A Bridge Too Far:
Google Books, Future Conduct, and the Limits of Class-Action Settlements

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INTRODUCTION

Class-action scholars have not paid much attention to the Google Books settlement, and analysts of the settlement have not discussed in detail the class-action issues it raises.[1] Both of these omissions are unfortunate. The case managed to raise a genuinely novel issue of class-action law: the extent to which a settlement can require class members to give up claims based in the defendant's future conduct. Circuit Judge Denny Chin's opinion rejecting the settlement rested primarily on this issue, but his brief and thinly-cited discussion discussion of the matter is all but guaranteed to leave future courts scratching their heads. At the same time, the issue of future-conduct releases raises fundamental questions in class-action law and policy, questions that scholars have never squarely confronted.

This article will fill both of these voids at once. Through a careful analysis of future-conduct releases in class-action settlements, the article will extract a broadly applicable holding from the Google Books opinion, and show how this holding is doctrinally and normatively justified. The Google Books opinion and class-action scholarship throw each other into sharp relief. Understanding why Judge Chin was right to reject the settlement because of its treatment of Google's future conduct helps us understand the structure of class-action law more generally. A single elegant principle – parity between the future-conduct claims at stake in settlement and in litigation – is both normatively appealing and consistent with existing class-action doctrine. The settlement was, in the words of the Department of Justice, "a bridge too far," and this bridge belongs on the maps scholars draw to mark the limits of class action law.

The Google Books settlement was the biggest development in copyright law of the past decade. Google had been digitizing millions of books held by university libraries to create a comprehensive search engine. The *New Yorker* called it Google's "moon shot," but authors and publishers saw things differently, and sued for copyright infringement. Rather than litigate the question of whether Google's massive scanning operation was fair use, however, the parties spent two years negotiating an even more audacious settlement, one that would have turned Google into a universal bookstore, with tens of millions of books on its virtual shelves. Google co-founder Sergey Brin called it a new Library of Alexandria; the Register of Copyrights said the plan "would flip copyright on its head."

Judge Chin, however, held that the settlement "contemplate[d] an arrangement that exceeds what the Court may permit under Rule 23."[2] The settlement would have released Google "from liability for certain <u>future</u> acts"[3] – selling complete copies of books to its users. This, he held, was impermissible. He quoted a Second Circuit case, *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*,[4] that a class-action settlement may release only "conduct [that] arises out of the 'identical factual predicate'"[5] as the underlying lawsuit. That test was not satisfied, he concluded: "This case was about the use of an indexing and searching tool, not the sale of complete copyrighted works."[6]

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[1] Authors Guild v. Google Inc., No. 05 Civ. 8136 (DC), __ F. Supp. 2d. __, 98 U.S.P.Q. 2d (BNA) 1229 (Mar. 22, 2011) [hereinafter Authors Guild]. Judge Chin was the District Judge assigned to the case at the time of his appointment to the Second Circuit. He continued to sit in it by designation.

[2] Authors Guild at 21.

[3] Authors Guild at 21.

[4] 396 F.3d 96 (2d Cir. 2005).

[5] Authors Guild at 17.

[6] Authors Guild at 25.

In some respects, it was a masterful opinion. The class-action theory was one of the narrowest possible grounds on which Judge Chin could have rejected the settlement, and he hin studiously avoided issuing holdings on most of the other questions before him: copyright, antitrust, privacy, and international law. At the same time, he discussed these questions in enough detail to signal that he was highly skeptical of the settlement for those reasons as well. The parties took the hint; they didn't try to appeal from the rejection. Like a good judicial minimalist, Judge Chin disposed of the matter before him without making doctrinal waves.

From an academic perspective, however – or the perspective of a future court called on to apply Judge Chin's holding – the opinion is deeply frustrating. Consider some of the questions left unanswered by the opinion:

> ***What is wrong with releases for future conduct?*** Judge Chin concluded that the settlement "would simply go too far" because of its treatment of Google's future conduct. But it never explains why this is a reason to be skeptical of such settlements. Why should future-conduct releases be different from any other kind of broad releases in class-action settlements? If the term overall are substantively fair to class members, why not approve such settlements?
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> ***What does future conduct have to do with the pleadings?*** Judge Chin cites *Wal-Mart* to require a link between the future conduct being released and the underlying lawsuit as defined by the complaint. But parties in non-class litigation frequently enter into unrelated forward-looking agreements as part of a settlement. Why require a tighter link in class actions?
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> ***Where does this doctrine come from?*** In Judge Chin's opinion, *Wal-Mart* functions as a *deus ex machina*: it comes out of nowhere and resolves the case. But *Wal-Mart* doesn't even mention future conduct; it is not immediately clear that it its "identical factual predicate" test has any bearing here. Is this a real doctrine, or just stray dictum from a single opinion?
>
> ***Is the sale of books really "beyond the scope" of a copyright infringement suit?*** Even if broad future releases are impermissible, might not this particular release be closely enough tied to the underlying lawsuit? Google and the authors and publishers argued strenuously that the case had always been about Google's complete copies of the books, and the settlement's friends and foes devoted dozens of pages to debating this precise question, discussing close to twenty cases. Judge Chin gives it four pages, and cites only two.

All of these questions could have been asked and analyzed two years ago. But class-action scholars have not asked them. Other aspects of the Google Books case – copyright, antitrust, international law – have received careful academic scrutiny. Its class-action aspects have not, even though they are central to the case, and even though they have broad implications for class-action settlement doctrine. Settlements in other cases will raise similar issues, and to address them, we will need a theory of future-conduct releases.

This article will start to fill that scholarly gap by answering the foremost class-action question left open by the *Authors Guild* opinion. It will give a detailed normative and doctrinal analysis of future-conduct releases, one that reveals the hidden logic uniting wide swaths of class-action law. Normatively, class-action settlements containing future-conduct releases are unusually dan-

gerous to class members and to society at large; courts should scrutinize them closely them in and sometimes prohibit them altogether. Doctrinally, both the *Wal-Mart* "identical factual predicate" test and Judge Chin's application of it are correct, but for reasons that have never before been clearly understood or articulated.

Parts I and II of the article will provide the background for the main argument. Part I will offer a quick history of the Google Books litigation, overview of the key terms of the settlement, and outline of the *Authors Guild* opinion rejecting it. Part II will then provide precision on releases for future future-conduct, explaining how these releases differ from the "future claims" discussed at length in class-action scholarship.

Parts III and IV of the article will do the normative work. Part III will present reasons that future-conduct releases are more dangerous than other, more familiar kinds of releases. Unlike releases based in the defendant's past conduct, these releases can reshape parties' incentives going forward. If badly designed, therefore, they can frustrate not just general deterrence but specific deterrence. The class-action setting means that in many cases both parties and the court will be poorly situated to make good design choices, threatening individual autonomy of class members, risking perverse incentives on the defendant's part, and putting the kind of problem better dealt with by a legislature or agency in a court's hands. Moreover, the forward-looking aggregation of power that such settlements enable present unique dangers for parties and non-parties.

Part IV will then discuss how courts should respond to these dangers. In addition to the fact-sensitive standard of applying heightened scrutiny to settlements containing future-conduct releases, it will also argue for the use of bright-line rules where possible. After discussing and dismissing the arguments that such releases should never be permissible and should always be permissible if the other class-action requirements are satisfied, it will identify and defend one particular bright-line rule: parity between litigation and settlement. As an outer bound, the releases given by a class in settlement should not be able to reach conduct that could not have been the subject of litigation by the class. This rule substantially reduces the dangers identified in Part III.

Parts V and VI of the article will do the doctrinal work. Part V will show that the courts have actually adopted the rule proposed in Part IV. *Wal-Mart* is not itself a future-conduct case, but its "identical factual predicate" test, when applied to future conduct, results in precisely the parity between litigation and settlement the rule calls for. The missing piece of the puzzle – one now forgotten by courts – is preclusion doctrine. Claim preclusion, issue preclusion, and ripeness interlock to ensure that the only future-conduct claims a class can put at risk in litigation are those based in the continuation of past conduct – that is, precisely those claims that share an identical factual predicate with past-conduct claims. Part V will trace the doctrine back through the caselaw, showing how it reflects both the representation concerns of class-action settlements and the broader rules of preclusion doctrine. Returning to the Google Books case, it will show that Judge Chin's analysis of the of the scope of the settlement before him, although thinly sketched, was substantially correct.

Part VI will then respond to objections to the identical factual predicate doctrine, both that it is too permissive and that it is too restrictive. Amazon and other objectors argued that future-conduct releases are never permissible under any circumstances; Google and the plaintiffs argued that courts regularly approve settlements that go beyond the relief that could have been awarded in litigation, such as consent decrees in discrimination lawsuits. Understanding why

both sides' arguments are mistaken will require a detailed doctrinal analysis of the cases they cite. In the end, however, the identical factual predicate doctrine will emerge substantially intact.

