumental conception of Ernest Weinrib—there is agreement that the law should be intelligible. Endicott notes disagreement about “what virtue there is in the rule of law” but finds “a consensus about the *requirements* of the ideal,” requirements that have as their “organizing principle” that “the law must be capable of guiding the behaviour of its subjects.” Endicott, *Vagueness in Law* at 185 (cited in note 50), quoting Joseph Raz, *The Rule of Law and Its Virtue*, in Raz, ed, *Authority of Law* 210, 214 (cited in note 57). See also Ernest J. Weinrib, *The Intelligibility of the Rule of Law*, in Hutchinson and Monahan, eds, *Rule of Law* 59, 83 (cited in note 51).

To individuals, however, the appeal of legal clarity can have limits. People engaging in possibly illegal conduct may not want the law clarified, particularly where detection is difficult and the mere request for clarification will draw unwanted scrutiny. See Yehonatan Givati, *Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings*, 29 Va Tax Rev 137, 156–58 (2009). Consider Laycock, *Modern American Remedies* at 526–27 (cited in note 12) (noting that in “scarecrow patent cases” a defendant may “benefit[] from prolonged uncertainty”). This is especially true when there is an asymmetry in the response of government officials, who are willing to say a course of conduct would be illegal but are reluctant to say that one would be legal. See Felix Frankfurter and Harry Shulman, *Cases and Other Authorities on Federal Jurisdiction and Procedure* 88–89 (Callaghan rev ed 1937) (reproducing an address at an ABA banquet in which Attorney General William D. Mitchell discussed asymmetry in government policy on antitrust opinion letters).



such as concerns about advisory opinions,<sup>91</sup> the reason is a straightforward issue of cost. As described below,<sup>92</sup> there would be enormous administrative costs and error costs from a system that generated legally binding answers to any question a person might ask,<sup>93</sup> not unlike the enormous costs and complexity that would be required if the legislature tried to answer every legal question through an infinite number of ever-more-specific rules.<sup>94</sup> In short, legal clarity is appealing, but any comprehensive method of achieving it, such as the Office of Clarity, is simply unworkable.

## B. In Search of a Limiting Principle

Preventive adjudication can be seen as an attempt to capture, to the extent possible, the advantages of the Office of Clarity while suffering as little as possible from the disadvantages. The need for legal clarity has always been the central argument made by proponents of the declaratory judgment.<sup>95</sup> But simply valuing legal clarity gives us no place to draw the line.<sup>96</sup> We need limiting principles, and two are offered below. For the first, the cost of clarifying the law, this Article draws on William Landes and Richard Posner's work on the administrative and error costs of ex ante legal decisionmaking.<sup>97</sup> But Landes and Posner overlook another crucial limiting principle: the adequacy

---

<sup>91</sup> See, for example, Philip Hamburger, *Law and Judicial Duty* 151–54 (Harvard 2008) (describing how advisory opinions can give rise to political manipulation of the judiciary); Laurence H. Tribe, 1 *American Constitutional Law* 328–30 (Foundation 3d ed 2000) (tracing the ban on advisory opinions from the late eighteenth century to the late twentieth century).

<sup>92</sup> See Part II.B.1.

<sup>93</sup> These costs may explain, for example, why as a matter of federal constitutional law “there is no general due process right to a declaratory judgment.” Henry P. Monaghan, *Third Party Standing*, 84 Colum L Rev 277, 294 n 97 (1984).

<sup>94</sup> Consider David A. Weisbach, *Formalism in the Tax Law*, 66 U Chi L Rev 860, 861 (1999).

<sup>95</sup> See, for example, Uniform Declaratory Judgments Act (UDJA) § 12 (National Conference of Commissioners on Uniform State Laws 1922) (noting that the Act’s “purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations”); Douglas Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U Chi L Rev 636, 659 (1979) (attributing the federal Declaratory Judgment Act to “the common-sense principle that a citizen should not have to risk imprisonment to learn what his rights are”).

<sup>96</sup> Proponents of the declaratory judgment have said comparatively little about limiting principles. The major work on the declaratory judgment in the United States is Borchard’s treatise, and the closest Borchard comes to offering limiting principles is more or less that a declaratory judgment is inappropriate if the court lacks jurisdiction or the case is nonjusticiable. See Borchard, *Declaratory Judgments* at 299–307 (cited in note 6). Consider also Edwin Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 Minn L Rev 677, 683 (1942) (explaining that refusal to exercise jurisdiction is proper when the same issue is pending before another court, the interests of absent parties would be thwarted, or the procedure is used purely for reasons of strategy).

<sup>97</sup> See generally Landes and Posner, 23 J Legal Stud 683 (cited in note 2).

of discounting as a substitute for preventive adjudication. Together these limiting principles distinguish the cases that should be resolved through preventive adjudication from those in which individuals should continue to live with legal uncertainty.

1. The cost of clarification.

The first limiting principle is the cost of clarifying the law through preventive adjudication. Think of the administrative costs of the Office of Clarity: staffing an office of capable government lawyers, who can answer any question regarding the application of law to facts, no matter how ill phrased the question or convoluted the facts, and who can do so within sixty days. Even more serious would be the error costs of making binding decisions in response to uncontested questions: all the usual explanations for doctrines like standing, ripeness, and adversity apply. The questions themselves would often be vague or ambiguous or even misleading on crucial points, either by accident or design. Some questions would be highly manipulable, because the person asking the question would control the underlying behavior and could alter it to influence the court's decision: "Would this action I have not yet taken be a tort?"<sup>98</sup> Or a question might be asked by a party whose interests diverged from the common good, or at least whose interests diverged from the interests of groups that may be less likely to file questions, such as the economically disadvantaged. There would be no adverse party to present the other side of the argument. And even if the Office of Clarity could surmount all of these obstacles, even if it could gather sufficient and accurate information to answer a question, the question might still be better answered with the additional data generated by a hardened dispute.<sup>99</sup>

These costs affect preventive adjudication. Courts engaged in preventive adjudication are doing the work of the Office of Clarity, albeit in a narrower set of cases. One consideration in defining this narrower set of cases, then, is cost: preventive adjudication should be available when its administrative and error costs are relatively low. Especially useful here is Landes and Posner's economic model of *ex ante* legal decisionmaking.<sup>100</sup>

---

<sup>98</sup> See note 84.

<sup>99</sup> But see note 103. The Office of Clarity's error costs could be drastically reduced by not giving its answers binding effect, but doing so would increase net administrative costs (deciding now would no longer be a means of reducing the number of questions to decide later), and it would remove a crucial part of the Office's rationale—providing not prediction but certainty.

<sup>100</sup> See Landes and Posner, 23 *J Legal Stud* at 686–98 (cited in note 2). Landes and Posner call the phenomenon they are modeling "anticipatory adjudication," which differs from "preventive adjudication" in important ways. Their concept is strictly about timing; it encompasses injunctive

Landes and Posner note that the administrative costs of deciding cases in advance include the cost of resolving “not yet fully developed disputes that, left alone by the courts for a time, might not require judicial resolution at all.”<sup>101</sup> The error costs include the “greater risk of deciding a case incorrectly when there is little or no factual record.”<sup>102</sup> When deciding before rather than after an act is taken, a court lacks “the benefit of information generated by the act itself,” information that can help the court more precisely characterize the act and more accurately weigh its costs and benefits.<sup>103</sup>

Although the cost of clarification offers a limiting principle for preventive adjudication, this cost will vary from case to case, and it can be difficult to discover the cost in any particular case, especially because there is little empirical data on the litigation costs (to parties and courts) of actual preventive cases.<sup>104</sup> At least three approaches are possible.

First, the relatively low-cost preventive cases could be determined through a highly reticulated, case-by-case cost-benefit analysis like the one undertaken by Landes and Posner. This would not be judicially manageable, at least in the ordinary case for the ordinary judge.

Second, justiciability doctrines could be used to screen out high-cost cases. For example, because errors are more likely for abstract questions raised by disinterested parties, a legal system could require a concrete question raised by someone with an interest at stake.<sup>105</sup> Indeed,

---

relief and is not limited to courts. It thus includes other kinds of ex ante legal decisionmaking, such as preliminary injunctions, preventive detention, claim preclusion, and agency guidance. Id at 684, 707.

<sup>101</sup> Id at 685 (describing such cases as “hypothetical, contingent, inchoate, premature, [and] abstract”).

<sup>102</sup> Id.

<sup>103</sup> Id at 690. The value of lawmaking in concrete cases has been strongly challenged. See Frederick Schauer, *Do Cases Make Bad Law?*, 73 U Chi L Rev 883, 884 (2006) (arguing that “the distortion of the immediate case” creates “results predictably worse than those that would be reached by making law in a less dispute-driven fashion”). This Article assumes the conventional understanding that making law in concrete cases decreases error costs. Alternatively, on Schauer’s account, the error costs of preventive adjudication would sometimes be even lower than those of remedial adjudication, a conclusion that would strengthen the argument for preventive adjudication for questions that tend to be less fact-specific (for example, a void-for-vagueness challenge).

<sup>104</sup> The sole data points I have found in published sources are State Farm’s determination in 1993 that the costs of defending a particular case and possibly obtaining a declaratory judgment would be “in the range of \$6,000 to \$7,000,” *Stevenson v State Farm Fire & Casualty Co*, 628 NE2d 810, 812 (Ill App 1993), and suggestions that the average cost of a patent infringement trial is more than seven figures, see Greg Halsey, Comment, *There Is a Pink Elephant at Our Patent Negotiation, and His Name Is Declaratory Judgment*, 46 San Diego L Rev 247, 256 (2009) (reporting that, in 2000, litigation costs in a “mid-range” patent infringement trial averaged about \$1,500,000); Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 Mich L Rev 365, 367 n 9 (2000) (reporting the median legal costs for patent infringement suits to be \$2,493,000).

<sup>105</sup> For analysis of how justiciability doctrines can block preventive adjudication in cases with high error costs, see Landes and Posner, 23 J Legal Stud at 715–19 (cited in note 2).

minimum (and usually minimal) requirements along these lines are pervasive in systems of preventive adjudication,<sup>106</sup> with the qualified exception of legal regimes that allow advisory opinions.<sup>107</sup> But justiciability doctrines are a crude way to screen out high-cost cases, and if they have been developed in the context of remedial adjudication, they should not be applied uncritically to preventive adjudication.<sup>108</sup>

Third, and more promising, a system of preventive adjudication could concentrate on categories of questions that can be resolved with relatively low administrative and error costs. Take, for example, the question of whether a written instrument is valid. Administrative costs are relatively low, because a court may need to decide only three questions: (1) what the rules for creating the instrument were at a particular time (for example, mental competence and attestation by a witness); (2) whether those rules were followed; and (3) whether since that time the instrument has been invalidated (for example, rescinded by the testator).<sup>109</sup> The question of a written instrument's validity involves relatively low error costs, too—we generally have no reason to think that the passage of time would generate relevant information (in fact, the passage of time might *reduce* the amount of information

---

<sup>106</sup> See, for example, *Maryland Casualty Co v Pacific Coal & Oil Co*, 312 US 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.”); *AG Farms, Inc v American Premier Underwriters, Inc*, 695 NE2d 882, 887 (Ill App 1998) (requiring “(1) a plaintiff with a tangible legal interest, (2) a defendant with an adverse interest, and (3) an actual controversy regarding that interest”); Woolf and Woolf, *The Declaratory Judgment* at 137–38 (cited in note 12), quoting *Russian Commercial and Industrial Bank v British Bank for Foreign Trade, Ltd*, 2 App Cas 438, 448 (HL 1921) (stating that in English and Scottish law, “[t]he question must be real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say some one presently existing who has a true interest to oppose the declaration sought”).

<sup>107</sup> Even advisory opinions are sometimes given with the benefit of factual assertions. See, for example, *Opinion of Justices to the House of Representatives*, 702 NE2d 8, 11 (Mass 1998) (noting that a memorandum was submitted by interested Boston residents); Manley O. Hudson, *Advisory Opinions of National and International Courts*, 37 Harv L Rev 970, 983–84 (1924) (explaining that before issuing advisory opinions, courts can hear arguments from amici curiae). See also Tribe, 1 *American Constitutional Law* at 329 n 8 (cited in note 91) (suggesting that liberal intervention rules can give “the necessary concreteness” to advisory opinions).

<sup>108</sup> For example, in the cases for which preventive adjudication is used we could see a continuum of adversity: from cases where there usually is no adversity at all (Is the missing person dead?), to cases where adversity may be hypothetical and future (Is the gestational surrogate the legal mother?), to cases where there is always adversity (Does A have better title than B?). (I am indebted to Robert Ferguson for this point.) Preventive adjudication also fits uneasily with an injury-in-fact requirement: whether harm is imminent or has already begun has very little to do with whether preventive adjudication is a useful means of avoiding harm in the future.

<sup>109</sup> See Finniss, *Natural Law* at 268 (cited in note 72) (“[W]hatever legal rule or institution (e.g. contract, settlement, corporation) has been once validly created remains valid, . . . until it [ends] according to its own terms or to some valid act or rule of repeal.”).

available as papers and electronic files are lost). Similarly, a case of lexical indeterminacy has relatively low administrative and error costs: the question is a narrow one within judicial competence, and the passage of time is again unlikely to generate new information.<sup>110</sup> And questions of lexical indeterminacy or the validity of a written instrument will tend to be less susceptible to manipulation because in neither kind of case does the person seeking clarification have full control of the relevant circumstances.<sup>111</sup>

As a limiting principle, the cost of clarification is useful but incomplete. We still need a way of determining the cases in which preventive adjudication is especially valuable.

## 2. The adequacy of discounting.

The second limiting principle is the adequacy of the primary substitute for preventive adjudication: discounting for the uncertainty of future events, and specifically uncertainty about how the law will be applied.<sup>112</sup> A brief example: an entrepreneur contemplates starting an industrial-hemp business, but knows that the business might ultimately be found to be illegal.<sup>113</sup> The entrepreneur will take into account this possibility. If the entrepreneur thinks there is a 50 percent chance that a court would declare industrial hemp illegal, then the entrepreneur will discount by half the expected return from operating the business.<sup>114</sup> Discounting is critical to a sound normative theory of preventive adjudication, but it does not feature in Landes and Posner's analysis.<sup>115</sup>

Before considering the adequacy of discounting, an important preliminary step is to examine more closely the problem of uncertainty that preventive adjudication is meant to address. Is uncertainty

---

<sup>110</sup> See text accompanying note 217. Landes and Posner suggest that error costs will generally be lower when "the facts bearing on legal entitlement are in existence rather than contingent even though no one has yet been injured, for example by making a bigamous marriage or by building on land owned by someone else." Landes and Posner, 23 J Legal Stud at 699 (cited in note 2). Although probably true, this state of the world can be hard to ascertain from pleadings, and the examples Landes and Posner suggest are better explained as instances where discounting is inadequate.

<sup>111</sup> See note 84 and text accompanying note 98.

<sup>112</sup> See note 8. See also Brooks and Schwartz, 58 Stan L Rev at 385 (cited in note 6) ("When the assignment of entitlements . . . is uncertain, parties rationally discount harms when selecting their course of conduct.").

<sup>113</sup> The entrepreneur is making this decision in the late 1990s, before the case culminating in *New Hampshire Hemp Council, Inc v Marshall*, 203 F3d 1, 3-4, 8 (1st Cir 2000) (holding that industrial hemp falls under the federal ban on cultivation of cannabis).

<sup>114</sup> I am obviously simplifying: other variables include the probabilities of detection, prosecution, and conviction. The mere prospect of possible illegality can affect aspects of starting a firm, such as financing, and a person can suffer substantial financial and reputational costs from being investigated or indicted without a conviction.

<sup>115</sup> See note 120.

caused by legal indeterminacy different from uncertainty generally? Walking into the dark is a metaphor for all of life, not just for life without declaratory judgments.<sup>116</sup> There are always unknowns; events unfold in unpredictable ways. For this broader problem of uncertainty, preventive adjudication seems like a trivially small response.

Consider a private equity firm deciding whether to buy a startup that has a new technology for producing ethanol from switchgrass. This decision, like investing generally, is fraught with uncertainty.<sup>117</sup> The uncertainties for the private equity firm include: (1) whether Congress will maintain a renewable-energy tax credit that is necessary to make the technology economically viable; (2) whether the cost of oil will return to the \$100-a-barrel level also needed to make the technology economically viable; (3) whether ethanol made from switchgrass is included in the definition of “ethanol” in a federal statute mandating the purchase of vast quantities; (4) the speed and extent to which the technology, relative to emerging rival technologies, can be developed, improved, and scaled; and (5) the availability of financing. Of these five uncertainties, preventive adjudication could address only the statutory definition of “ethanol.” It would do very little, then, to address the broader problem of uncertainty. To justify preventive adjudication because it removes uncertainty, therefore, we need an account of why uncertainty caused by indeterminacy in the application of law is different from (that is, more costly or solvable than) uncertainty about congressional action, markets, technology, and capital availability.<sup>118</sup>

Another way to raise this question is to ask why we need preventive adjudication when individuals can discount for uncertainty in the application of law.<sup>119</sup> In the ethanol example, we expect the private equity firm to discount for the probability of each occurrence. Why should the firm not also discount for the chance that a court will decide, as a matter of first impression, that “ethanol,” in a federal statute requiring millions of gallons of ethanol purchases, includes ethanol made from switchgrass? No one would think it appropriate, immediately after

---

<sup>116</sup> See text accompanying note 88.

<sup>117</sup> See, for example, Uwe Götze, Deryl Northcott, and Peter Schuster, *Investment Appraisal: Methods and Models* 261 (Springer 2008); Sverrir Olafsson, *Making Decisions under Uncertainty—Implications for High Technology Investments*, 21 BT Tech J 170, 170, 176 (2003).

<sup>118</sup> Consider Jonathan T. Molot, *A Market in Litigation Risk*, 76 U Chi L Rev 367, 368–69 (2009) (comparing legal risks to market risks); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv L Rev 509, 533–36 (1986) (analogizing market- and government-created risks); Michael J. Graetz, *Retroactivity Revisited*, 98 Harv L Rev 1820, 1825 (1985) (“The costs of uncertainty in the law do not seem necessarily different in kind or in magnitude from the costs of uncertainty in markets arising from, for example, changing technology or demand.”).

<sup>119</sup> Yet another way to raise the question, in Coasean terms, is to ask why parties cannot bargain to an efficient outcome without judicial clarification of their legal entitlements. See note 144.

a congressional election, to resolve a firm's uncertainty about the future existence of a tax credit by calling together the newly elected members of Congress and having them indicate their positions (even assuming, for the sake of argument, that this poll would accurately predict legislative results). So why should a private equity firm be able to go to court to resolve its uncertainty about whether "ethanol" includes ethanol made from switchgrass?

As a general matter, this objection is right. Discounting usually is an adequate response to legal indeterminacy, and when it is, it should not be displaced by preventive adjudication.<sup>120</sup> There are significant exceptions—described below—but first we need to be clear about the general rule that discounting is adequate. Against this general rule it might be argued that the state has an obligation to make determinate laws. But indeterminacy in law is to a significant degree unavoidable. Sometimes we have no practical way of escaping the fact-based indeterminacy of a standard like "serious distress" or "reasonable," and sometimes indeterminacy may even be desirable.<sup>121</sup> Discounting for the

---

<sup>120</sup> See Wagner, *Declaratory Judgments in New York* at 15 (cited in note 42) ("Mere uncertainty . . . does not justify the operation of legal machinery."). Individuals' discounting will sometimes be informed by legal advice. On legal advice as a response to uncertainty about the law, see Landes and Posner, 23 J Legal Stud at 687 (cited in note 2) (explaining that lawyers can only predict the probability of various outcomes of an action while an adjudication can provide certainty about whether conduct is legal); Steven Shavell, *Legal Advice about Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J Legal Stud 123, 131–33 (1988). Contra Landes and Posner, we should describe discounting, not the legal advice on which it sometimes relies, as the alternative to preventive adjudication. See Landes and Posner, 23 J Legal Stud at 687 (cited in note 2) ("A fundamental question is why, if the problem is uncertainty, the private market for legal services is not the solution."). Many people cannot afford legal advice in the ordinary course, even about things that matter greatly to their well-being, and legal questions sometimes are not amenable to consultation with an attorney. Consider, for example, the legal driving speed in Montana, which replaced its numeric speed limits for three years in the 1990s with a requirement of "reasonable and prudent driving." See Robert E. King and Cass R. Sunstein, *Doing without Speed Limits*, 79 BU L Rev 155, 179 (1999). For cases where the "reasonable and prudent driving" standard was indeterminate, the substitute for preventive adjudication was probably discounting, not legal advice. Consider id at 162–64, 181–85 (discussing drivers' and law enforcement officials' views of what would or would not be a legal speed).

<sup>121</sup> On the value of vagueness, see sources cited in note 89. There is an enormous literature on the specificity of law, often cast in terms of rules and standards. See, for example, Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L J 557 (1992); Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon 1991); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv L Rev 1685 (1976).

Even in the criminal law, though clarity is often praised, it is not infrequently abandoned so that vague laws can reach conduct that is hard to proscribe in advance. Compare *Hubbard v United States*, 514 US 695, 701 n 4 (1995) ("We have often emphasized the need for clarity in the definition of criminal statutes."); *Dunn v United States*, 442 US 100, 112–13 (1979) ("[T]o ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not plainly and unmistakably

uncertainty caused by law is inevitable because uncertainty caused by law is inevitable.

And yet there are at least two significant exceptions to the general adequacy of discounting. I argue that uncertainty caused by legal indeterminacy should *not* be left to discounting when it (1) concerns legal status, or (2) “clouds” ownership of property. There may be further exceptions, but here preventive adjudication is especially valuable.

a) *Doubtful status*. A question of status considers a person, either a natural person or a firm, and asks if a legal relation obtains between that person and one or more other persons.<sup>122</sup> Law recognizes many statuses. Some are related to sex, gender, and the family: maternity, paternity, filiation, civil union, marriage. Others are defined by one’s relation to a particular nation-state: citizen, legal immigrant, enemy, enemy combatant. Other statuses relate to being human or mortal, such as death. (A person’s status as dead becomes an issue when a person is missing.) And some statuses, such as membership in an organization<sup>123</sup> or being a person’s legal counsel, fall along the shadowy boundary between public recognition and private ordering.

In a case of doubtful status it is unclear whether a person has a particular status. When status is doubtful, discounting tends to be an inadequate response for three reasons. First, having or not having a particular status is often a threshold question, and one’s view of it will affect many future decisions. A determination that someone is or is not a citizen of a particular country can reverberate throughout her life, with implications for residence, voting, military service, jury service, deportation, detention, and self-identity. And it can be enormously

---

proscribed.”) (citations and quotation marks omitted) with *United States v Petrillo*, 332 US 1, 7 (1947) (“That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.”). See also Buell, 83 NYU L Rev at 1491, 1493–95 (cited in note 89) (arguing that overly broad criminal statutes may be a cost-justified way to prevent wrongdoers from being able to adapt their behavior to avoid legal sanctions); Baker, Harel, and Kugler, 89 Iowa L Rev at 468–74 (cited in note 89) (describing the deterrent effects of uncertainty and ways to manipulate uncertainty); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S Ct Rev 345, 345–49 (arguing that judicial underenforcement of the principle of lenity reflects a tension between that principle and the criminal lawmaking power delegated to courts from Congress); Waldron, 82 Cal L Rev at 534–38 (cited in note 51) (suggesting that when a statute criminalizing conduct is vague, citizens will behave more cautiously to avoid actions that would even arguably be of the type prohibited by the statute); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va L Rev 189, 190–201 (1985) (describing the history of the principle of legality and the uncertainty in its application).

<sup>122</sup> See Restatement (Second) of Judgments § 31, comment a.

<sup>123</sup> See Woolf and Woolf, *The Declaratory Judgment* at 102 (cited in note 12) (stating that the right to be a member of a local or professional organization “often lies on the borderline between status and contract”); Sarna, *The Law of Declaratory Judgments* at 162 (cited in note 12).



difficult or even impossible to undo all of the decisions a person might make based on a mistaken view about legal status.

Second, *some* view of a particular status can be unavoidable. If a rave organizer is uncertain whether a rave in a particular location would fall within the strictures of a noise-pollution statute, she can avoid legal risk by not holding a rave in that location.<sup>124</sup> By contrast, with legal status it is sometimes impossible to avoid acting on a particular view. Whether an adult is or is not the legal parent of a child will normally affect how the adult acts toward the child; to ignore the question of legal parenthood is itself a decision—a decision to act as though one is not a legal parent.<sup>125</sup> Likewise, a person who *might* be the legal counsel representing an accident victim must act as if she either is or is not the victim's legal counsel.<sup>126</sup>

Third, status is often effectively dichotomous. A person is or is not another person's legal parent. A person is or is not a citizen; if a person is unsure whether she is a citizen, she cannot cast a one-half vote. This is not to say that status is *absolutely* dichotomous. True, one is or is not a citizen. But one could have some other status, such as lawful permanent resident. And yet legal status often feels dichotomous—binary, on/off—because of how status is defined by law in a limited set of options, with each option having specified rights and duties that cannot be scaled down or customized, as illustrated by the legal statuses of parent, citizen, spouse, and lawyer.<sup>127</sup> These features that make status seem dichotomous also make it resistant to discounting. When status is uncertain, a person cannot easily pick an intermediate option, a Solomonic splitting. Status is usually all or nothing.

These three reasons why discounting is an inadequate response to uncertainty about legal status can be summed up by the metaphor of a crossroads: the roads from which one can choose are long and different (threshold decision); one must choose a road (unavoidable); and

---

<sup>124</sup> See notes 58–61 and accompanying text.

<sup>125</sup> Consider Rush, *Freewill*, on *Permanent Waves* (Mercury Records 1980) (“If you choose not to decide, you still have made a choice.”).