This has been a long roadmap. It will be a long article. Even so, it will hardly deplete the rich vein of civil procedure issues raised by the *Authors Guild* case. The proposed class faced difficult commonality, typicality, and adequacy of representation problems, issues that this article can do no more than point out in passing. The conflict of laws challenges posed by the interaction of this United States class action with a global plaintiff class, the public international system of copyright treaties, and the private international law of judgments will also need to be a matter for another day.

Even on its chosen topic – future-conduct releases – the article cannot exhaust the subject. It speaks to two audiences – students of the Google Books settlement and students of class-action law – and while some topics (such as the history of the identical factual predicate doctrine) are of interest to both, to say everything of interest to either would have made the article unworkably long. I have chosen to speak herein primarily to those following the Google Books settlement, and to leave for future work a number of interesting and important topics of interest to class-action scholars. Those topics include how the identical factual predicate doctrine can best be grounded in the statutory and constitutional sources of class-action law, and how it compares to other variations on the class action theme, such as defendant class actions, mandatory class actions, and the release of future claims in bankruptcy. Thus, the discussion that follows will focus on class actions for damages brought under Rule 23(b)(3); extending these arguments to class actions brought under Rules 23(b)(1)(a), (b)(1)(b), and (b)(2) will require more detailed treatment than this article can give them.

I. BACKGROUND

A. History

Google started scanning books in 2004. It partnered with research libraries, primarily at state universities. The libraries supplied Google with books from their collections. Google then took the books offsite and photographed them using specially built book scanners. The precise technical and workflow details are closely guarded secrets, but the end result is clear: Google has a detailed digital image of each page of the books, which it then processes with optical character recognition (OCR) software to reconstruct the text of the books.

Google began with public-domain books, those that are no longer under copyright. Google makes these books searchable and viewable in full at its Google Books website. Google typically also makes these books available to users as free PDF downloads, and returns a copy of the images to the library which supplied the books. Because these books are in the public domain, these uses raise no copyright issues, and no one has a legal right to object. Other institutions, including many libraries, the non-profit Internet Archive, and Microsoft have had active public-domain scanning programs.

Authors and publishers were wary, and not without reason. Later in 2004, Google revealed that it had started scanning books under copyright for inclusion in its search engine. The scanning process itself was the same as for public-domain books, but Google's uses are more limited. The OCR-generated text is fed into a index, so that Google Books users can search for terms in the text of the scanned books. Instead of displaying the full context for each hit and letting users click through to see the complete page, Google showed only short "snippets" of text

around the search term. For users who wanted to see more of the book, Google supplied links to online bookstores like Amazon and Barnes and Noble where users could purchase a copy: Google itself would not give the user one. Google also returned copies of the images to the libraries that supplied the books, if they wanted.

The announcement that Google was scanning books in copyright touched off a firestorm of criticism. Authors and publishers saw this use of their books as a blatant act of wholesale infringement. Their arguments and sense of outrage echoed those of other copyright owners who have appreciated the advertising benefits of being indexed by Google but objected to its claim that it need not ask permission first: websites, online newspapers, and television broadcasters, to name a few.

The controversy swirled through much of 2005. After some initial dithering, Google offered an opt out: any author or publisher who identified her books could have them removed from the scanning program. This brought its Google Books policies more in line with its policies on the web (which several courts have held to be fair use): it assumes permission unless told otherwise, but provides a straightforward way to remove one's content from the search index. This did not satisfy copyright owners. Even though many of them were currently supplying Google with their own books and giving it permission to display limited previews of the contents,[7] they felt that the broader "no scanning without permission" principle was crucial.

After a year of jousting in the press and failed talks, copyright owners filed suit against Google in the fall of 2005. There were two lawsuits, filed separately but containing parallel allegations. In one, *Authors Guild v. Google*, the Authors Guild filed suit as an associational plaintiff for its members, and also included five individual authors as representatives for a putative class of all copyright owners whose books were in the University of Michigan library, one of Google's partners. In the other, *McGraw-Hill v. Google*, five major publishers filed suit individually against Google. The Association of American Publishers was not officially involved, but played a coordinating role and supplied a war chest to finance the litigation. The cases were filed in the Southern District of New York, which consolidated them for all pre-trial purposes.

The parties engaged in basic pretrial practice, including discovery. The proposed schedule called for Google to make its motion for summary judgment, and only then for the plaintiffs to file for class certification, so the class remained only a putative class for the time being. It was widely expected that Google's defense would center on fair use. This defense was plausible but hardly conclusive; scholars have argued both that it would (or should) have succeeded, and that it would (or should) have failed. It is important to note that there were at least five separate activities that would have needed the blessing of fair use:

- The initial acts of scanning, which created digital image copies of each book scanned. These copies were presumably multiplied across Google's infrastructure for storage and backup purposes.

[7] To this day, any book that is in "Limited Preview" in Google Books – that is, is viewable in part, but not in total – is there with the copyright owner's affirmative grant of permission. The settlement would not have significantly affected these books, and I will not discuss them further. Individual contracts between copyright owners and Google raise very different, and much less worrisome, issues than Google's class-wide behavior in the absence of a specific agreement.

• The construction of an index from the scans, which involved conducting optical-character recognition on each image, then compressing, sorting, and correlating the recognized texts. The index as a whole arguably qualified as an additional "copy" of each book, or as a derivative work of the various books.

• The use of the index to perform various further analyses, such as Google's recently released ngram tool, which permits users to see numerical trends in word and phrase usage over time.

• The display of snippets to users of Google Book Search.

• Providing (some) of Google's library partners with their own digital copies of the scanned books.

The best argument in favor of Google's fair use claims was probably the existence of substantial numbers of "orphan books" – books under copyright, but whose copyright owners can't be located by someone wanting to make use of the work. The copyright provides no useful control or revenue to the owner, but the possibility that she might turn up and exercise copyright's powerful remedies is a powerful drag on public use of the book. The result is a failure of the copyright system: no incentives for the author, no access for the public. Congress has twice considered orphan works legislation; it has twice stalled out.

Although estimates of the number of orphan books vary widely – from well under 500,000 to many millions – their existence makes it all but impossible to create a book search engine on a negotiated-permission basis. Google cannot possibly obtain permission from all copyright owners of books for its index; no one could. This is a profound market failure, of the sort that many scholars believe justifies a fair-use holding. The worst countervailing fact for Google was probably the library digital copy, which is hardly required to create a working index.

In 2006, the District Court asked the parties to discuss settlement. Perhaps to their mutual surprise, they quickly discovered the outline of a potential settlement. It was, according to some reports, suggested by the publishers' representatives, and then agreed to by the other parties. The next two years were consumed with negotiating the details. Libraries were not officially parties to the negotiation, but Google, recognizing that the deal would be unviable unless the library partners could be accommodated, brought some library representatives into the circle of confidentiality with the permission of the authors and publishers, exploring their needs and concerns.

The settlement was publicly announced in October 2008. The initial response, after a flurry of press coverage, was a kind of stunned silence. The settlement itself was over 140 pages with more than a dozen attachments, and almost no one beyond the parties themselves had a clear sense of how it fit together. Commentary and reaction emerged only slowly over the winter and spring, with a split between enthusiasm and concern.

The original District Judge on the case, John Sprizzo, passed away shortly after issuing his preliminary approval and ordering the class notice program to start. The notice was worldwide and expensive, including published notices in a large number of languages in a larger number of countries. The case was reassigned to his colleague, Denny Chin, who has presided over the case since then, even after being appointed and confirmed to the Second Circuit.

The original class notice period was scheduled to run through May of 2009 with a fairness hearing in June. That didn't happen. A few highly critical public voices emerged in the late

spring. A group of authors led by the Steinbeck estate filed a motion to put off the opt out and objection deadlines for four months, which Judge Chin granted almost immediately.

In the run-up to the new September 2009 deadline, the opposition was much more substantial. A class-action lawyer, Scott Gant, made the *New York Times* with an objection he drafted on behalf of himself as client; he was followed by hundreds of others. So many individuals sent the court *pro se* objections and opt-out requests that the clerk's office was ironically overwhelmed for several days by the task of scanning them all so they could be entered into its electronic-filing system. The most influential was probably the Statement of Interest submitted by the United States government raising both antitrust and class-action issues.

The parties never said so explicitly, but it seems likely that the Department of Justice's filing led them to revise the settlement. They told the court, shortly before the scheduled October 2009 fairness hearing, that they wished to withdraw the proposed settlement and present an amended one in its place. Judge Chin granted the request, conducting a status conference in the scheduled hearing slot instead. The revisions to the settlement, released on Friday the 13th of November, substantially narrowed its geographic scope, excluding many foreign works, and changing the settlement's treatment of unclaimed funds.[8] Judge Chin set a revised briefing schedule, with fresh objections and opt-outs in January. The United States, apparently unconvinced by the modifications, filed a fresh Statement of Interest arguing that the settlement was "a bridge too far" in its use of class action law.