<sup>126</sup> In *Bennett v Miller*, 137 SW3d 894, 895 (Tex App 2004), two attorneys were hired on contingency to represent the same car accident victim—one was hired by the victim and one by the victim's temporary guardian—and the attorneys sued for a declaratory judgment regarding which one was the victim's attorney.

<sup>127</sup> Legal status in the United States therefore resembles property, not contract. As Tom Merrill and Henry Smith have shown, property law is marked by the *numerus clausus* (“the number is closed”) principle: it offers a closed list of standardized forms instead of free customization. Merrill and Smith, 110 Yale L J at 4 (cited in note 9). Consider Mary Anne Case, *Marriage Licenses*, 89 Minn L Rev 1758, 1775–77 & n 77 (2005) (noting the relevance of the *numerus clausus* principle for marriage). On the intersection of property and status (though not primarily the law of status), see generally Nestor M. Davidson, *Property and Relative Status*, 107 Mich L Rev 757 (2009) (discussing the status-signaling function of property).

there are only a small number of roads, without intermediate possibilities (effectively dichotomous).

All three reasons why discounting is inadequate can be seen in the case of an executor who must decide whether a missing person is dead.<sup>128</sup> First, a particular view of legal status—that is, that the missing person *is* dead—is a threshold point for all the decisions involved in the distribution of the estate. And no one wants the liability, not to mention the guilt, from making these decisions based on an erroneous view (seen *ex post*) that the missing person is no longer alive.<sup>129</sup> Second, the executor cannot avoid a decision. A decision could be postponed, but after a few years go by, the question whether to distribute the estate necessarily depends on some view about whether the person is dead. Third, the status of death is dichotomous. The person is dead or is not dead, and there will often be no reasonable half measures for the estate: it hardly makes sense to distribute most of the estate because a person is probably dead.

Preventive adjudication is well suited to resolve uncertainties about legal status.<sup>130</sup> To protect executors, for example, from the potential financial and personal costs of acting on an erroneous view that a missing person is dead, a number of states allow a judicial declaration of death.<sup>131</sup> Or consider the case, described above, of a genetic provider who has contracted with a gestational surrogate.<sup>132</sup> Or a case where a woman has been arrested, and the state would like to place her child in the care of a man who has been on the periphery and is thought to be the biological father. Before accepting placement of the child, the man may wish a court to determine whether he is recognized as the legal father. In other cases a person's marital status is in doubt because a domestic court may or may not recognize a foreign marriage

---

<sup>128</sup> Although the question of whether a missing person is dead may seem purely factual, it is about “death” as a legal status at a particular point in time. If a missing person who had been declared dead suddenly returned, no one could plead issue preclusion about the fact of death. But the declaration would still have determined, at a particular point in time, that the law would treat a person as “dead” and thus that an executor relying on that determination would not be liable if she distributed the estate.

<sup>129</sup> Consider, for example, being in the unfortunate position of claiming the estate of Odysseus when he returned to Ithaca.

<sup>130</sup> See sources cited in note 233. For an ancient example of preventive adjudication to resolve legal status, see S.C. Todd, *The Shape of Athenian Law* 109, 182 (Oxford 1993) (describing the *graphē xenias*, an action for a judicial declaration that someone was or was not a citizen).

<sup>131</sup> See, for example, 20 Pa Cons Stat Ann § 5701(a) (Purdon) (“[U]pon the petition of any party in interest,” a court “may make a finding and decree that the absentee is dead and of the date of his death,” provided there has been “diligent inquiry” and “notice . . . has been given to the absentee.”). See also Sarna, *The Law of Declaratory Judgments* at 160, 162–63 n 16 (cited in note 12) (detailing the power of courts in Manitoba, Ontario, British Columbia, and Québec to declare a person dead).

<sup>132</sup> See note 47 and accompanying text.

or divorce. Or a business may want to ascertain whether its government recognizes a foreign entity (for example, a breakaway province in a civil war) *before* trading with that entity and risking an absence of diplomatic and military protection abroad, punitive actions by a rival foreign entity, and ostracism at home with respect to domestic government contracts.<sup>133</sup> In each of these cases, a legal status is uncertain, and discounting would not be an adequate response.

*b) Clouded ownership.* The second exception to the adequacy of discounting is the phenomenon of “clouded ownership.” Ownership is “clouded” when one person has possession of private property (land, art, trademarks, and so on) and has been thought to have a right in one of the standard forms of property specified by the legal system,<sup>134</sup> but someone else now disputes that person’s claim to the property right.

Clouded-ownership cases resist discounting because of how uncertainty affects the policy rationales for having property rules rather than liability rules.<sup>135</sup> Among the reasons for property rules are (1) encouraging efficient investment<sup>136</sup> and (2) encouraging property owners to develop and disseminate information about their property.<sup>137</sup> The

---

<sup>133</sup> A case involving similar issues with a private trading partner occurred in 1915 after Germany occupied Belgium. An English firm refused to fulfill its contractual obligations to a Belgian firm that had Portuguese mining operations, on the view that the Belgian firm was now an “enemy” for purposes of the English Trading with the Enemy Acts. The Belgian firm sued in the English Court of Chancery for a declaration that it was not an “enemy” under the Acts and for injunctive relief. Because of the extreme urgency and importance of the case, it was resolved and a declaration was issued with unprecedented rapidity. The case was tried in one day and the court announced its decision just two days later. The case was heard on appeal that same afternoon, and disposed of by the Court of Appeal the following day. See *Société Anonyme Belge des Mines d’Aljustrel (Portugal) v Anglo-Belgian Agency, Ltd*, 2 Ch 409 (CA 1915). The need for preventive adjudication in a government-recognition scenario may be especially relevant given the trend by executive branches not to officially recognize governments after revolutions or other extraconstitutional transfers of power—a trend that can prompt courts to take a greater role in determining the recognition of foreign entities. See Michael E. Field, Note, *Liberia v. Bickford: The Continuing Problem of Recognition of Governments and Civil Litigation in the United States*, 18 Md J Intl L & Trade 113, 119–34 (1994).

<sup>134</sup> See Merrill and Smith, 110 Yale L J at 3 (cited in note 9). See also Thomas W. Merrill and Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L J 357, 360–66 (2001).

<sup>135</sup> For the famous articulation of property rules and liability rules, see generally Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089 (1972).

<sup>136</sup> See Yoram Barzel, *Economic Analysis of Property Rights* 3 (Cambridge 2d ed 1997) (describing the motivation of the residual claimant). See also Carol M. Rose, *The Shadow of The Cathedral*, 106 Yale L J 2175, 2187 (1997) (noting that one of “[t]he usual roles of property rules” is “encourag[ing] individual investment, planning, and effort, because actors have a clearer sense of what they are getting”). This point is subject to the usual concerns about transaction costs and Michael Heller’s critique of fragmented ownership. See note 155.

<sup>137</sup> See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 Va L Rev 965, 975–90 (2004); Smith, 79 NYU L Rev at 1755 (cited in note 84). Other reasons for property rules include high transaction costs and high administrative or measuring costs. There are of course countervailing reasons to have liability rules. See, for example, Ian Ayres and J.M. Balkin,

investment reason is familiar. The information-development reason has also become important in property scholarship; Henry Smith identified it as a key advantage that helps explain the frequent use of property rules to protect entitlements.<sup>138</sup>

These policy reasons are undermined, however, when there is uncertainty about property rights.<sup>139</sup> Stewart Sterk has recently described how uncertainty about property rights can create inefficiently high search costs.<sup>140</sup> I have in mind not the way uncertainty increases search costs (an increase that might *offset* the ordinary justifications for property rules), but rather the way uncertainty undermines the rationales that justify property rules in the first place. Uncertainty undermines investment and information development; and for these problems, discounting is an inadequate response.

Consider a concrete example in which, for simplicity, I will treat Knightian uncertainty about property rights as if it were risk.<sup>141</sup> A person possesses and appears to hold in fee simple a parcel of land. (This person is “the probable owner.”) Another person produces a deed that indicates a heretofore unknown conveyance in the past. The deed is probably fraudulent; nevertheless it puts a cloud on the probable owner’s title.<sup>142</sup> (The person producing the deed is “the low-probability owner.”) By stipulation, there is a 90 percent chance that a court would find the deed fraudulent. If, however, the court were to find the deed legitimate, the low-probability owner would have superior title.

*Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 Yale L J 703, 748–50 (1996) (arguing that liability rules can allocate property to the user who values it more without reducing incentives to develop property); Louis Kaplow and Steven Shavell, *Property Rules versus Liability Rules: An Economic Analysis*, 109 Harv L Rev 713, 773–74 (1996) (arguing that liability rules are superior for preventing harmful externalities, and property rules are superior for preventing takings).

<sup>138</sup> See sources cited in note 137.

<sup>139</sup> In their analysis of the timing of preliminary injunctions, Richard Brooks and Warren Schwartz make an analogous point about legal uncertainty and liability rules. See Brooks and Schwartz, 58 Stan L Rev at 386–87 (cited in note 6) (“Liability rules generally (and expectation damages specifically) do not preserve parties’ incentives to behave efficiently in the context of legal uncertainty—the quintessential context of preliminary hearings.”).

<sup>140</sup> Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty about Property Rights*, 106 Mich L Rev 1285, 1299–1304 (2008).

<sup>141</sup> See note 87. The argument developed in the text is even stronger under a condition of Knightian uncertainty. When no one knows the exact probability of various legal outcomes, the actors may incur additional costs to try to better discern what these probabilities are (for example, by obtaining legal advice).

<sup>142</sup> In a more extreme example, the cloud on title could come from a neighbor’s display of signs that say “Property Line Dispute,” “No Sale,” “This is not the correct property line,” “Our Deed calls for 900.90 ft of Road Frontage Not 838 [ft],” “We only want what is ours,” “Tried 3 times to Settle this to no Avail,” and “Sign #1 Ripped Down During the Night.” *Dowdell v Cotham*, 2007 WL 2198169, \*2 (Tenn App) (reciting facts related to an action to quiet title and for recovery of damages for defamation of title). Query, however, whether potential buyers would be deterred by uncertainty about the boundary or certainty about the neighbor.

Therefore, in order to sell the land, the probable owner will have to lower the price, because buyers will discount for the possibility of not receiving good title.

Here discounting seems to work: everyone discounts the probable owner's claim to title because of the risk of a probably fraudulent deed. And yet relying on discounting is problematic, because of how the risk affects the incentives of the possible owners. Without certainty, their incentives to invest in the property are reduced. Any significant investment would be unlikely because the expected return must be discounted for the possibility of non-ownership.<sup>143</sup> This disincentive to invest would thus prevent the property from being put to its most efficient use. And without certainty, the benefit from developing and disseminating information about the property is also reduced.

Crucially, we should not assume that the reduction in the advantages of ownership (both individual and societal) is *continuous* with the reduction in the probability of ownership. In other words, a cloud on title does not merely redistribute individual shares of the pie—it makes the pie smaller. This is so for three reasons, the first two of which have not been recognized in the existing literature.

First, a small reduction in the probability of ownership is likely to reduce the probable owner's incentives to understand and improve the property without a corresponding increase in incentives for the low-probability claimant. A person with a 90 percent chance of ownership is likely to reduce her investment in the property by at least 10 percent, but the low-probability owner is unlikely to make small investments that make up the difference between the probable owner's investment under the certainty and uncertainty conditions. We can describe this as a "certainty bonus" from having undisputed title: an additional increment in the likelihood of gaining title, especially one that is relatively close to zero (for example, the move from a 4 percent chance to a 5 percent chance), is not as valuable as the last increment (for example, the move from 99 percent to 100 percent).

Second, even if the low-probability owner did make investments in the disputed property that corresponded to the probable owner's reduction in investment, there would be a coordination problem. This is an understatement, given the animosity that often accompanies title

---

<sup>143</sup> See Nicole Stelle Garnett, *Property In-Laws*, 156 U Pa L Rev PENnumbra 279, 285 (2007), online at <http://www.pennumbra.com/responses/12-2007/Garnett.pdf> (visited Apr 3, 2010); Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* 46–51, 218–21 (Basic Books 2000). See also Boris Kozolchyk, *A Roadmap to Economic Development through Law: Third Parties and Comparative Legal Culture*, 23 Ariz J Intl & Comp L 1, 1 (2005) ("[I]f one cannot rely on what one believes one owns or has a right to claim as owner or contracting party, one will only invest and trade most reluctantly.").

disputes.<sup>144</sup> An investment of \$100 by one owner is likely to be more effective than an investment of \$90 by a probable owner and \$10 by a low-probability owner, since the expenditure by the low-probability owner is likely to be duplicative. Clouded ownership thus reduces the return on the possible owners' uncoordinated investments. (And legal rules can exacerbate the problem if they penalize high-probability owners for cooperating with low-probability ones.)

Third, uncertainty over ownership may cause the claimants to increase their expenditures on inefficient self-help. As a general matter, self-help is often not the most efficient way to protect an owner's investments.<sup>145</sup> Self-help is even more costly in a clouded-ownership scenario, because of how it interacts with the coordination problem just described. If one claimant engages in extralegal self-help, her efforts can drive down even further the return on the uncoordinated investments in the property. To vary an example given by Henry Smith,<sup>146</sup> imagine a locked gate on an access road. Rival claimants can even make the property practically unusable for each other—imagine *two* locked gates on an access road, each installed by a different claimant.<sup>147</sup>

By causing these three problems, uncertainty about ownership thwarts the ordinary function of property rules—encouraging owners to make efficient investments and to develop and disseminate information.<sup>148</sup> And all three problems are impervious to discounting. But

<sup>144</sup> One example is the case of the neighbor with intemperate signs. See note 142. The animosity that can exist in title disputes is a major reason why Coasean bargaining is not an adequate substitute for preventive adjudication. Consider Ward Farnsworth, *Do Parties to Nuisance Cases Bargain after Judgment? A Glimpse Inside the Cathedral*, 66 U Chi L Rev 373, 421 (1999) (finding animosity between parties and an absence of bargaining after nuisance judgments). Farnsworth includes this illuminating quotation from the defense attorney in a nuisance case: “[M]ost property line disputes that I have ever been involved in [were] a result of animosity between the parties involved. It doesn’t seem to matter whether those parties are family members or strangers but the property line dispute solidified their feelings of dislike and/or hatred of the other party.” *Id.* at 429–30.

<sup>145</sup> See, for example, Smith, 79 NYU L Rev at 1787 (cited in note 84) (“[T]he entire property system rests on an assumption that government enforcement of entitlements is often superior to owner self-help.”). On self-help generally, see Symposium, *Property Rights on the Frontier: The Economics of Self-Help and Self-Defense in Cyberspace*, 1 J L, Econ, & Pol 1 (2005); Douglas Ivor Brandon, et al, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 Vand L Rev 845 (1984).

<sup>146</sup> See Smith, 79 NYU L Rev at 1730 (cited in note 84).

<sup>147</sup> Installing gates with locks seems improbable—doing so would be expensive, subject to vandalism, likely to prompt remedial suits for trespass, and so on. This scenario is not impossible, though, given sufficient animosity, see note 144, and it illustrates the potential destructiveness of self-help. See also Molly Moorhead, *Feud over Fence in Road May Go to Trial*, St. Petersburg Times PT4 (Feb 10, 2010) (describing a property dispute that culminated in a landowner building a fence on a property boundary in the middle of a public road, blocking an entire lane of traffic to prevent future trespassing).

<sup>148</sup> An illustration of how uncertainty can affect the value of property in the long run is provided by Gary Libecap and Dean Lueck’s remarkable investigation of land demarcation

all three can be solved by preventive adjudication that allows the probable owner to clarify title, as in an action to quiet title, an action to remove a cloud on title, or a declaratory judgment action.<sup>149</sup> Preventive adjudication would of course involve the ordinary costs of litigation, both to parties and courts, but these costs would be relatively low.<sup>150</sup> And the societal return on these litigation costs could be very significant: averting the costs of reduced investment, uncoordinated investment, and inefficient self-help—costs that without preventive adjudication could continue and accumulate over time.<sup>151</sup>

Two qualifications are in order. One is that preventive adjudication is useful for clarification at the margin, but it would not be an effective way of creating a system of formal property relations. The success of such a system depends on, among other things, broad recognition in society of the validity of the property regime<sup>152</sup>—something that cannot be generated by adjudication of myriad individual disputes.<sup>153</sup> But in a system where ownership is generally formalized and certain, preventive adjudication is exceedingly useful. The second qualification is that clarity in ownership is no panacea for other problems with property rights. Proponents of the declaratory judgment have sometimes waxed grandiloquent about life with clear property relations.<sup>154</sup> But clarity does

---

systems in Ohio. See Gary D. Libecap and Dean Lueck, *The Demarcation of Land and the Role of Coordinating Institutions* \*42 (ICER Working Paper No 14/2009, July 2009), online at <http://www.icer.it/docs/wp2009/ICERwp14-09.pdf> (visited Apr 3, 2010) (concluding that increased certainty from a particular land demarcation system “broadens the range of economic activities that are possible”).

<sup>149</sup> This certainty effect can be gained regardless of which way the court comes down. Joseph William Singer, *The Reliance Interest in Property*, 40 *Stan L Rev* 611, 666 n 173 (1988).

<sup>150</sup> Landes and Posner, 23 *J Legal Stud* at 699 (cited in note 2) (asserting that title disputes are “good cases for the use of the declaratory judgment” because of lower error costs). Still, it is hard to determine as a matter of timing exactly *when* preventive adjudication should be available in a clouded-ownership case. The leading English treatise contrasts two scenarios. In one, someone asks a court, “independent of any contractual dispute, . . . to declare that a painting is genuine, because some critic has indicated an opinion to the contrary.” Woolf and Woolf, *The Declaratory Judgment* at 61–62 (cited in note 12). In this scenario, the treatise says, preventive adjudication is disfavored. In the second scenario, “the dispute is affecting the ability of the owner to sell the painting.” *Id* at 62 n 5. In this scenario “the court should be prepared to resolve what then could be a very real dispute.” *Id*. But this can be viciously circular: the availability of preventive adjudication turns on whether the putative owner wants to sell the painting, and whether she wants to sell the painting may turn on the outcome of preventive adjudication.

<sup>151</sup> For evidence of how these costs can persist over time, see Libecap and Lueck, *The Demarcation of Land* at \*1–4 (cited in note 148).

<sup>152</sup> See De Soto, *The Mystery of Capital* at 170–72 (cited in note 143); Andrzej Rapaczynski, *The Roles of the State and the Market in Establishing Property Rights*, 10 *J Econ Persp* 87, 87–89 (1996).

<sup>153</sup> See Merrill and Smith, 110 *Yale L J* at 61 (cited in note 9) (suggesting that legislated rules are better than decisional rules at low-cost distribution of information to market participants).

<sup>154</sup> See, for example, Borchard, *Declaratory Judgments* at 741 (cited in note 6) (arguing that “disputes involving titles to or interests in property” are “ruinous to amicable relations” until they receive “the clarifying ministrations of the declaratory judgment”); *id* at 748 (explaining that, like disputes over title, disputes over mineral interests “give[] birth to economic unrest,

nothing to solve the problem of excessively fragmented property entitlements. As Michael Heller has shown, “the *content* of property rights can matter as much as the *clarity* of ownership.”<sup>155</sup> And clarity, though it might affect the political salience of the distribution of property rights, is obviously not itself a solution to unequal distribution or to rent-seeking directed at distribution or redistribution.<sup>156</sup>

\* \* \*

The value of legal clarity justifies preventive adjudication, but limiting principles are needed. Other limiting principles may be possible, but I have suggested two: the cost of clarification and the adequacy of discounting. With these principles taken into account, the normative argument for preventive adjudication is a qualified one. Preventive adjudication is justifiable when its cost is relatively low or when discounting is an inadequate response to uncertainty, as in cases of doubtful status or clouded ownership. In these cases, preventive adjudication is a useful means of accelerating the judicial resolution of legal indeterminacy. When it comes to timing, therefore, preventive adjudication is a counterpart to “the passive virtues” that Bickel famously advocated in constitutional law.<sup>157</sup> The “passive virtues” are “mediating techniques” and devices for “not doing.”<sup>158</sup> Preventive adjudication offers *immediating* techniques and devices for *doing*.

### III. SORTING CASES FOR PREVENTIVE ADJUDICATION

A sense of which cases should be resolved through preventive adjudication is not enough. Normative theory does not translate automatically into judicial practice, because it must be implemented by actual legal systems, with their varying institutional constraints and expectations. It is one thing to specify the cases that preventive adjudication should resolve and another to ensure that those are the cases it *does* resolve. This issue—translating the normative theory of Part II

---

requiring the antitoxin of a judicial declaration,” which will prevent “[b]itterness [from] disrupting the smooth working of a whole business”).

<sup>155</sup> Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* 147 (Basic Books 2008).

<sup>156</sup> See, for example, Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U Chi L Rev 181, 182–84 (2003).

<sup>157</sup> Bickel, *The Least Dangerous Branch* at 111–98 (cited in note 3). Even though preventive adjudication and the passive virtues are opposites with respect to timing, they are sometimes said to be complements with respect to intensity. See note 239 and accompanying text. Special considerations apply to the use of preventive adjudication in constitutional and other public law contexts. See notes 234–40 and accompanying text.

<sup>158</sup> Bickel, *The Least Dangerous Branch* at 112 (cited in note 3).



into the actual practice of courts in the United States—is the problem now considered.

When a legal system allows preventive adjudication in some cases but not others, it is “sorting.” Sorting is necessary because of the impracticality of preventive adjudication without limits—recall the Office of Clarity. Generally speaking, legal systems in the United States sort cases for preventive adjudication in two ways, which I call “retail sorting” and “wholesale sorting.” Although I discuss retail and wholesale sorting only in the context of preventive adjudication, these concepts can be used much more broadly: they have expansive implications for how jurisdictional statutes should be designed by legislatures and read by courts.

Retail sorting relies on case-by-case decisionmaking by courts about whether preventive adjudication is appropriate. With this approach, even if the plaintiff proves the elements of her claim, the judge still has discretion over whether to give preventive relief. Take, for example, the federal Declaratory Judgment Act.<sup>159</sup> Under the Act, a plaintiff can seek a declaratory judgment in essentially any kind of case, no matter what the subject matter or kind of question involved, provided the court has jurisdiction.<sup>160</sup> The federal district court decides whether declaratory relief is appropriate; in making this decision the court has “unique and substantial discretion.”<sup>161</sup>

Wholesale sorting allows preventive adjudication only for categories of cases that are specified in advance—usually, though not necessarily, by statute. Wholesale sorting lacks an expansive discretionary element; the court *must* decide the case. An example is an action to quiet title to real property. This action allows a person (sometimes only the possessor, sometimes anyone claiming the property) to bring a suit for a judgment regarding title. Although its roots are in equity,<sup>162</sup> the action to quiet title is statutory in many states,<sup>163</sup> and state courts routinely treat it as nondiscretionary.<sup>164</sup> State courts tend to use wholesale

---

<sup>159</sup> 28 USC §§ 2201–02.

<sup>160</sup> For the exceptions, see 28 USC § 2201.

<sup>161</sup> *Wilton v Seven Falls Co*, 515 US 277, 286 (1995) (“Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.”). See also 28 USC § 2201(a) (specifying that a federal court “*may* declare the rights and other legal relations of any interested party”) (emphasis added); notes 173–76 and accompanying text.

<sup>162</sup> See, for example, *Caira v Offner*, 24 Cal Rptr 3d 233, 244–45 (Cal App 2005); John Norton Pomeroy, Jr., 4 *A Treatise on Equity Jurisprudence* § 1396 (Law Co-op 4th ed 1919).

<sup>163</sup> See Laycock, *Modern American Remedies* at 551 (cited in note 12); Pomeroy, 4 *Equity Jurisprudence* at § 1396 (cited in note 162).

<sup>164</sup> See, for example, *Gabler v Fedoruk*, 756 NW2d 725, 730–31 (Minn App 2008) (declaring that “[n]o serious question exists that the remedy for the establishment of a boundary by practical location in Minnesota has always included the automatic recognition of that boundary . . . as

sorting for preventive adjudication, but federal courts almost exclusively use retail sorting.

Retail and wholesale sorting can be combined in three ways. First, they are sometimes *paired*, as when a legal system uses wholesale sorting in certain kinds of cases (for example, actions to quiet title) and retail sorting for preventive adjudication more generally (for example, declaratory judgment actions on any topic). Second, legal systems sometimes *sequence* wholesale and retail sorting, by allowing preventive adjudication for certain categories of cases, and within those categories giving courts discretion about whether preventive relief is appropriate. Third, legal systems sometimes rely on *informal wholesale sorting*: as a formal matter judges have discretion in deciding which cases are appropriate for preventive adjudication, but in actual practice courts' exercise of this discretion is constrained and generally predictable.<sup>165</sup> Judicial discretion may be constrained by appellate courts, which can establish norms for exercising discretion and can police the outliers by means of appellate review.<sup>166</sup> Or discretion may be constrained by statutes, such as statutes that grant courts jurisdiction to give declaratory judgments in any kind of case but single out paradigmatic cases for which declaratory judgments are especially intended.<sup>167</sup> This Article distinguishes re-

---

a matter of right," not as an "optional or discretionary" remedy, "despite the generally equitable nature of the overall action"); *Dunegan v Griffith*, 253 SW3d 164, 168 (Tenn App 2007) (instructing a trial court that on remand it would be "called upon to determine who has the 'better paper title' and declare the owner of the disputed property").