The fairness hearing took most of the day on February 18, 2010 and featured some two dozen speakers. At the end of the hearing, Judge Chin took the case under advisement. He held the case for over a year. When he did rule, it was anticlimactic. His March 22, 2011 opinion rejecting the settlement is forty-eight double-spaced Courier 12-point pages: short.

B. Terms of the Settlement

Some, relatively less controversial, terms of the settlement would have allowed Google to continue scanning and searching books, much as before. It would have had to "Remove" any book whose owner requests that it not be scanned,[9] but in the absence of such a request, it would be permitted to scan and index. As a compromise of claims for damages, Google would have paid $60 for each book that it scanned before May 5, 2009.

The settlement also went further. It would have authorized five major uses of the scanned books, over and above book search itself. Three were commercial:

- Consumer Purchase would have sold individual users access to online e-books (much as Google eBookstore now does). Copyright owners could either pick a price or delegate the choice to Google's algorithms.

- Institutional Subscription would have been an all-you-can eat service offered to various institutions, including schools, libraries, and companies. The pricing was to be determined later, with the dual goals of maximizing revenue and broad access.

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[8] In this article, I will discuss only the terms of the amended settlement, except where the initial settlement's terms raise an issue particularly on point with my analysis.

[9] Removal and Exclusion, discussed below, are distinct from opting out of the settlement. These are options available to copyright owners who accept the settlement's terms; they are provided as part of it. In practice, Google can also use the list of copyright owners who opt out to pull other books from Google Books.

• Preview Use would have let Google Book Search users see up to 20% of the pages of a book, with ads shown alongside.

Two further major new uses weren't expected to generate money:

• A Public Access Service would have authorized an Institutional Subscription terminal in each public library building, and limited numbers at higher education institutions.

• A Research Corpus would have supported automated research on the complete set of texts.[10]

Copyright owners would have had ongoing rights to Exclude their books from any so-called Display Uses: ones that show humans the expression in the books. By default, books in print would have had their Display Uses turned off; books that were out of print would have had Display Uses turned on by default.

To handle the money from the so-called Revenue Models (Consumer Purchase, Institutional Subscription, and Preview Use), the settlement established a new Book Rights Registry.[11] The Registry would have received 63% of the gross revenues from the various Revenue Models, and been charged with distributing the money out to the copyright owners whose books generated it. The owners who had claimed their books would have be cut checks; those who had not would be represented by an Unclaimed Works Fiduciary within the Registry, which would have been empowered to use up to 25% of the revenues to look for them. If they could not be found within ten years, the money would have been given to book-related charities.

The settlement ramified as it dealt with the variety of books. It excluded non-textual material, such as photographs and illustrations, entirely – the claims of those copyright owners would not have been. It had special provisions for the owners of Inserts: short, separately copyrighted works included in a book, like forewords or stories in a collection. They would have received a one-time payment, and could Exclude their works from being displayed, but only a global basis, and would not participate in any of the ongoing revenue-sharing. Sheet music and children's' books (both of which can straddle the line between textual works and other media) were both specifically addressed.

The settlement also included a set of provisions that deal with the author-publisher relationship, since both might have a copyright interest (concurrent or conditional) in the same book. Either party could lay claim to the book by presenting the appropriate contract. In the absence of a contract, the settlement would have divided revenues between authors and publishers based on formulas that varied with the age of the contract.

In order to deal with the inevitable disputes, both about larger issues of interpretation and about the treatment of specific books, the settlement contained a mandatory arbitration provision. Arbitrators would determine most questions relating to compliance with the settlement and ownership of the electronic rights in a given book as between author and publisher, or between rival claimants. Google would also have been insulated from liability for small deviations from the settlement. A number of provisions (such as its determinations of whether a book is in

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[10] Google's ngram tool (which lets users graph frequency of word usage across centuries), provides a good example.

[11] The Registry is also authorized to negotiate with Google the terms of three additional uses: print-on-demand, downloadable copies (e.g. in PDF or EPUB format), and consumer subscription.

the public domain) would have provided it with a "safe harbor" – an arbitrator could reverse Google's decision, but it wouldn't have faced damage liability for the mistake.

C. The Opinion

About thirty of the filings with the court were fully briefed objections, many of them excellently done. Google's fierce rivals Microsoft, Yahoo!, and Amazon filed detailed objections, as did several groups representing copyright owners. The Open Book Alliance – a group including Google rivals, libraries, and other would-be digitizers like the Internet Archive – filed a brief drafted by noted antitrust attorney Gary Reback. Public-interest organizations filed briefs with concerns about privacy and the copyright landscape. Google and the plaintiffs responded with highly detailed briefing in support of their motion for approval, including a 180-page supplemental memorandum of law in support by the plaintiffs' counsel. Taken together, they raised, by one count, seventy-six distinct legal issues.

This article is not the place to discuss them in detail – and neither, it turned out, was Judge Chin's opinion. It discusses between seven and ten issues, depending on how one counts, and not one of them is discussed in the level of detail it was briefed. The action discussion in *Authors Guild* contains recognizable holdings, most clearly on the future-conduct issue. The rest of the opinion is dictum. It discusses "concerns" and issues that the court finds "troubling," but then either explicitly avoids issuing a holding ("I need not decide" and "I need not rule" appear three times) or cites arguments for and against the settlement without clearly weighing in on one side or the other.

The opinion starts its analysis by reciting the Second-Circuit's familiar but unhelpful eight-factor test for settlement approval. The settlement was negotiated and presented competently enough that most of the factors (such as the likely expense and complexity of litigation) favor approval. The only sticking point he considers worth discussion is that many class members objected or opted out. After a paragraph, he moves on: none of the reasons for rejection discussed over the next thirty pages are explicitly part of the multi-factor test. Similarly, objections to the quality of class notice are dismissed in a breezy paragraph that ends with the questionable claim that "it is hard to imagine that many class members were unaware of the lawsuit."[12]

Instead, the first serious concern it analyzes in depth is the permissible scope of relief under Rule 23. The opinion starts by distinguishing the settlement's releases of "past conduct" from the provisions that "would release Google (and others) from liability for certain future acts."[13] These latter provisions "exceed[] what the Court may permit under Rule 23."[14] The next sentence then explains the nature of this hard limit: the settlement would "implement forward-looking business arrangements that go far beyond the dispute before the Court."[15]

Two justifications for this rule then follow. The first is institutional: this is "a matter more suited for Congress than this Court."[16] The support for this proposition, however, comes primarily from *copyright* caselaw, not from *class-action* law. Whatever the policy merits of deferring copyright decisions to Congress, the court does nothing to connect them to the limit it claims to find

[12] Authors Guild at 21.
[13] Authors Guild at 21.
[14] Authors Guild at 21.
[15] Authors Guild at 21 (quoting DOJ).
[16] Authors Guild at 22.

in class-action law. Indeed, the counter is obvious: Congress has also enacted the Rules Enabling Act pursuant to which the Federal Rules require the courts to approve settlements that are "fair, adequate, and reasonable." There is no *a priori* reason why the court's prudential deference in copyright cases should trump to its duty to approve appropriate settlements – or at least none offered by Judge Chin.

The more persuasive defense of the holding is the doctrinal one. The court makes a factual distinction about Google's conduct: "This case was about the use of an indexing and searching tool, not the sale of complete copyrighted works."[17] It quickly refutes the parties' claims that the lawsuit was about Google's "broader conduct" involving their books by throwing their own words from the hearing and complaint back at them, citing phrases that focused on Google's scanning activities.[18] Instead, it points out that Google did not plan to sell complete books, and "would have no colorable defense to a claim of infringement" for selling complete books.[19] The settlement would, on the court's view, reward Google for scanning without permission by giving it the right to do something it could never do without permission. After this extended factual discussion, the court concludes, in a sentence each, that the settlement would violate the *Firefighters* and *Wal-Mart* tests linking the scope of settlement to the scope of the pleadings.

The other class-action issue that the opinion discusses is a compressed treatment of structural conflicts within the class. Academic and foreign copyright owners, some of whom filed vociferous objections, are both specifically noted as groups that may not share the specific commercial objectives of the named plaintiffs. The more intriguing discussion concerns copyright owners who do not claim their works – that is, in many cases orphan owners. Here, too the future conduct / past conduct distinction proves critical:

> While it is true that in virtually every class action many class members are never heard from, the difference is that in other class actions class members are merely releasing "claims" for damages for purported past aggrievements. In contrast, here class members would be giving up certain property rights in their creative works, and they would be deemed – by their silence – to have granted to Google a license to future use of their copyrighted works.[20]

II. Future-Conduct Releases

There are two moving parts in this article's core argument: future-conduct releases, and the identical factual predicate doctrine. Ultimately, the article will show how they coincide – that is, how the identical factual predicate doctrine implements doctrinally the normative case against future conduct releases. But first, we should be clear on what future-conduct releases are and why they are largely unprecedented in class action settlements.