<sup>165</sup> A shift over time from more or less unfettered discretion to rule-informed discretion can be seen in the history of equity. See Hamburger, *Law and Judicial Duty* at 125–26 (cited in note 91); Theodore F.T. Plucknett, *A Concise History of the Common Law* 690, 692 (Butterworth 5th ed 1956). In the terminology used here, this would be a shift from retail sorting to informal wholesale sorting. The culmination of this shift is exemplified by Judge Benjamin Cardozo's warning that "[i]n equity, as at law, there are signposts for the traveler," and discretion "must be regulated upon grounds that will make it judicial." *Evangelical Lutheran Church of the Ascension of Snyder v Sahlem*, 172 NE 455, 457 (NY 1930).

<sup>166</sup> This approach is taken for declaratory judgment actions in the United Kingdom. See Woolf and Woolf, *The Declaratory Judgment* at 130–31 (cited in note 12), quoting *Ex parte Stafford Corp*, 2 KB 33, 43 (CA 1940) ("[A]lthough nominally [the court] has a discretion, if it is to act according to the ordinary principles upon which judicial discretion is exercised, [it] must exercise that discretion in a particular way, and if a judge at trial refuses to do so, then the Court of Appeal will set the matter right."); Woolf and Woolf, *The Declaratory Judgment* at 130–31 (cited in note 12) (explaining that although declaratory relief is discretionary, it is granted "predictabl[y]" and according to "settled principles"). See also Comment, *The Declaratory Action as an Alternative Remedy*, 36 Yale L J 403, 403 (1927) (describing fifty years of English experience with discretionary declaratory judgments as "discretion . . . largely hardened into rule, and . . . subject to appellate review"). This informal wholesale sorting differs sharply from the expansive discretion of federal courts in the United States. See note 161 and notes 173–76 and accompanying text.

<sup>167</sup> This approach is taken by the Uniform Declaratory Judgments Act and the state statutes following it. The UDJA grants a general "power to declare rights, status, and other legal relations" and authorizes declaratory judgments in specific circumstances, such as cases involving a "question of construction or validity arising under [an] instrument, statute, ordinance . . . or franchise." UDJA §§ 1–4. See also UDJA § 5 (clarifying that the enumeration of specific circum-

tail and wholesale sorting, but the effects of different kinds of sorting will often be a matter of degree—wholesale sorting, informal wholesale sorting, and retail sorting offer a plaintiff varying degrees of assurance that a court will decide her case.

In legal scholarship, these ways of sorting cases are often invisible. There is not much positive scholarship on how cases are sorted for preventive adjudication, and normative analysis is even less common. In the meager normative analysis that does exist, the consensus view is that judicial discretion is an important feature of the declaratory judgment;<sup>168</sup> this consensus, however, lacks any rigorous support. If this assessment seems unduly critical, consider the leading English treatise on the declaratory judgment. Compared to recent literature in the United States, it offers a singularly expansive discussion of the use of discretion in declaratory judgment actions—more than one hundred pages—but it offers only a page and a half under the heading “The importance of a declaration being a discretionary remedy,” and even this page and a half offers only a single conclusory sentence about why discretion may actually be important.<sup>169</sup> The conventional wisdom, such as it is, is aligned with retail sorting.

The conventional wisdom is unsound. As explained below, wholesale sorting has a number of advantages over retail sorting, at least in private law cases.<sup>170</sup> Wholesale sorting can better align the actual practice of preventive adjudication with its justification. It allows judges to develop expertise in preventive cases, and it gives plaintiffs the knowledge that their cases will in fact be resolved, a fact which makes preventive adjudication more attractive to plaintiffs (and more accessible to low-income plaintiffs). Wholesale sorting also minimizes forum shopping. These advantages could be largely achieved by informal wholesale sorting, too.<sup>171</sup> By contrast, a system of retail sorting, as in declaratory judgment actions in federal courts, has significant drawbacks, which are inverse to wholesale sorting’s advantages: less judicial expertise, less accessibility to low-income plaintiffs, and more forum

---

tances “does not limit . . . the general powers conferred”); UDJA § 6 (making declaratory judgments discretionary).

<sup>168</sup> See Woolf and Woolf, *The Declaratory Judgment* at 123 (cited in note 12) (“A most important feature of the declaratory judgment is that it is a flexible and discretionary remedy.”); Borchard, 26 Minn L Rev at 678 (cited in note 96) (defending discretion in declaratory judgment actions); note 183. Borchard’s position, however, is complicated and not entirely consistent. Compare note 176 with note 179.

<sup>169</sup> Woolf and Woolf, *The Declaratory Judgment* at 123–24 (cited in note 12) (“Its flexible and discretionary nature enables the court to exercise precise control over the circumstances and terms in which relief is granted.”). For a critique of this sentence, see text accompanying note 180.

<sup>170</sup> For a suggestion that retail sorting may have a role in public law cases, see text accompanying note 238.

<sup>171</sup> See text accompanying notes 166–67.

shopping. These drawbacks may help explain the seemingly moribund condition of the federal declaratory judgment.

#### A. Retail Sorting: Discretion

Retail sorting for preventive cases is common in federal courts, especially in declaratory judgment actions.<sup>172</sup> A district court's discretion under the federal Declaratory Judgment Act is "unique and substantial,"<sup>173</sup> and is not significantly controlled by case law or appellate review. The case law guiding district courts in their exercise of discretion consists of multifactor tests of at least the usual inconclusiveness. Typical factors include "whether the declaratory action would serve a useful purpose" and "whether [it] is being used merely for the purpose of procedural fencing"<sup>174</sup>—factors that operate at such a high level of generality that they rarely seem to require any particular outcome. The Supreme Court's guidance to district courts is similarly unhelpful: "When all is said and done, . . . 'the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power.'"<sup>175</sup> Nor does federal appellate review bring a high degree of consistency: when a federal district court has decided whether declaratory relief is appropriate, the standard of review on appeal is abuse of discretion.<sup>176</sup>

Outside federal courts, there is widespread commitment to retail sorting as a formal matter. This is true, for example, of the declaratory judgment actions in many state courts and in foreign courts. In actual practice, however, these systems appear to rely more on informal

---

<sup>172</sup> See notes 159–61 and accompanying text.

<sup>173</sup> *Wilton*, 515 US at 286.

<sup>174</sup> These factors come from the widely adopted Sixth Circuit test. See *Scottsdale Insurance Co v Flowers*, 513 F3d 546, 554 (6th Cir 2008), quoting *Grand Trunk Western Railroad Co v Consolidated Rail Co*, 746 F2d 323, 326 (6th Cir 1984) (quotation marks omitted).

<sup>175</sup> *Wilton*, 515 US at 287, quoting *Public Service Commission of Utah v Wycoff Co*, 344 US 237, 243 (1952).

<sup>176</sup> See *Wilton*, 515 US at 289 (refusing to engage in de novo review based on the determination that district courts are in a better position to determine the usefulness of the declaratory judgment remedy and the "fitness of the case for resolution"). But see *Newell Operating Co v International Union of United Automobile, Aerospace, and Agricultural Implement Workers of America*, 532 F3d 583, 591 & n 1 (7th Cir 2008) (noting disagreement about *Wilton*'s scope). In *Wilton* the Court noted, but seemed unpersuaded by, Borchard's suggestion that "sound administration of the Declaratory Judgment Act calls for the exercise of 'judicial discretion, hardened by experience into rule.'" 515 US at 289, quoting Borchard, *Declaratory Judgments* at 293 (cited in note 6). Neither the Court nor the parties briefing the case appear to have noticed that the language quoted from Borchard—describing a discretion "hardened into rule"—also appeared in the Senate report accompanying the Declaratory Judgment Act. See *Declaratory Judgments*, S Rep No 1005, 73d Cong, 2d Sess 5 (1934). Consider Brief for Petitioners, *Wilton v Seven Falls Co*, No 94-562, \*18 (US filed Jan 11, 1995) (available on Westlaw at 1995 WL 13178) (citing only Borchard).

wholesale sorting—judicial discretion is constrained through case law and appellate review<sup>177</sup> or through statutes that enumerate paradigmatic cases for declaratory relief.<sup>178</sup>

### 1. The need for gatekeeping.

There is one primary argument that can be made for retail sorting (as opposed to wholesale or informal wholesale sorting). It is that retail sorting is the only feasible option. Sometimes this is said directly and sometimes indirectly, but in neither form is the point compelling.

The direct way of saying this is that we cannot adequately specify the categories of cases in which preventive adjudication is justified.<sup>179</sup> On this view, retail sorting would allow courts to engage in preventive adjudication in a theoretical void. A variation of the impossibility-of-wholesale-sorting argument is that discretion “enables the court to exercise precise control over the circumstances and terms in which relief is granted”<sup>180</sup>—a “precise control” ex post that is necessary if precise specification ex ante is prohibitively difficult. But is it? Closer analysis shows that we can specify the categories of cases in which preventive adjudication is especially useful. This conclusion is supported by the discussion above of doubtful status and clouded ownership, and by the detailed consideration below of wholesale sorting.

The indirect way of putting the argument for retail sorting is to say that without it the courts would be overwhelmed with preventive cases. Landes and Posner’s economic analysis suggests that even when preventive adjudication is beneficial to society, it is even more beneficial to the individual seeking it, given the administrative and error costs that are not borne by the plaintiff.<sup>181</sup> Accordingly, they expect courts to “be flooded with requests for anticipatory adjudication.”<sup>182</sup> This expectation leads them to “predict that courts will be given”—and to argue that courts *should* be given—“greater discretion to refuse to hear a case before [instead of] after a party acts, enabling

---

<sup>177</sup> Compare Woolf and Woolf, *The Declaratory Judgment* at 123 (cited in note 12) (“In England discretion has always been a dominant feature of the declaration.”) with note 166.

<sup>178</sup> See note 167 and accompanying text.

<sup>179</sup> See Borchard, 26 Minn L. Rev at 693 (cited in note 96) (defending judicial discretion over the appropriateness of preventive adjudication because “[n]o categorical rule can be laid down governing all cases”). Two other arguments are made by Borchard for why discretion is important for declaratory judgments. One is that the declaratory judgment is “not an action strictly legal or equitable but sui generis”; the other is that declaratory judgments are considered discretionary in the UDJA. *Id.* at 678. Borchard’s reliance on these two arguments to support a normative conclusion is puzzling; neither has the slightest normative force.

<sup>180</sup> Woolf and Woolf, *The Declaratory Judgment* at 123 (cited in note 12).

<sup>181</sup> See Landes and Posner, 23 J Legal Stud at 694 (cited in note 2).

<sup>182</sup> *Id.*

[courts] to turn down requests for anticipatory adjudication when the private gain is positive but the social gain is negative.”<sup>183</sup> This prediction, though true as a descriptive matter about the federal declaratory judgment, is not a persuasive reason for retail sorting. If preventive adjudication would be inefficient in many or even most cases—a point that should be accepted, given the general adequacy of discounting—we would expect to see some kind of gatekeeping mechanism. But this need not be judicial discretion; it could be the nondiscretionary methods of wholesale sorting. Landes and Posner show only that a sorting mechanism of some kind is needed.

Further, Landes and Posner’s position that the sorting method should be judicial discretion is inconsistent with the role of legal error in their model. They argue that some preventive suits, such as those to ascertain the scope of a criminal statute, are likely to have “the principal effect of . . . allow[ing] some people to get away with their unlawful acts because of legal error.”<sup>184</sup> This is because, according to Landes and Posner, in a suit to clarify the scope of the criminal law there would often be “very little doubt that [the proposed] act is unlawful and likely to cause significant harm,” so the value of preventive adjudication to a plaintiff would primarily lie in the small chance that a court will make an error about a relatively clear statute.<sup>185</sup> But if courts will make mistakes in easy cases that are in the core of judicial competence, then how could they be expected to succeed in performing the intricate cost-benefit analysis that Landes and Posner suggest?<sup>186</sup>

The rationale for retail sorting is therefore unpersuasive, provided that some other method of sorting is feasible and can better perform the gatekeeping function.

---

<sup>183</sup> *Id.* For Landes and Posner’s normative position, see *id.* at 699 (“Even where declaratory relief would meet the Article III criteria, the court has discretion to refuse to grant it; this is a further safeguard against the use of the device to obtain a private gain but impose a social loss.”); *id.* at 703 (explaining that judicial discretion prevents “the number of anticipatory adjudications [from] exceed[ing] the socially efficient number”).

<sup>184</sup> *Id.* at 692.

<sup>185</sup> Landes and Posner, 23 *J Legal Stud* at 692 (cited in note 2).

<sup>186</sup> Landes and Posner also connect judicial discretion to their economic modeling of the claim-preclusive effect of a declaratory judgment. This part of their analysis is undermined by a faulty doctrinal premise. Landes and Posner call *res judicata* (that is, claim preclusion) “an important feature of anticipatory judgments,” *id.* at 700–01, and they provide an extensive economic analysis that leads them to predict that the law will be exactly what they say the law is: the more that judges are given discretion, as they are in federal declaratory judgment actions, “the more likely is the outcome of anticipatory adjudication to be treated as *res judicata* in *ex post* litigation and the greater is the precedential weight likely to be given to anticipatory judgments.” *Id.* at 703. But declaratory judgments are in fact *not* given claim-preclusive effect. See notes 76–78 and accompanying text. They generally have only issue-preclusive effect, and Landes and Posner expressly do not address issue preclusion. See Landes and Posner, 23 *J Legal Stud* at 700 (cited in note 2).