A. An Example: The Google Books Settlement

The Google Books settlement provides an excellent example. The operative clause that releases class members' claims reads:

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[17] Authors Guild at 25.
[18] Authors Guild at 25.
[19] Authors Guild at 26.
[20] Authors Guild at 30.

> Without further action by anyone, as of the Effective Date, the Rightsholder Releasors . . . shall be deemed to have, and by operation of law and the Final Judgment and Order of Dismissal shall have, fully, finally, and forever released, relinquished, settled, and discharged (i) the Google Released Claims . . .[21]

The settlement defines "Google Released Claims" as:

> each and every Claim of every Rightsholder that has been or could have been asserted in the Action against any Google Releasee (including all Claims of copyright infringement, trademark infringement, or moral rights violation) that arises out of
>
> > (A) any of the following actions taken on or before the Effective Date . . .
> >
> > > (ii) any Google Releasee's Digitization of such Books and Inserts and any Google Releasee's use of Digital Copies of Books and Inserts for Google's use in Google Products and Services . . . ,
> >
> > (B) after the Effective Date, any act or omission authorized by this Amended Settlement Agreement . . . when that act or omission is undertaken by a Person who is authorized to undertake it under this Amended Settlement Agreement . . . .[22]

This definition neatly splits into two parts. Subclause (A) covers any and all claims arising out of Google's actions through the Effective Date when the releases actually take place.[23] Subclause (B) covers all claims arising out of Google's actions from the Effective Date onwards. If Google digitizes a book the day before the Effective Date, it is a past-conduct claim under subclause (A); if Google digitizes a book the day after the Effective Date, it is a future-conduct claim under subclause (B).

Notice that there is a substantial asymmetry in the two subclauses. That asymmetry is crucial to how the settlement works, and it is crucial to understanding future-conduct claims. Subclause (A), defining past-conduct claims, hews closely to the actions that Google has already undertaken: digitizing books, making a search index, and showing snippets to search users. But subclause (B), defining future-conduct claims, is much broader. It covers "any act or omission authorized" by the settlement, and therefore includes Google's rights to to sell complete copies of books individually and as part of a subscription, to put free terminals with unlimited access in public libraries, and to show large excerpts from books as free previews to users. If the settlement had been approved, then subclause (A) would have the resolved the underlying lawsuit, whereas subclause (B) would have launched the universal bookstore.

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[21] ASA § 10.2(a).
[22] ASA § 10.1(f) (indentation added to show structure).
[23] *See* ASA § 1.53 (defining "Effective Date").

B. Defining Future-Conduct Releases

There are three features of this example worth emphasizing. If you understand all three, you understand how future-conduct releases work, and you are well along the road to understanding why they are doctrinally and normatively troubling. They are:

1. The settlement uses *releases*.
2. Those releases are made *by the class*.
3. The releases apply to *future conduct.*

First, there is the nearly tautological point that future-conduct releases are *releases*. It is a release that makes a settlement a settlement: it ends the possibility of litigation by freeing the defendant from potential liability. Typically, a release is given in exchange for some valuable consideration: compensation, or a promise by the defendant to alter its behavior. The key question in any class-action settlement, then – whether it is "fair, reasonable, and adequate" to class members – is a question of whether the class receives fair compensation for the releases it gives up. The other terms of a settlement can be quite intricate (in the Google Books settlement, they run to dozens of pages), but a settlement is dangerous to class members only in proportion to the releases they give.[24] Courts and class-action scholars therefore focus on the releases in settlements; these are the heart of a settlement, and the terms requiring the most exacting scrutiny.

At the same time, the fact that a settlement contains releases is not, without more, a reason to reject it. Many objections to the settlement miss the fact that releases are the bread and butter of settlements. Scott Gant, for example, has led other objectors in arguing that the settlement is a "commercial transaction." As William Rubenstein has observed, however, much of modern class-action practice is transactional. Class members sell their claims to the defendant in exchange for payment. That is, the defendant wants to purchase finality, and the settlement process is simply an extended negotiation over the terms of the deal in which it will obtain releases from class members.

On the other hand, it is not a convincing objection to the Google Books settlement to argue that it is "forward-looking" and creates new institutions. Many class-action settlements establish claim-processing facilities. Some of them fund significant educational initiatives, or even provide medical services to class members. Extinguishing asbestos claims in bankruptcy requires the creation of a trust that may need to be kept open for decades. Settlements can even create corporations and issue shares to class members. The Registry is ambitious, to be sure, but it pales in comparison with the class- and non-class- victim compensation funds of recent years. These institutions do not implicate the *releases* given as part of the settlement, and they do not raise the same concerns.

Second, we are mostly concerned with releases by classes, not by individuals. An individual party, at least in theory, makes her own decisions in full consultation with her choice of counsel. Outside of the courtroom, she would have the authority to enter into a binding contract with

[24] We should also be concerned about settlements that impose other obligations on the class, such as paying the opposing party, or making promises to take or refrain from particular actions in the future. Settlements containing promises by the class raise all of the issues as settlements containing future-conduct releases, and *a fortiori* all of the arguments in this article also apply to them. It does not discuss them separately only because such settlements are extraordinarily rare, whereas settlements in which the class gives releases are nearly universal.

the other party; one of those things that such a contract could do is to release possible claims, present and future, against that party for it conduct, past and future. Indeed, ordinary contracts do this all of the time; just look at the warranties section of a contract for the sale of goods or services. Giving her the power to release those claims as part of a settlement allows no more than what she could have done by using two pieces of paper (settlement + contract) instead of one.

But because class litigation is inherently representational, matters here are quite different. The result in a class action will be binding on all class members, regardless of whether they agreed with the strategy, or even knew about it – and the same goes for any settlement. Here, there is no contractual parallel; we do not ordinarily allow lawyers to go around signing contracts on behalf of large classes of individuals. Instead, the only way to obtain a release from a class is in settlement of a lawsuit. If an ordinary settlement can be a hybrid of a judicial order and a contract, a class settlement lies closer to the judicial order end of the spectrum.

For this reason, within a class settlement, releases or promises given *by the class* raise issues that releases or promises given *to the class* do not. This asymmetry is fundamental. Courts scrutinize class actions and class-action settlements in order to protect absent class members. Releases given by those class members can seriously harm them, but they can only benefit from releases given to them. The arguments for close judicial oversight, therefore, justify a judicial inquiry that starts with the releases given by the class and then asks whether the settlement's other provisions justify imposing those releases on them.

And third, we are here concerned with releases involving claims based in the defendant's future conduct. The contrast here is with a release for past conduct. Consider a relatively typical mass-tort settlement, say one involving a batch of tainted soup. Class members who ate the soup and got sick release their product-liability tort claims against the defendant soup company that arise out of its conduct in making and selling the bad soup. In exchange, they receive compensation: checks, or, if they have been badly represented by class counsel, a coupon for more soup. If the soup company sells more tainted soup next year, that is future conduct not covered by the settlement's releases, and will lead to a new lawsuit. But class members are forever barred from suing the company based on last year's bad batch.

In contrast, the Google Books settlement would have reached Google's future conduct, as well as its past conduct. The settlement could have remained in effect for a century or more. During that entire time, Google would be displaying and selling books. As part of the settlement, class members would have been required to release their claims against Google well into the 22nd century. A "library to last forever" requires a settlement to last forever, as well – and that means the release of future-conduct claims.

C. Future Claims ≠ Future Conduct

Class-action caselaw and scholarship are utterly filled with discussion of "future claims." But for the most part, the"future claims" at stake in most mass torts are not future-conduct claims. They are future claims, to be sure, but they are based on the defendant's past conduct. The defendant has already taken all of the actions that will lead to liability on its part; only some of the consequences of those actions remain in the future. It will be worth taking a moment to review some of the issues with future claims, so that the distinctive issues raised by future-conduct releases will be clearer in comparison.

In the tainted-soup example, one could imagine a settlement that released claims by class members who had eaten the soup but whose injuries had not fully manifested themselves. Some of these claims would be unripe under state tort law; they would thus be future claims not yet suitable for litigation. The Supreme Court's *Amchem* and *Ortiz* cases famously rejected highly ambitious "global" asbestos settlements that would have included releases of both present and future claims,. Together with some similarly skeptical Court of Appeals cases, they are sometimes taken to rule out the possibility of settling future claims on a class-wide basis.