## 2. Incentives of judges, incentives of plaintiffs.

In addition to lacking a persuasive rationale, retail sorting has three serious drawbacks: (1) less judicial expertise; (2) less attractiveness to plaintiffs, especially low-income plaintiffs; and (3) more forum shopping. These can be seen in the federal declaratory judgment.

The first drawback is that retail sorting encourages trial courts to give less attention to their preventive cases than their remedial ones. It is no secret that most federal district courts labor under severe caseload pressures.<sup>187</sup> We should expect, then, that discretionary cases will tend to receive less attention. Judges maximize the same things everyone else does,<sup>188</sup> and they will not usually be inclined to take on “optional” cases when their dockets are full.<sup>189</sup> This sidelining of discretionary cases is made even worse if the process of sorting is itself a time-consuming one for the court.<sup>190</sup> Retail sorting increases the number of issues that the court must decide, and it therefore increases the cost of a case (both to the court and to the litigants) when the court does choose to decide it.<sup>191</sup> And if a court declines to decide a discretionary case, it cannot entirely avoid the costs and complexities of retail sorting; a judge will still need to give reasons for her decision.<sup>192</sup>

The second, related drawback is that retail sorting reduces the attractiveness of preventive adjudication to plaintiffs. This follows from

---

<sup>187</sup> See Fallon, et al, *Federal Courts* at 41 (cited in note 76) (noting that there were 259,541 civil cases, 66,860 criminal cases, and 1,112,542 bankruptcy petitions filed in fiscal year 2006).

<sup>188</sup> See generally Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 S Ct Econ Rev 1 (1993). Consider Donald L. Doernberg and Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L Rev 529, 567 n 174 (1989) (discussing a 1928 letter from a federal district judge to Congress warning that legislation authorizing declaratory judgments would “greatly increase the congested dockets of the Federal Courts”).

<sup>189</sup> This is why discretion is universally recognized as enabling a court to reduce its caseload. See, for example, *Hart v Massanari*, 266 F3d 1155, 1177 (9th Cir 2001) (stating that the Supreme Court “uses its discretionary review authority to limit its merits docket”); Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 USF L Rev 1, 41 n 251 (2005) (noting that some have suggested that the European Court of Human Rights should gain “discretionary authority” as a means of “coping with [its] caseload”); Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 Cardozo L Rev 579, 621 (2005) (explaining that once the Supreme Court was “armed with increased discretion to choose its cases,” its “caseload declined”).

<sup>190</sup> Unusual candor on this point appears in the district court decision reviewed in *EMC Corp v Norand Corp*, 89 F3d 807, 809 (Fed Cir 1996). A plaintiff sued for a declaration of patent invalidity and noninfringement, and the defendant filed a motion to dismiss. The district court found that deciding the motion “would be a significant undertaking and would involve a close question.” *Id.* For this reason, among others, the court chose to “exercise its discretion under the Declaratory Judgment Act to decline to entertain the action.” *Id.*

<sup>191</sup> Consider Jules L. Coleman, *Risks and Wrongs* 248–49 (Cambridge 1992).

<sup>192</sup> These reasons will often track a multifactor test. See note 174 and accompanying text.

courts' relative inattention. If judges have discretion to refuse preventive relief—even if a plaintiff proves her claim—then plaintiffs will rationally discount the value of preventive adjudication.<sup>193</sup> And risk-averse potential plaintiffs will be unwilling (at the margin) to bring even meritorious claims. They face losses that would be nearly certain, such as the expense of the suit and worsened relations with the defendant, but their requested relief would be contingent not only on the legal merits but also on the trial court's discretion.<sup>194</sup> To evade the court's discretion, a plaintiff might request not only a declaratory judgment but also money damages—yet a request for monetary relief usually makes declaratory relief superfluous<sup>195</sup> and it may force the plaintiff to postpone the suit until after she has suffered the very harm she is trying to avoid. Indeed, this superfluous use of the declaratory judgment action is now common practice, and most plaintiffs who seek declaratory relief in federal courts also request monetary or injunctive relief.

The third drawback is that retail sorting encourages forum shopping. If one court gains a reputation for being more willing to give preventive relief, plaintiffs are likely to seek out that court. This is a problem specific to retail sorting, because interjudge disparity is likely to be greater under a discretionary regime than under wholesale sorting or under an informal wholesale system in which discretion is hardened into rule.<sup>196</sup>

---

<sup>193</sup> Judges have not infrequently been reluctant to give preventive relief. See, for example, Woolf and Woolf, *The Declaratory Judgment* at 12, 17 (cited in note 12) (“[U]ntil the beginning of the twentieth century the courts exercised their powers to obstruct, rather than promote, the development of declaratory relief.”); Borchard, *Declaratory Judgments* at 129 (cited in note 6); Note, 53 Colum L Rev at 1130–31 & n 3 (cited in note 22) (citing instances of hostility to declaratory judgment in the United States).

<sup>194</sup> See Lucian Arye Bebchuk and Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J Legal Stud 371, 397 (1996) (explaining that “greater legal uncertainty” discourages risk-averse plaintiffs from suing). For a discussion of plaintiff risk-aversion, see Robert H. Mnookin, *Negotiation, Settlement and the Contingent Fee*, 47 DePaul L Rev 363, 365 (1998) (noting that tort plaintiffs tend to be more risk-averse than defendants).

<sup>195</sup> See *Gouriet v Union of Post Office Workers*, 1978 App Cas 435, 501 (HL) (Diplock) (arguing that a request for declaratory relief is “generally superfluous” when accompanied by another cause of action and is most useful “when an infringement of the plaintiff’s rights in the future is threatened or . . . there is a dispute between parties as to what their respective rights will be if something happens in the future”); Woolf and Woolf, *The Declaratory Judgment* at 13 (cited in note 12) (describing declaratory relief as “most needed . . . where no other remedy could be obtained”); note 14. Consider Doernberg and Mushlin, 36 UCLA L Rev at 563 n 156 (cited in note 188):

Virtually the entire discussion of the benefits of the proposed [federal Declaratory Judgment] Act was devoted to situations in which the potential plaintiff would have been unable to sue without it, either because there had not yet been a violation of right or because the potential defendant was the only one who possessed a common law right of action.

<sup>196</sup> See note 176. The forum shopping effect is compounded if the plaintiff in preventive adjudication has a broader set of venue choices than would be available in a remedial suit.



These drawbacks reinforce one another over time. As judges decline to provide preventive adjudication, plaintiffs are less willing to bring preventive suits; as plaintiffs bring fewer suits, judges take them less seriously; and judges decline still more cases to avoid attracting forum shoppers. Together, these drawbacks make it unlikely that judges exercising discretion can perform better than wholesale sorting. Even if we assume for the sake of argument that retail sorting would be the best method in the first iteration, over time these drawbacks would compromise its effectiveness.

The drawbacks of retail sorting may help explain the seemingly moribund condition of the federal declaratory judgment. Outside of a handful of contexts governed by unusual considerations, such as patent litigation,<sup>197</sup> declaratory judgments in federal court play only a minor role. This may be due in part to retail sorting, which discourages serious consideration of the declaratory judgment by federal courts and plaintiffs.

## B. Wholesale Sorting: Categories

Wholesale sorting, though uncommon in federal courts, is widely used in state courts. State statutes routinely authorize preventive adjudication in specific categories of cases,<sup>198</sup> such as petitions to declare a missing person dead,<sup>199</sup> petitions to declare legal paternity,<sup>200</sup> and actions

---

Broader venue is available, for example, in a suit for a declaration regarding patent infringement than in a remedial patent infringement suit, because only the latter is restricted by the special venue provisions of 28 USC § 1400(b). See Adam D. Kline, *Any Given Forum: A Proposed Solution to the Inequitable Economic Advantage That Arises When Non-practicing Patent Holding Organizations Predetermine Forum*, 48 IDEA 247, 270–71 (2008). See also Matthew D. Henry and John L. Turner, *The Court of Appeals for the Federal Circuit's Impact on Patent Litigation*, 35 J Legal Stud 85, 91 n 13 (2006) (“Because the patentee and the alleged infringer will typically prefer different lower courts for the trial, he who files first may gain a tactical advantage by naming the venue.”).

<sup>197</sup> In patent cases, a potential infringer has strong incentives to sue for a declaration of noninfringement, invalidity, or unenforceability. If successful, the plaintiff no longer operates under a cloud of legal uncertainty; if unsuccessful, the plaintiff has minimized damages. And regardless of ultimate success, the plaintiff can choose a convenient forum because suits for declarations of noninfringement are not subject to the narrow venue restrictions placed on remedial suits for patent infringement. See notes 16 and 196. See also note 226. In addition, there is evidence that a potential infringer has a better chance on the merits in a jury trial by bringing a declaratory judgment action instead of waiting for a patent infringement suit. See Moore, 99 Mich L Rev at 368 (cited in note 104).

<sup>198</sup> Federal statutes, too, authorize declaratory judgments in specific categories of cases, but these authorizations are often read as giving district courts the same broad discretion they have under the federal Declaratory Judgment Act.

<sup>199</sup> See, for example, 20 Pa Cons Stat Ann § 5701(a).

<sup>200</sup> See, for example, NY Fam Ct Act § 523 (McKinney) (setting forth the petition process prior to securing a “declaration of paternity”).

to quiet title.<sup>201</sup> In addition to these and other specific categories of cases, states allow declaratory judgment actions. State declaratory judgment actions are often characterized by informal wholesale sorting, because as a formal matter courts have discretion over declaratory relief, yet this discretion is constrained by statutes that offer paradigm cases for declaratory judgments<sup>202</sup> and by a more exacting practice of appellate review.<sup>203</sup> Although the analysis here focuses on wholesale sorting, it largely holds for informal wholesale sorting, too.

Like retail sorting, wholesale sorting has received little positive or normative analysis. Here I briefly describe the consequences of wholesale sorting, noting that it avoids retail sorting's drawbacks (less expertise, less accessibility, more forum shopping). I then explain how wholesale sorting can work, describing various categories of cases that can be specified in advance. Useful categories for wholesale sorting are lexical indeterminacy, legal status, property rights, and validity. These categories approximate the cases in which preventive adjudication is justifiable, either because the cost of clarification is low (lexical indeterminacy, validity) or because discounting is inadequate (legal status, property rights). And where the categories used in wholesale sorting prove inadequate over time, they can be easily tweaked or supplemented—something much harder to do if sorting depends on the discretionary decisions of many decisionmakers resolving individual cases.

### 1. Inverting the incentives of judges and plaintiffs.

Wholesale sorting lacks retail sorting's disadvantages. It does not discourage judges from giving attention to preventive adjudication; by contrast, it allows the growth of judicial expertise about preventive relief.<sup>204</sup> It does not reduce the attractiveness of preventive adjudication to

---

<sup>201</sup> See, for example, Alaska Stat Ann § 09.45.010 (allowing a person with possession of real property to bring an action against another who claims an adverse interest).

<sup>202</sup> See, for example, 10 Del Code Ann §§ 6502–03 (making declaratory relief available to interested parties “under a deed, will, [or] written contract” and to parties “whose rights, status or other legal relations are affected by statute, municipal ordinance, contract or franchise”). See also note 167.

<sup>203</sup> See, for example, *In re Marriage of Rife*, 878 NE2d 775, 780–86 (Ill App 2007) (canvassing Illinois appellate decisions that engaged in “searching” review of a decision to issue declaratory relief and distinguishing decisions that should be reviewed deferentially from those that should be reviewed de novo). Consider Pete Schenkkan, *UDJA Declaratory Judgments in Texas Administrative Law*, 9 Tex Tech Admin L J 195, 206–07 (2008) (explaining that under the Texas Uniform Declaratory Judgments Act judges are “duty-bound” to issue a judgment when certain justiciability requirements are met).

<sup>204</sup> Consider Schenkkan, 9 Tex Tech Admin L J at 199–200 (cited in note 203) (noting that the mandatory venue provision for declaratory judgments under the Texas Administrative Procedure Act has allowed the local attorneys and judges to learn the declaratory judgment’s “uses and limits”).

plaintiffs, especially low-income plaintiffs, because they know their cases will be adjudicated.<sup>205</sup> Nor does it encourage forum shopping, because all forums apply the same wholesale categories.

One objection that could be made to wholesale sorting is that it merely shifts judicial discretion, because (1) there will be questions about whether a case falls into a particular predefined category, and (2) judges have tacit discretion in applying justiciability requirements. It is true that there will be residual discretion in every system of sorting, just as there is discretion involved in decisions on the merits. But the two kinds of residual discretion just enumerated would not make a wholesale sorting system into a de facto discretionary one.

First, whether a case falls into a defined category can be an easy or hard question depending on the categories used. And there are legal categories that would involve relatively few borderline cases. For example, there may be a borderline case in which it is hard to decide whether a person is seeking a declaration of legal paternity, but in the great majority of paternity petitions this will be clear.