The cases, however, do not sweep quite so broadly. The real issue in these cases is typically intra-class conflict, not the settlement of future claims per se. Consider *Amchem*, which allocated a single pool of money to be paid out to class members according to their presently manifested injuries, in exchange for a release of both present and future claims. This created a structural conflict between class members with present injuries and those without. The money would overwhelmingly flow to the class members with serious present illnesses, such as mesothelioma. But class members who currently had only pleural thickening without physical impairment would receive nothing – even if they later developed serious injuries. This is a problem of insufficient commonality and inadequate representation: in effect, the future claims are being sold off on the cheap, in order to collusively benefit present claimants, class counsel, and the defendant. It could also be argued that class members with only future claims are not properly part of the class at all, and cannot be bound by its judgment.

Notice, however, how much this problem turns on the correlation between future *claims* and future *claimants*. Suppose that asbestos followed a completely predictable, deterministic course: exposure, pleural thickening, mesothelioma, early death. Now imagine a class composed entirely of victims who have pleural thickening. They have low-value present claims based on pleural thickening, and high-value future claims based on their early deaths. A settlement in which this class releases its future wrongful death claims would not suffer from serious internal conflicts. Despite having future claims, the class consists entirely of present claimants. This is precisely the line taken by the plaintiffs in the Google Books case to argue that the class was adequately represented. Google was scanning the books of every class members (pleural thickening), and will under the settlement sell complete copies of every class member's books (mesothelioma). There is no *Amchem*-style conflict; class members are all in the same boat.

The best response to this claim is that, at least on the future claims issue, there is one subclass we do expect to be treated differently by the settlement: orphan works owners. In the settlement's terminology, these owners (plus others) will never "claim" their works. Owners who do claim their works will actively manage how they are displayed and sold; owners who do not will be subject to the settlement's default rules. Thus, although all involved give up their future claims identically, the practical differences will be significant. Some settlement critics argued that major publishers would Exclude all their works from the settlement and strike side deals with Google instead. Indeed, by creating an Unclaimed Works Fiduciary, the settlement itself seems to admit that it creates programs that the owners of unclaimed works may need protection from.

One should not overstate the argument from unclaimed works. In every class-action settlement, many, indeed most, class members will be "absent." But the Google Books settlement is special in this regard, given the well-recognized orphan works problem. These are not class members who are absent due to the vagaries of notice and class-action litigation; they are inher-

ently absent for all purposes. The settlement works because it ropes them in, but that is precisely why it raises such striking class-action concerns.

But notice that the release of claims involving future conduct is a bridge beyond the release of future claims. In the soup example, such a release would permit the defendant soup company to start making and selling tainted soup again while immunizing it from the consequences. Not even the global asbestos settlement famous rejected by the Supreme Court in *Amchem Products Inc. v. Windsor* would have gone that far. There is something so obviously wrong with that possibility that not even the class-action plaintiffs' bar has been willing to attempt it. Future-*conduct* releases are a step beyond mere future-*claim* releases. Of course, this is an extreme example, but it is worth keeping in mind as the kind of settlement that becomes possible when future-conduct releases are available.

D. The Creative Potential of Future-Conduct Releases

As the Google Books settlement demonstrates, a settlement containing future-conduct releases can create major new institutions that will last for decades and substantially affect an industry. At first blush, this doesn't appear to be unique to future-conduct releases. Mass-tort settlements regularly create long-term claim-processing facilities; civil-rights settlements regularly require government institutions to implement sweeping changes in practices. Nonetheless, there is something uniquely creative about future-conduct releases, and it is worth bringing out just how that is so:

Consider the Google Books settlement once again. Google has not sold complete books without explicit permission, and it would not have done so. Without the settlement to shield it, this would be an open-and-shut cases of copyright infringement. This is how the settlement *works*: delete this single subsection and it would not provide Google with the legal cover it needs to set up its online bookstore and the other settlement programs. True, it would have done so by requiring Google to fund and launch these programs, but the ground on which they would have stood was to be cleared with the future-conduct releases given by class members. The dispute-resolution system for allocating electronic rights between authors and publishers, for example, would have cut a wide swatch through the publishing industry in order to make the management of individual books and the payment of royalties tractable.

Contrast this with a mass-tort claim processing facility or a prison-reform plan to reduce crowding in cells. These are promises on the defendant's part; they redound to the benefit of the class. True, the class has extracted these promises with the threat of litigation and paid for them with releases. But the releases are not necessary to make these programs possible; the defendant would not have risked liability by implementing them unilaterally on its own.

Thus, the releases are critical to what Judge Chin called a "forward-looking business arrangement." A promise not to sue is effectively a grant of permission, which in turn gives the released party freedom of action. And where – as with copyrights – the right consists of nothing *but* the right to sue, it should be clear that one can do essentially anything with appropriately drafted releases.

For an even more dramatic example, imagine a class-action lawsuit by a group of adjoining landowners against a developer. If the landowners settle by releasing the developer from all future trespass liability, then the developer will be free to erect a skyscraper on their land. Presto: land assembly via class action. Or imagine a lawsuit by a group of patients against their medical

insurers over billing practices and copayments.[26] If they settle by releasing the insurer from future liability as long as it adheres to a set of new standards for approving treatments, making payments, and setting premiums, then we have something very much like health-care reform via private lawsuit.[27] Because so many legal entitlements are protected in practice only via the ability to sue, appropriate releases for future conduct can threaten a wide variety of entitlements.

It should be clear by now that future-conduct releases are a potential Pandora's Box. It is time to explain just what is wrong with opening that box too widely.

III. The Problems with Future-Conduct Releases

It is well-understood that even ordinary past-conduct class-action settlements are dangerous to class members. Just as the inability to litigate as a class can leave them with no effective way to vindicate their rights, and a poorly conducted class action can fritter away those rights, a poorly negotiated settlement can trade those rights for a mess of pottage. Worse, the nature of attorney-directed class litigation creates structural incentives for class counsel to sell the class's claims to the defendant in exchange for attorneys' fees, payouts to the attorneys' individual clients, or better relief for some class members at the expense of others. It is for this reason that courts are required to scrutinize proposed settlements and approve only those that are "fair, adequate, and reasonable."

This Part will argue that the risks of future-conduct releases are substantially greater than the risks of past-conduct releases, so that they require correspondingly greater scrutiny by courts. These heightened risks are driven by the basic asymmetry between past and future. The past can be known but not changed, whereas the future can be changed but not known. Thus, the consequences of future-conduct releases will tend to be both more far-reaching and harder to predict. The following sections will expand on four implications of this point. There is more at stake in future-conduct releases, they are harder to get right, the aggregation of rights is itself dangerous, and courts are the wrong institutions to be making such decisions.

A. There Is More at Stake in Future-Conduct Releases

There is more at stake in a settlement with future-conduct releases. Consider once more the a paradigmatic past-conduct release: the tainted-soup settlement. The soup has already been manufactured, sold, and eaten. Consumers who ate it have a cause of action against the soup company in strict liability for distributing a defective product. Nothing the legal system does at this point can prevent their illness; that has already happened. The best that can be done for them is to compensate them for their injuries. At least, however, nothing further can happen to them. The *status quo* is that they have been sick and have not yet been compensated. The worst-case scenario is that they remain uncompensated.

When future-conduct releases are on the table, however, that assumption is no longer true. Things can get much, much worse for class members. If the settlement releases the soup company from liability for future batches of soup, then class members could get sick again from eating it, and be uncompensated for those injuries, as well. Past-conduct releases are limited by past harms; future-conduct releases raise the stakes to include future harms, as well. A scanning-

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[26] This hypothetical was suggested by Susan Koniak.

[27] Yes, both of these settlements have other readily apparent problems. But if future-conduct releases are available in class-actions, then neither of them is quite as unthinkable as it might have previously have been.

and-searching settlement confined to Google's past conduct would cover seven years; a scanning-and-searching settlement that included its future conduct would likely run for over a hundred.

Worse still is the fact that those future harms need never happen. If the settlement gives the soup company the green light to sell tainted cream of broccoli, many more people will get sick from it than if the settlement is silent on future conduct or if the soup company agrees never to sell it again. This is not to say that any of these possibilities is necessarily the most efficient, just that this is now a much higher-stakes decision. Similarly, there is both more money on the table, and more risk to copyright owners, from a full-book-sales settlement than from a scanning-and-searching settlement.

In some cases, what future-conduct settlement class members give up – the right to sue – is the key to a property right. In the Google Books settlement, copyright is nothing but the right to sue; the settlement amounts to the transfer of a nonexclusive property interest to Google. In the skyscraper example, the harm is particularly severe. Giving up the rights to sue for trespass and other property-protecting torts leads, in effect, to loss of the land itself; the developer can knock down your house without fear of liability.