Second, judges do have some discretion in how stringently they apply justiciability doctrines like ripeness and standing, and this malleability has been a focus of doctrinal critique.<sup>206</sup> The play in the joints of justiciability doctrines might seem to turn wholesale sorting into a sequence of wholesale-retail sorting.<sup>207</sup> But these concerns have somewhat

---

<sup>205</sup> The advantage of wholesale sorting for low-income plaintiffs is significant. Judicial discretion about whether a case is appropriate for preventive adjudication makes it almost impossible to equalize access to courts. If it is uncertain whether the court will even choose to hear the case, a low-income plaintiff is less likely to pay the upfront costs necessary to bring a suit. A low-income plaintiff will have less money to hire counsel who are adept at characterizing a case as one that a court should exercise its discretion to hear—precisely the kind of difficult task where reciting boilerplate is not enough, where real lawyerly skill matters. And it is difficult under retail sorting to encourage preventive adjudication in the kinds of cases more useful to low-income litigants. These distributive effects are avoidable, however, with wholesale sorting. A low-income plaintiff knows her case will be heard, her counsel will not need to brief the reasons why the court should exercise its discretion, and preventive adjudication can be allowed in cases more useful to the economically disadvantaged. For example, low-income litigants may be more likely to have property rights that are unclear. Consider Karol C. Boudreaux, *The Legal Empowerment of the Poor: Tiling and Poverty Alleviation in Post-Apartheid South Africa*, 5 *Hastings Race & Poverty L J* 309, 339–42 (2008) (describing how the cost of formal conveyancing is too high for people transferring real property in Langa, South Africa, forcing them to pursue informal methods of showing the transfer of property, such as affidavits attested to by police officers). Low-income individuals are disproportionately likely to encounter other legal issues, too, such as the validity of a relatively informal contract, a marriage license, or a holographic will. Holographic (that is, handwritten) wills, for example, are primarily created by persons who are not advised by counsel, and they raise “chronic issues of validity and interpretation.” Richard Lewis Brown, *The Holograph Problem—The Case against Holographic Wills*, 74 *Tenn L Rev* 93, 93 (2006). See also Jesse Dukeminier and Stanley M. Johanson, *Wills, Trusts, and Estates* 248–61 (Little, Brown 5th ed 1995).

<sup>206</sup> See Tribe, 1 *American Constitutional Law* at 324–27 (cited in note 91).

<sup>207</sup> Compare the suggestion of Landes and Posner that justiciability doctrines function to block anticipatory adjudication that has high error costs. See note 105.

less force in ordinary private law disputes, especially those that are relatively narrow and confined (for example, “Is this deed valid?”). Indeed, the very malleability of ripeness and standing in the context of preventive adjudication may be partly contingent on the fact that federal courts now rely on retail sorting for declaratory judgments. Where courts are hearing specified categories of cases, and developing expertise in preventively resolving them, it may be easier to spot justiciability outliers (in both directions, for any given justiciability doctrine). Further, as a normative matter, justiciability doctrines are ill suited to a significant role in sorting.<sup>208</sup>

## 2. Options for wholesale sorting.

For wholesale sorting to work, it requires categories that are consistent with a normative theory of preventive adjudication, such as the one presented in Part II. To specify these categories, a legal system can choose from several approaches. One is *conduct sorting*, which would distinguish cases based on the kind of conduct that is made more costly by the legal indeterminacy: for example, does the legal indeterminacy increase the cost of constitutionally protected conduct? Another is *government-request sorting*, which would distinguish cases based on whether a government agency or other nonjudicial entity indicated that preventive adjudication was appropriate. Another option is *indeterminacy sorting*, which would allow preventive adjudication for some kinds of indeterminacies but not others: for example, lexical indeterminacy but not fact-based indeterminacy. Still another approach is *topic sorting*, which would allow preventive adjudication only for certain substantive areas of the law (such as patent infringement) or certain transubstantive topics (for example, is this a case about legal status?). Especially attractive is a combination of indeterminacy sorting and topic sorting—using these two approaches is the best way to ensure that preventive adjudication is available when its costs are relatively low or discounting is inadequate.

*a) Conduct sorting.* A legal system could sort cases based on the conduct that legal indeterminacy was discouraging or, in the language of First Amendment jurisprudence, “chilling.” For example, preventive adjudication might be allowed when a given indeterminacy discourages constitutionally protected conduct. On Gillian Hadfield’s reading of

---

<sup>208</sup> Justiciability doctrines that have been developed in the context of remedial adjudication (such as adversity and the injury-in-fact requirement) can be incongruous when applied to preventive adjudication. See note 108. And using justiciability doctrines for back-end sorting may have regressive distributive consequences, because, as mentioned in note 205, legal acumen is especially important for relatively difficult areas of the law.

the Supreme Court's void-for-vagueness doctrine, something like conduct sorting is taking place: the Supreme Court restricts vagueness to protect "the exercise of constitutional rights but not other lawful behavior."<sup>209</sup> A more general kind of conduct sorting would allow preventive adjudication if the underlying conduct were economically, artistically, or otherwise socially valuable. Of course, such determinations would be complicated and involve courts in explicit and controversial judgments about valuable conduct.<sup>210</sup> We might see constitutionally protected conduct as a relatively manageable proxy for conduct that is socially valuable.<sup>211</sup> But this sorting method could force judges, before reaching the merits, to decide extraneous constitutional questions.

*b) Government-request sorting.* Alternatively, preventive adjudication could be allowed only when requested by the government. This kind of sorting already happens in advisory opinions, which some states, such as Massachusetts, allow if requested by the executive or legislative branch.<sup>212</sup> Similarly, in declaratory judgment actions in England, the attorney general's participation makes it more likely that a court will allow preventive adjudication.<sup>213</sup> This kind of government-request principle could theoretically be incorporated into wholesale sorting through a mechanism analogous to the Supreme Court's requesting the opinion of the solicitor general on whether it should grant certiorari.

But government-request sorting has drawbacks. First, it would be seriously underinclusive, neglecting the large number of private law disputes that need resolution and yet never attract the attention of the executive or legislative branch. Second, it would raise substantial concerns about government bias, particularly if suits to clarify the criminal law were subject to a government veto.<sup>214</sup> It would be a problem of the fox and henhouse variety.

---

<sup>209</sup> Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 Cal L Rev 541, 545 (1994).

<sup>210</sup> If the normative judgments were made on the basis of an extensive cost-benefit analysis, there would be problems of judicial manageability. See note 231.

<sup>211</sup> Consider Laycock, *Modern American Remedies* at 540 (cited in note 12) (noting as a descriptive matter that "[s]uits to declare criminal statutes unconstitutional are common," but "[s]uits to declare that proposed conduct is not within the criminal statute are rare, and courts are more reluctant to entertain them").

<sup>212</sup> See Fallon, et al, *Federal Courts* at 57–58 (cited in note 76). See also Landes and Posner, 23 J Legal Stud at 710–13 (cited in note 2). Consider also Woolf and Woolf, *The Declaratory Judgment* at 140–45 (cited in note 12) (noting that advisory opinions requested by the executive or legislature have often tended to impair the independence of the judiciary).

<sup>213</sup> See Woolf and Woolf, *The Declaratory Judgment* at 127, 138 (cited in note 12).

<sup>214</sup> Intriguingly, both Justice William Rehnquist and Justice William Brennan suggested the possibility of declaratory judgment actions by the government to clarify the criminal law. See *Steffel v Thompson*, 415 US 452, 484 (1974) (Rehnquist concurring) (suggesting that declaratory judgment actions may be useful for "the State itself" when it is "confronted by a possible violation

Government-request sorting is therefore undesirable when all parties are private (the underinclusiveness problem) and when the parties on one side of a question are private (the bias problem). Its usefulness in advisory opinions stems from the fact that those opinions frequently involve interbranch disputes. Where a form of preventive adjudication is aimed at questions that will have government parties on both sides, there is little to be lost from requiring a government request.<sup>215</sup>

c) *Indeterminacy sorting*. Another method of wholesale sorting would distinguish cases based on the kind of legal indeterminacy involved. For example, a system might allow preventive adjudication in any case of lexical indeterminacy, but not in cases of fact-based indeterminacy. There are good reasons to do this, because deciding lexical indeterminacy cases brings a greater return at a lower cost.

Resolving one case of lexical indeterminacy can remove legal uncertainty in many other cases, because lexical indeterminacy is “chunky” (involving large groups of essentially identical cases); all cases involving the industrial-hemp subspecies of *Cannabis sativa* would be identical for the question whether the subspecies is “marijuana” for purposes of a federal criminal statute.<sup>216</sup> For the cost of deciding one industrial-hemp case, we can get the return of deciding many.

Further, in a case of lexical indeterminacy, delay usually will not improve adjudication. Without preventive adjudication, a court might, of course, avoid adjudication entirely. The indeterminacy of “marijuana” in a federal drug statute<sup>217</sup> might deter someone from producing industrial hemp, and if no one produced industrial hemp then the indeterminacy

---

of its criminal laws” but does not want to “activat[e] . . . the criminal process”); *Dombrowski v Pfister*, 380 US 479, 491 & n 6 (1965) (recommending declaratory judgment actions by states to remove indeterminacy in state criminal statutes). See also Shapiro, 74 Nw U L Rev at 768–69 (cited in note 83). It is unclear who the defendant in such an action would be, and there would be policy concerns about one-sided clarification by prosecutors. Perhaps if prosecutors could bring declaratory judgment actions to clarify the criminal law, it would be easier to have a penalty default rule that held legal indeterminacy against them—what the rule of lenity and the doctrine of legality presently offer in theory but not in practice.

<sup>215</sup> A variation on government-request sorting would be *government-action sorting*, which would ask whether the indeterminacy is proximately caused by state action. If and only if the answer is yes would preventive adjudication be allowed. On this method, courts would use preventive adjudication to resolve an indeterminacy in a statute but not in a private contract. Courts would remove a cloud on title when it was attributable to a state official’s acceptance of a fraudulent trademark registration. See, for example, *Coca-Cola Co v Stevenson*, 276 F 1010, 1014–15 (SD Ill 1920) (discussing a defendant who registered the trademarks “Coca and Cola Carbonating Syrup” and “A Genuine Coca and Cola Flavor” with the intention to use Coca-Cola’s trademarks). This approach, however, would also be seriously underinclusive, and would be open to the obvious response that the state specifies the secondary rules that govern how private parties can create legally binding contracts and legally recognized entitlements. On secondary rules, see H.L.A. Hart, *The Concept of Law* 80–81 (Oxford 2d ed 1994).

<sup>216</sup> See Part I.C.2.b.

<sup>217</sup> See note 54 and accompanying text.

would go unresolved. But if at some later time the lexical indeterminacy does need to be resolved—say, in remedial adjudication—delay usually will not have put the court in a better position. Suppose someone *did* produce industrial hemp, *was* arrested by federal drug agents, and *was* prosecuted by a United States Attorney: none of this would create new information about whether a court should read “marijuana” in the federal statute as including industrial hemp.

Contrast a case of fact-based indeterminacy. Each case stands alone, and there is less value for future cases in deciding a particular case now. As to the cost of preventive adjudication, it is true that the task of applying expressions to facts on a continuum is still within the core competence of a judge. But here a judge will often be in a better (or at least a different) position to decide if adjudication is delayed. In the imaginary case of the million raves,<sup>218</sup> everything was held constant between the raves except volume. Yet delaying adjudication could very possibly change the question that the court is answering and thus the answer it gives. First, there may be slippage between what the rave organizer expects the rave to be like and what it turns out to be. A rave may be planned for one hundred people but two hundred show up, or it may be scheduled to end at midnight but it continues to 2:00 AM.<sup>219</sup> Second, it is hard to specify in advance all the facts necessary to decide whether a particular rave will be likely to cause serious distress. Must the rave organizer specify the songs, the performers, the instruments, the bass intensity of the speakers, and expectations regarding improvisation by performers or DJs, all of which may affect “loudness”? And some of the relevant facts that would be hard to specify in advance are extrinsic to the rave itself, such as the acoustics of the topography and the weather. Third, even though the statutory standard is objective—“likely to cause serious distress”—the local inhabitants’ ex post distress or indifference would be useful evidence about the hard-to-estimate ex ante likelihood that the rave would seriously distress them. Indeed, the best evidence of the likelihood that an intended rave will cause “serious distress” is probably whether a previous rave in the same neighborhood *did* cause serious distress. Finally, multiple kinds of indeterminacy can combine to make a judicial

---

<sup>218</sup> See notes 58–61 and accompanying text.