All of this goes to the core value protected by class-action law's solicitude for class members: individuals' autonomy to make their own life choices. This is the basic issue facing representative litigation, and the scholarship on how and how much to protect individual autonomy is voluminous. By shifting more of human affairs into the pile available to be given away in a class-action settlement, future-conduct releases shift the corresponding decisions from class members to class counsel. With so much more at risk, class members require corresponding greater procedural protections.

B. Future-Conduct Releases Are Harder to Get Right

Settlements that involve future-conduct releases pose design challenges that settlements with only past-conduct releases do not. Some of these challenges flow from the fact that the future is unknowable. In Yogi Berra's words, "It's tough to make predictions, especially about the future." To be sure, every class-action settlement poses informational problems. The attorneys negotiating the settlement must determine whether its terms offer class members fair compensation for the rights they give up. Class members themselves must decide whether to opt out or object to its terms. And the courts tasked with approving or rejecting the settlement must decide whether it is "fair, reasonable, and adequate" to class members.

Future-conduct releases multiply the difficulty of these decisions. In the Google Books settlement, for example, one of the least knowable issues was also one of the most important: how the books would be priced in practice. Google pledged to develop an algorithm that would set a profit-maximizing price for each book. But when Judge Chin was asked to approve the settlement, the algorithm itself was not in existence, and neither was the comparative sales data on which the algorithm would depend. Under such circumstances, it was impossible to make any reliable predictions about what would happen – and indeed, the settlement itself appears to be internally contradictory on this score.

Of course, even past-conduct settlements depend on predictions. This point is central to concerns about "future claims" in the ordinary sense: knowing whether a settlement will be fair to someone who might or might not develop cancer is much harder than knowing whether that settlement is fair to someone who has developed cancer. This problem alone has made it extraor-

dinarily difficult to resolve many mass toxic tort suits through class action settlements: it is just too hard to be sure that a settlement really is fair to class members with future claims to justify imposing the settlement (with its attendant releases) on them.

But the fundamental asymmetry between past and future adds greater even uncertainty when future conduct is involved. We are now not simply trying to guess which single future outcome will happen, but which of many possible futures will, where that choice is itself dependent on what the court does. The more complex the settlement, the more these futures will diverge in subtle and hard-to-predict ways.

Future-conduct settlements are also hard to get right because the future can be changed. In particular, a badly designed future-conduct release can create perverse incentives. The risk here is that if the release is too broad and a party's future actions too insulated from review, it will have insufficient incentives to take appropriate precautions in the future. It is one thing to compromise a claim based in past conduct; that affects only the price the defendant must pay *ex post* for its alleged breach of duty. But to compromise future-conduct claims is to mess with incentives; by displacing the potential liability the defendant would otherwise face, a settlement can leave the defendant with no *ex ante* reason to care about preventing harms going forward.

In theoretical terms, scholars worry about calibrating the deterrent effect of class-actions: defendants (primarily companies) will vary their level of risky activities in light of the expected liability they face from class actions. For class actions over past conduct, this is a form of general deterrence: it aims to ensure that other potential defendants in similar situations will take adequate precautions. When future-conduct releases are involved, however, one must also worry about specific deterrence, because the settlement will directly affect this particular defendant's incentives going forward.

The Google Books settlement amply illustrates the challenges involved. Consider, for example, the pricing algorithm. What are Google's incentives for lower or higher prices, and what are the incentives of individual book copyright owners to monitor it carefully? These are not questions with obvious answers; if the settlement design is wrong, Google could end up either collectively raising prices in restraint of trade or underpricing books and undermining their value to copyright owners. Similarly, commentators have questioned the settlement's treatment of which programs Google is required to offer and under what terms: it could drop the Public Access service entirely, for example, which would seem to affect the public-interest calculus substantially. Finally, and perhaps most tellingly, the original settlement's protections for owners of unclaimed works were clearly insufficient: by reallocating unclaimed funds to claiming owners, it gave the claiming owners an incentive to pressure the Registry not to be diligent in searching out owners of unclaimed works.

C. Future-Conduct Releases Create Concentrated Power

The defining feature of class-wide future-conduct releases is that they give the defendant freedom to act in a way that affects large numbers of class-member plaintiffs at once. Past-conduct settlements can't do this; they can at most forgive a defendant who already has power, not give it power going forward. But this concentration of power can sometimes be turned around against class members – or against third parties.

Sometimes, centralization can be a good thing, particularly in overcoming anticommons problems. This, for example, might make the skyscraper settlement attractive in avoiding hold-up

by holdouts. It is also why the Google Books settlement can seem like an appealing solution to the orphan works problem: the settlement enlists the opt-out feature of the class action to bring individually low-value orphan works together again in a new, immensely valuable collection.

Some anticommons, however, are good things. Sometimes, dispersed ownership can serve social goals by making it hard to engage in undesirable uses, like the overdevelopment of greenfield land. Widely dispersed power makes markets work; they break down when a monopolist holds too much power in a market. And dispersed power is central to democracy; if a small elite holds all the cards, self-governance breaks down.

This is the great danger in the healthcare reform settlement hypothetical. One worries that the settlement could entrench existing insurers, rather than subjecting them to public oversight and market discipline. In particular, individuals could end up being helpless against the new settlement-produced insurer cartel: precisely the opposite of the vindication of their rights the class action was supposed to provide.

It gets worse. We ordinarily think of class-action lawsuits as implicating only the rights of class members and defendants. Indeed, the Supreme Court has been aggressive in insisting that non-parties to a suit are not generally bound by a judgment. When a class-action settlement grants rights to the defendant that involve its future conduct, however, the result may practically determine the rights and interests of third parties. Again, the going-forward nature of the settlement is crucial here; the third parties fear that bad things will happen to them in future as a result of the settlement.

The antitrust objections to the Google Books settlement reflect these concerns. The accumulation of pricing power in Google and the Registry could create a market-dominant player at the stroke of a pen. This also the type of claim made by the American Society of Media Photographers, which objected to the fact that visual artists were *excluded* from the settlement class. The ASMP fears that the terms on which visual art included in books will be licensed will be, for all practical purposes, set by the settlement. It is also clearly at work in fears that the Google Books settlement will lead to the loss of reader privacy. Google's privacy policies are one thing if it's one bookseller among many in a crowded market; they're quite another if it's the only source for millions of orphan books.

For another example, consider the healthcare insurance settlement hypothetical. Doctors weren't defendants or members of the class. Provisions on doctor choice, claim processing, and reimbursement rates, however, profoundly could shape the environment in which doctors operate. What if the settlement excluded all reimbursement for cardiac stents and required approval of two referring physicians before paying for visits to dermatologists? One might expect cardiologists and dermatologists to be concerned that the settlement would effectively preclude their rights.

D. Future-Conduct Releases Require Courts to Act As Legislatures

The *Authors Guild* opinion is full of deference to Congress. Judge Chin roots this deference in copyright law, pointing both to caselaw emphasizing Congressional control over copyright policy and in the diplomatic issues raised by the United States's copyright treaty obligations. But the point is valid more broadly: future-conduct settlements thrust courts into a legislative role.

Future-conduct settlements, as we have seen, can make prospective changes affecting large numbers of people in complex ways. This is the province of legislation. For reasons of technical competence and democratic accountability, decisions of this sort are committed to the political branches. Judges are limited in the sources of information they can draw on; they are ill-suited to balance conflicting normative claims in an open-textured way; they are not directly accountable to the people whose lives they will reshape. For all of these reasons, the judicial branch is normally considered an inferior place to resolve polycentric problems.

The Google Books settlement is a good example of these dangers. Orphan works reform was the subject of a massive Copyright Office study, and orphan works legislation was the subject of fierce debate in multiple Congresses. This was a broadly participatory process, subject to the tug and pull of conflicting interest groups, and accompanied by great deal of public discussion. What makes us think that a few lawyers and a single judge will get things more right? Indeed, by having a single group draft a settlement, the class-action process tends towards central planning. By submitting that settlement to a judge for approval, it channels everything through perhaps the single actor *least competent* to make the intricate technical decisions and contestable value tradeoffs required. And because the judge is not permitted to modify the settlement but must give an up-or-down ruling on it, the class-action settlement process delegates tremendous agenda-setting power to the attorneys – we should not expect the resulting arrangements to reflect anything like majoritarian preferences.

Sometimes, judges cannot avoid being caught up in these "legislative" functions. The rise of structural reform litigation required judges to engage deeply with the creation and governance of institutions, to make prospective decisions about how they would be run in ways that would affect large populations. Desegregation, prison conditions, changes in police practices: these have all been ordered and overseen by judges.

In all of these cases, however, the problem comes at the remedial stage, and involves concessions ordered of the defendants, not the class. If a prison system is overcrowded to a degree that violates the Constitution, then the judge hearing a class-action lawsuit by the inmates *must* do something about it, or the constitutional violation will continue. If a school system is unlawfully segregated and refuses to change its practices, then the political branches have shirked their responsibility to an extent that itself violates the law. There is no alternative to judicial involvement; there is no road around the swamp.

In contrast, a future-conduct settlement is never necessary. Litigation is always an option. The resulting judgment will define the defendant's rights and duties vis-a-vis the class, and it will therefore provide a roadmap for their future dealings. The range of outcomes available in litigation may not be socially optimal, but if not, it is the legislature's responsibility to fix the problem, not the court's.

IV. Reining in Future-Conduct Releases

Merely pointing out the dangers of future-conduct releases does not, however, tell courts what they should do when confronted with a settlement containing one. Its proponents will be quick to argue that while such dangers might arise from *some* future-conduct settlements, *this* particular settlement appropriately guards against them. They will also be quick to point out the settlement's offsetting benefits. These arguments will often be substantial. The Google Books settle-

ment, after all, came with a $45 million up-front payment to class members and the promise of much more money to come. How should a court evaluate such promises?

A. How Courts Evaluate Settlements

The starting point, of course, is the analysis a court would apply to a settlement containing only past-conduct releases. That is, it would first check that the prerequisites of Rule 23 – such as the typicality of the class representatives and the notice to class members – were met. Then, it would apply the general "fair, reasonable, and adequate" standard of Rule 23(e) to weigh the settlement's costs to class members against its benefits for them. This would typically lead it into a multi-factor all-things-considered balancing test.

Unfortunately, "fair, reasonable, and adequate" is too hollow a standard to provide meaningful guidance even in a run-of-the-mill past-conduct settlement. And the multi-factor tests that the Courts of Appeal use to implement this standard are no better; they make laundry lists look focused by comparison. They rarely get at the terms that make a particular settlement fair or unfair. Indeed, in the Google Books case, Judge Chin concluded that "most of the [factors used in the Second Circuit] favor approval of the settlement," then proceeded to reject it.

To deal with this problem, the courts have fleshed out the "fair, reasonable, and adequate" standard with a number of more specific doctrines. Commonly, these doctrines take the form of identifying particularly problematic settlement terms, and then subjecting such terms to heightened scrutiny. Examples include settlements in which class members receive only in-kind relief, such as a coupon for future purchases from the defendant, rather than cash. Such settlements are regularly approved, but they also (at least on paper) are analyzed by courts with a more skeptical eye.

In more extreme cases, when the courts feel they have identified a settlement feature that has no benefits to the class, or which will almost never benefit them sufficiently to offset the harm it causes them, they will prohibit it altogether. Sometimes, these doctrines take the form of a rule rather than a standard: a settlement containing them is impermissible as a matter of law. These rules are sometimes grounded in the "fair, reasonable, and adequate" standard, and sometimes in the Rule 23(a) prerequisites to class certification, particularly typicality and adequacy of representation. A settlement that gives different class members different recoveries for a reason unrelated to the underlying lawsuit, for example, will be treated as a *per se* failure of adequate representation. In some cases, Congress has even stepped in to prescribe such rules: the Class Action Fairness Act, for example, prohibits some forms of geographic discrimination in settlement awards.

Courts considering class-action settlements, therefore, use both rules and standards. The choice is driven largely by administrability concerns. Class-action settlements are too diverse and fact-specific for rules to cover more than a fraction of the ground, so the basic test is a standard. A few well-defined abuses are so clear that the courts have stated rules against them no matter the other merits of the settlement. And in between are the numerous indicia that courts look for as red flags of potential trouble: the coupon settlements, excessive fee awards, and other factors that will trigger particularly searching scrutiny.

B. Future-Conduct Settlements Are Sometimes Appropriate

Where, then, should future-conduct releases fall in this classification? The simplest answer would be that there should be a flat *per se* rule against them. This rule has the virtue of simplicity.

It is easy to identify a settlement containing future-conduct releases. And it is certainly easy to implement a rule rejecting them all. This approach would head at the pass off all of the concerns identified in Part III. No settlements with future-conduct releases would mean no dangers from them.

Unfortunately, this rule is almost certainly too strict. Most simply, one could imagine a settlement that gives class members an windfall for a narrow future-conduct release: a million dollars each for a release of liability in the event that the defendant negligently transmogrifies the moon into a gigantic scoop of ice cream. This class of releases is probably too absurd to be worth worrying about, but there is a more realistic and more important class: some disputes are all but impossible to settle without future-conduct releases.

Consider a simple nuisance class action against a polluting factory by a few thousand nearby landowners. If the landowners can give a release only for the factory's past conduct, then the case cannot practically be settled. Whatever the parties agree to will be effective only up through the day the settlement takes effect; after that, the landowners will have a fresh cause of action for the factory's future pollution. The only stable settlement will be a complete capitulation by the factory, one in which it agrees to shut down completely.

This result is even more anomalous given what could happen in litigation. Given the precedent of cases like the famous *Boomer v. Atlantic Cement*, a possible outcome is that the landowners will be awarded permanent damages but no injunction. That result is functionally identical to a settlement that includes future-conduct releases in exchange for cash compensation. It seems bizarre to argue that parties should be prohibited from settling on terms that the court itself might quite reasonably have ordered. True, the court will need to make sure the compensation in a settlement is sufficient, and to make sure that the releases are appropriately limited so as not to create a perverse incentive for the defendant to intensify its activities – but it would have had to do that anyway as part of its judgment order.

The Google Books lawsuit itself displays this pattern. The sharp contrast between Google's past scanning-and-searching behavior and the future book sales the settlement would have enabled have masked the fact Google also desires to continue scanning and searching into the indefinite future. A book search engine that no one can use is worthless to it. The Department of Justice, among others, has floated the possibility that a narrower settlement focused on scanning and searching would be appropriate. If it were not, the only possible outcomes of the case would be capitulation on Google's part, or a fair-use victory at trial for one side at the other. A settlement that provided compensation in exchange for future-conduct releases of Google's scanning and searching liability, would seem like a natural compromise in between the outcomes possible at trial. Given the public policy in favor of settlement, if the case is maintainable as a class action at all, it ought to be settleable as one.

This is the first appearance of a principle that will be of great importance in what follows: parity between litigation and settlement. Here, we have seen that outcomes possible in litigation should also be available as settlements. Since some suits naturally seem to implicate future conduct – in a sense to be made precise in Part V – a rule that prohibits future-conduct releases entirely is too strict. Soon we will encounter the inverse: the claim that outcomes not possible in litigation should not be allowed in settlements. With appropriate qualifications, we will see that this claim is correct – and explain the shape of class-action doctrines dealing with future-conduct releases.

C. Courts Should Apply Heightened Scrutiny to Future-Conduct Releases

We have reached the second part of the spectrum: the realm of standards. How should future-conduct releases affect a court's application of its Circuit's multi-factor balancing test? Here, the answer is clear. The presence of future-conduct conduct releases is, at the very least, a major warning sign that this is not a run-of-the-mill settlement. As soon as a court sees a release for the defendant's future conduct, it should start reading with more than usual care. In light of the dangers of future-conduct releases identified in Part IV, a court should also start reading with more than usual skepticism. Consider how those dangers color the analysis:

More at Stake: Because class members give up more in a settlement containing both past- and future-conduct releases than they do in a settlement containing only past-conduct releases, the court should expect that they will be given more in return. At the very least, there should be some incremental additional compensation for these releases, compensation over and above what a past-conduct release alone would have warranted. Beyond that, the court should make a searching effort to identify just what rights the class will be giving up going forward, and to put a value on those rights, not just the class's existing claims.

Harder to Get Right: Because future-conduct releases are harder to design, the court must be more questioning of their terms. Because class members will have less ability to predict the consequences of such releases, the court should require more rigorous notice. Because the court itself will have a hard time evaluating the consequences, it should consider appointing a special masters or independent class representative to explore the possible negative consequences in a devil's advocate role. Terms that could create perverse incentives on the defendant's part require especially close attention; the court should be careful to detail what the worst-case scenario for class members is, and to make sure that the settlement has internal safeguards against that scenario. the court should also recognize that class counsel have weak incentives to get the design right in the long run if their compensation is payable immediately, and consider insisting that any awards of attorneys' fees be subject to a deferred compensation scheme that links the class counsel's fees to the class's fate going forward.

Concentrated Power: Because future-conduct releases can give the defendant concentrated power, the court should ask whether the settlement has such an effect. The question is whether the releases collectively give the defendant a freedom of action that is qualitatively different from what it would obtain if it had an individual release from a single class member. This concern will be most prominent if the lawsuit has a commercial character (such that it presents antitrust risks) or if it involves class members' speech interests (such that it presents risks to democratic values). The court should not limit its inquiry to class members' interests; third parties can also be affected; in an appropriate case, the court may need to appoint a special master to help identify third parties whose legitimate interests are likely to be prejudiced.