<sup>219</sup> Consider Frankfurter and Shulman, *Federal Jurisdiction and Procedure* at 89 (cited in note 90), which quotes Attorney General Mitchell on the subject of antitrust opinion letters:

We have found as a result of experience that such proposals often have some practical elements that are not fully developed when the proposals are submitted and that the plans as carried out have not operated just as was contemplated, and the transactions as outlined to the Department in advance, seemingly innocuous, have in practice worked in apparent violation of the anti-trust laws.

decision narrower and less instructive. In real life, fact-based indeterminacy will often be accompanied by incommensurability—the next rave may run a little longer but be a little quieter.<sup>220</sup>

It makes sense, then, for US legal systems to distinguish between lexical and fact-based indeterminacy, allowing preventive adjudication only for the former. This does not appear to be done—as a formal matter—in any system of preventive adjudication, because law usually does not make formal distinctions between different kinds of indeterminacy.<sup>221</sup> Lexical indeterminacy seems to be primarily in view, however, for the numerous statutes that allow preventive adjudication for the construction of contracts.<sup>222</sup> But despite its appeal, indeterminacy sorting should not be the primary way cases are sorted for preventive adjudication. The types of indeterminacy are not always distinct;<sup>223</sup> in some cases a judge might plausibly approach an indeterminacy as either lexical or fact based (one litigant might argue that it is lexical, the other that it is fact based).<sup>224</sup> And a category like “fact-based indeterminacy” contains such a vast number of cases—varying extensively in their amenability to preventive adjudication—that it may not be helpful for sorting. Indeterminacy sorting is therefore a useful complement to another method of wholesale sorting.

*d) Topic sorting.* Finally, cases could be sorted based on the topic involved. On substantive lines, this could be done broadly: allowing preventive adjudication in property law but not in tort law. Or it could be done narrowly: allowing preventive adjudication in cases about the scope of trustee powers under a trust instrument, or in cases about patent infringement and noninfringement,<sup>225</sup> or in cases about an insurer’s duty to defend a specific claim.<sup>226</sup> Or preventive adjudication

---

<sup>220</sup> See Endicott, *Vagueness in Law* at 74 (cited in note 50). This kind of narrow judicial decision might also be more easily manipulated by the person who seeks it. See note 84 and text accompanying notes 98 and 111.

<sup>221</sup> See Solan, *Vagueness and Ambiguity* at 74 (cited in note 67).

<sup>222</sup> See, for example, 10 Del Code Ann §§ 6502–03.

<sup>223</sup> See Endicott, *Vagueness in Law* at 50–55 (cited in note 50) (describing semantic and pragmatic vagueness).

<sup>224</sup> See Part I.C.1.

<sup>225</sup> For arguments that preventive adjudication is especially valuable in the patent context, see Lisa A. Dolak, *Power or Prudence: Toward a Better Standard for Evaluating Patent Litigants’ Access to the Declaratory Judgment Remedy*, 41 USF L Rev 407, 408–09 & n 6 (2007) (explaining that Congress’s main desire in passing the Declaratory Judgment Act was to alleviate the uncertainty of patent holders); Russell B. Hill and Jesse D. Mulholland, *Effective Use of the Declaratory Remedy in the Patent Context*, 13 Tex Intel Prop L J 43, 46–47 (2004) (noting that the possibility of continuously accruing damages and even treble damages for willful infringement make declaratory judgments especially valuable).

<sup>226</sup> See Landes and Posner, 23 J Legal Stud at 700 (cited in note 2). From its enactment, the federal Declaratory Judgment Act has been widely used in patent and insurance contexts. See, for example, Edwin M. Borchard, *Declaratory Judgments and Insurance Litigation*, 34 Ill L Rev



could be available for certain questions that recur in different substantive areas. These might include legal status or the validity of a text, such as a will or a contract.

The narrow substantive topics just mentioned—trustee powers, patent infringement, insurer's duty to defend—are especially amenable to preventive adjudication.<sup>227</sup> So are the more general topics of (1) legal status, (2) property rights, and (3) the validity of a text. "Legal status" and "property rights" translate directly to the two exceptions to the general adequacy of discounting: cases of doubtful status and cases of clouded ownership. "Validity of a legal text" cases can overlap with legal status and property rights, as when the validity of a will determines title or the validity of a foreign birth certificate affects a person's status as a legal parent.<sup>228</sup> And preventive adjudication of all three kinds of questions will have relatively low error costs: if we wait for time to pass we will usually have no more relevant information about title to real property, a person's status as legal parent, or the validity of a will.<sup>229</sup> And these questions are well suited to judicial capacity.<sup>230</sup>

These topics are only proxies for cases in which the costs of clarification are relatively low or discounting is inadequate, and they are inevitably over- and underinclusive. But they nevertheless are likely to be better than relying on the underlying cost-benefit considerations, for reasons of institutional competence and judicial economy.<sup>231</sup>

*e) Summary and extension to public law.* This examination of wholesale sorting suggests that topic and indeterminacy sorting are the best ways to align the practice of preventive adjudication with the normative theory elaborated in Part II. Topic sorting is best used to select cases of (1) legal status, (2) property rights, and (3) validity. And indeterminacy

---

245, 245 (1939); Herman L. Trautman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 Vand L Rev 445, 464–65 (1954).

<sup>227</sup> See notes 225–26.

<sup>228</sup> Many of the categories of property cases that are well suited to preventive adjudication will involve the validity of a text. Other categories of property rights questions will be less amenable to preventive adjudication, especially in areas of property law that are more "mud" than "crystal." See generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan L Rev 577 (1988).

<sup>229</sup> See Landes and Posner, 23 J Legal Stud at 698–99 (cited in note 2) (offering uncertainty about marital status and uncertainty about title to real property as examples in which acting in the face of uncertainty would "cast no additional light on the issue"). See also Part II.B.1.

<sup>230</sup> See notes 109–10 and accompanying text.

<sup>231</sup> For the complexity of case-by-case cost-benefit analysis, see generally Landes and Posner, 23 J Legal Stud 683 (cited in note 2) (using eleven variables in various equations to determine the social and private benefits under anticipatory and ex post adjudication). We could of course imagine a system that directly applied the normative theory in Part II in a case-by-case fashion: we could call it *low-cost-of-clarification-or-discounting-is-inadequate sorting*. But this might be difficult for judges to apply in individual cases, leading to wide variations in judicial willingness to give preventive relief. In actual practice, this kind of sorting would resemble retail sorting and would have the same drawbacks of lower judicial priority, reduced attractiveness for plaintiffs, and forum shopping.

sorting is best used to select cases of (4) lexical indeterminacy, even in cases (like the industrial-hemp case<sup>232</sup>) that do not involve status, property rights, or validity. This approach is broadly consistent with the practice of most systems of preventive adjudication, which specify a number of wholesale categories, either through statute or through formal discretion hardened into rule. These particular categories are the ones for which preventive adjudication has most often been used.<sup>233</sup> And these four categories align the practice of preventive adjudication with its justification: in cases of lexical indeterminacy and textual validity, the cost of clarification is relatively low; in cases of legal status and property rights, discounting is inadequate.

This normative outline of sorting should be qualified, however. This Article has focused primarily on private law and on status cases that are partly private and partly public, because there are special considerations for the use of preventive adjudication in other areas, such as administrative, constitutional, and criminal law. Preventive adjudication might force the unnecessary resolution of constitutional questions. Its higher error costs could be especially problematic when erroneous decisions are difficult to correct.<sup>234</sup> It might be ineffective if the court's declarations will be ignored by the political branches.<sup>235</sup> In the criminal law, its use might inhibit delegated criminal lawmaking by courts.<sup>236</sup> And if it was used for preenforcement review of agency rulemaking, this could impair the interaction of agencies and regulated entities.<sup>237</sup> In addition, in certain public law contexts there may be reasons to use retail sorting that outweigh its disadvantages—as David

---

<sup>232</sup> See note 54 and accompanying text.

<sup>233</sup> See Declaratory Judgments, Hearings on HR 5623 before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong, 1st Sess 47 (1928) (written statement of Edwin Borchard, Professor of Law, Yale University) ("The declaratory judgment is used most frequently in the construction of written instruments, including statutes, ordinances, contracts, deeds, leases, articles of association or wills."); Woolf and Woolf, *The Declaratory Judgment* at 7 (cited in note 12) (explaining that nineteenth-century English law allowed a declaration only for "the construction of wills and trust deeds," but in the twentieth century it was made available for "such matters as personal status, title to property, the construction of contracts and other written instruments"); id at 98 ("Declaratory proceedings have always played an important part in determining status."); Sarna, *The Law of Declaratory Judgments* at 162–65 & n 16 (cited in note 12) (describing statutes in Québec that allow declarations of status). See also note 166 and note 176 and accompanying text.

<sup>234</sup> See Landes and Posner, 23 J Legal Stud at 710 (cited in note 2). See also notes 99–107 and accompanying text.

<sup>235</sup> See Kent Roach, *Constitutional Remedies in Canada* ¶¶ 12.560–12.620 (Canada Law Book 2008).

<sup>236</sup> See Kahan, 1994 S Ct Rev at 367–89 (cited in note 121). See also note 121.

<sup>237</sup> See Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 L & Contemp Probs 185, 235–36 (1994) ("A period of attempted compliance, experimentation, and negotiation between the agency and affected parties, induced by the unavailability of immediate review, might well produce better rules, swifter compliance, and less litigation.").

Shapiro has noted, discretionary jurisdiction can “contribute to the easing of interbranch and intergovernmental tensions.”<sup>238</sup>

And yet there also are reasons to favor preventive adjudication in public law contexts. Preventive adjudication may foster democratic values, because by speaking *sotto voce* a court can engage in a dialogue with the legislative or executive branch about remedial choices.<sup>239</sup> If courts lack institutional competence to design remedial solutions, preventive adjudication can allow them to defer to administrative or legislative expertise. And preventive adjudication can give public law plaintiffs remedial flexibility, because they no longer need “to anticipate and express all the key directives needed to induce compliance in a single, comprehensive, and hard-to-change decree.”<sup>240</sup> These considerations complicate the assessment of preventive adjudication in public law, and analysis of them lies beyond the scope of this Article. But in public law, too, any assessment of preventive adjudication’s role should incorporate what this Article makes clear: discounting is often an adequate substitute for preventive adjudication, and retail sorting is susceptible to serious problems that compound over time.

### CONCLUSION

Despite its neglect in current legal scholarship, preventive adjudication is pervasive in American law. This Article has clarified what preventive adjudication is and explained how it should and should not be used. Preventive adjudication allows people to avoid future harm by obtaining from a court a judgment and opinion about how the law applies. The argument for preventive adjudication is necessarily a qualified one. It advances legal clarity but requires limiting principles—

---

<sup>238</sup> See David L. Shapiro, *Jurisdiction and Discretion*, 60 NYU L Rev 543, 545 (1985). See also *id.* at 580–87 (describing discretionary considerations particularly appropriate to the public law context). There are dangers in this approach, however—the absence of discretion has in the past made it easier for judges to resist illicit pressure, because they have “the safety of always standing firmly on the concrete requirements of the law of the land.” Hamburger, *Law and Judicial Duty* at 113–14 (cited in note 91).

<sup>239</sup> See Woolf and Woolf, *The Declaratory Judgment* at 7–9 (cited in note 12) (describing English practice and noting that when “courts are not hampered by considerations of enforceability or conflict [they] are correspondingly freer to examine the issues fully and to reach conclusions against the executive if it is warranted”), quoting Lord MacDermott, *Protection from Power under English Law* 95 (Stevens & Sons 1957). See also Roach, *Constitutional Remedies in Canada* at ¶¶ 12.100, 12.215, 12.477, 12.480 (cited in note 235) (contrasting preventive adjudication and the passive virtues with respect to timing). Another way of putting this is that preventive adjudication allows courts to give definitive answers on legality but advice on remedies. See Neal Kumar Katyal, *Judges as Advicegivers*, 50 Stan L Rev 1709, 1790–91 & n 389 (1998).

<sup>240</sup> Sabel and Simon, 117 Harv L Rev at 1021 (cited in note 5). But see Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 Rev Litig 99, 104–05 (2007) (suggesting that litigants “are closest to the specifics and details of the case and can readily identify what types of preventive steps might effectively curb the illegal behavior in the future”).

namely, the cost of clarification and the adequacy of discounting for uncertain future events. The best way to translate this normative understanding of preventive adjudication into the actual practice of courts, at least in the United States, is not judicial discretion but rather the specification of certain categories of cases in which preventive adjudication is available: cases of lexical indeterminacy, legal status, property rights, and the validity of texts.

This theory of preventive adjudication has a host of potentially valuable applications well beyond scholarship on declaratory judgments and equitable remedies. The legal literature on the role of courts has often focused on the question of when adjudication should be delayed from the baseline of an ordinary suit for damages or injunctive relief, but this baseline is not obvious. Preventive adjudication offers the option of deciding even sooner. Legal indeterminacy will always be with us; but the story that we should tell about legal indeterminacy depends to a large degree on the ordinary human response of discounting. The adequacy of discounting has been overlooked, but it has important implications for vagueness in law. This Article's analysis of sorting sheds light on important questions of judicial decision-making and statutory drafting. In particular, the federal Declaratory Judgment Act offers a cautionary tale, not only about discretionary jurisdiction, but also about insufficient attention to optimal specification in statutes and to appellate review. All of these questions could be elaborated upon at length; their implications run far beyond a consideration of preventive adjudication itself.