Separation of Powers: Because future-conduct releases require the court to take on a legislative role, it should exercise great caution. Where the area of the lawsuit is governed by a statute or by public-policy values expressed by the legislature, the court should require that the settlement be consistent with them. If the legislature has not spoken, the court should require that it be able to: that is, the settlement must not lock in an arrangement that is not (either legally or practically) subject to legislative override if the court has erred. If representatives of the political branches file objections or appear at the fairness hearing, the court should give their views due deference. The court should be concerned if it appears that the settlement will create political or

diplomatic trouble for the political branches in their relationships with other jurisdictions. The more far-reaching the settlement, the more reluctant the court should be to act at all.

D. Future-Conduct Releases Should Be Limited to Claims at Risk in Litigation

Within this realm of standards, the courts have carved out some bright-line rules for categorically impermissible settlements. Even if future-conduct releases are sometimes allowable, can we identify any bright-line rules worth drawing? That is, are there some subclasses of future-conduct releases that are so particularly dangerous or so unnecessary that we can confidently say they should be categorically impermissible?

Yes. *A future-conduct release by a class must be limited to claims the class could have lost through an adverse result in litigation*. This is the flip side of the principle identified above, that future-conduct releaes must sometimes be available in settlement because the class could lose them in litigation. Together, they stand for a principle of parity between litigation and settlement: a class should be able to release the same claims by fighting a case or by settling it. If we trust class counsel enough with a claim to risk that they will fritter it away by litigating it poorly, we should trust them also to settle that claim (subject to appropriate oversight from the court). If we don't trust them to gamble with that claim in litigation, we shouldn't let them sell it, either.

Part V will establish the doctrinal bona fides of this rule. But for now, consider how it helps address the concerns with future-conduct releases described in Part III. It is not a complete solution, and courts should still give settlements containing future-conduct releases a searching and skeptical review. But it does draw a line that blunts the worst of the dangers. The reason why is simple. In order to be at stake in litigation, a given claim must be connected to something the defendant has already done, and that past conduct helps ground the scope of the future-conduct releases. In general (and we will be more precise about this shortly) a plaintiff class can only put in play those claims that are based on the defendant's past conduct and on the continuation of that conduct into the future.

More at Stake: This is almost tautological. If a given claim was at risk in litigation, then the stakes are already high enough to include it. True, a broadly drafted complaint can put a great many legal theories in play. But there are still limits. There is no way that authors and publishers could have lost the right to stop Google from selling complete copies of their books. For one thing, since Google did not and was not about to sell complete books, such claims would have been categorically unripe. For another, the infringement case would have been so unequivocal that a court could easily conclude that there was no colorable risk of loss. Indeed, Judge Chin entered something very close to just such a finding.

Harder to Get Right: Grounding future-conduct releases in the defendant's past conduct introduces a form of specificity: we can more easily predict the future if we know that it will be like the past. This makes it easier to predict the relevant conduct and its consequences, helping counsel, class members, and the court. They can look at what the defendant has already been doing to guess what it will do in the future. One reason that a scanning and searching settlement is more reasonable than the actual Google Books settlement is that we already have a very good idea of what scanning and searching look like: one just needs to use Google Books for a few minutes to get the picture (literally and figuratively). Similarly, it is harder to set up perverse incentives by mistake if the question is not about new conduct. The question to class members is simply whether they will be able to tolerate what the defendant is already doing, and if so, at what price.

Concentrated Power: Future-conduct releases can still give a defendant concentrated power, but with this limit, that power is limited to the continuation of the power the defendant already has. If the defendant could have obtained the necessary rights through litigation, anyone similarly situated could have done, or could do, likewise. This was one of the key defects of the Google Books settlement: it created a legal platform that was usable only by Google and not available to other book scanning institutions. The settlement does not create new and dangerous institutions. A defendant seeking a privileged position will need to be prepared to seize that position first, without the cover of the settlement, and risk the consequences. This "skin in the game" can expose an overreaching defendant to early challenge, give the class more negotiating leverage, and help give a court more confidence that the arrangement it is blessing is not unduly dangerous, if it has managed to exist already without problem.

Separation of Powers: Tying future-conduct releases to the scope of litigation immediately brings them back to the core judicial function: the resolution of disputes. Again, almost tautologically, this rule keeps courts from doing by settlement order what they could not do by an ordinary judgment order. The judgments of the legislature are still given effect through the bodies of law that shape and constrain the underlying lawsuit. The resulting settlements still have substantial prospective effects and apply broadly, but they are no longer wholly untethered from legislative enactment. A class-action lawsuit gives the court license to settle that lawsuit, rather than being an excuse to get the parties into court and play Let's Make a Deal. A scanning and searching settlement would not remake the copyright system; it would not rework the control of orphan works.

E. Conclusion

Normatively, some future-conduct releases are appropriate; others are not. Courts should not apply a bright-line rule prohibiting all class-action settlements containing such releases altogether. Instead, they should apply heightened scrutiny to those settlements, paying close attention to the dangers they raise. That heightened scrutiny should be supplemented by a rule that future-conduct releases are only permissible if the conduct in question is the continuation of the defendant's past conduct. Taken together, these rules create a normatively attractive parity: a settlement may release those, and only those, future-conduct claims that could have been lost to the class through an adverse result in litigation.

V. The Identical Factual Predicate Doctrine

Let us take stock. Part II isolated future-conduct releases by a class as the defining feature of the Google Books settlement. Part III showed that such releases are normatively troubling on a variety of grounds. Part IV then demonstrated that many of these concerns can be partially mitigated through a rule that a class should be permitted to release only those future-conduct claims it could have lost in litigation. It is time to consider such releases doctrinally, as well as normatively.

A. The Link Between Settlement and Preclusion

The last section of Part IV asserted, but did not dwell on, the point that such claims are those that are based on the defendant's future conduct that is a continuation of its past conduct. We can make this argument precise, and the reason is preclusion doctrine. To say that a plaintiff puts a claim at stake in a lawsuit is to say that the claim could be precluded against her by a judgment in the lawsuit. But the doctrines of preclusion law all operate to bar only claims that

are rooted in the defendant's past conduct, either directly or indirectly. This connection between releases and preclusion should not be surprising. A release, after all, is nothing more or less than a voluntary form of preclusion.

Consider a defendant who wins a class-action lawsuit at trial, on the merits, and ask what is the *largest* possible set of legal claims this judgment could possibly preclude. The first piece of the puzzle is claim preclusion. Any claims the plaintiffs did not assert will be barred if they are based on a common factual basis as the claims they did assert. There is an important limit on the claims they could have asserted, however: ripeness. Any claims that were (as of the time of the judgment) wholly based on the defendant's future conduct were categorically unripe; the plaintiff class could not have brought suit on them.[28] Thus, claim preclusion can bar only those claims of the class that are based on the defendant's past conduct.

When it comes to future-conduct claims, then, claim preclusion will never apply – but issue preclusion may. Suppose that a defendant has done X to the class in the past, and the class sues but loses on a *legal* holding that X violates no rights of the class. If the defendant then later does X to the class again, issue preclusion will operate to prevent relitigation of the issue. The class members will be treated as parties to the prior adjudication, so – barring any failures of adequacy of representation – will be held to have had the opportunity to llitigate the issue and will be bound the court's determination against them.The effect is that the defendant, having won a ruling on the propriety of X as to past conduct, will be allowed to continue X in its future conduct.

Thus, when a class sues on a given set of past-conduct facts, it potentially places at risk all causes of action grounded in that past conduct, plus also any right to assert causes of action based on future conduct raising the same legal issues. The former follows from claim preclusion, the latter from issue preclusion, with the line between "past" and "future" being drawn in by ripeness. Thus, the future-conduct claims a class could lose as the result of an adverse judgment are precisely those that are based on the materially identical continuation of the defendant's past conduct.

B The Origins of the Identical Factual Predicate Doctrine

We now have a precise statement of the litigation-settlement parity principle: *a settlement may require class members to release only those future-conduct claims that arise from the materially identical continuation of the defendant's past conduct*. Remarkably enough, this is precisely the line that the courts have drawn, albeit without realizing it. The identical factual predicate doctrine has been developed by courts to deal with the structural dangers of class-action settlements, is rooted in preclusion doctrine, and – properly understood – links future-conduct releases to the defendant's past conduct.

The doctrine is primarily a creation of the Second Circuit. It first arguably appeared in 1981, in *National Super Spuds, Inc. v. New York Mercantile Exchange*.[29] The underlying suit was a class action by traders alleging that the defendants had conspired to depress prices in the potato fu-

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[28] Declaratory judgments and preventative injunctions are not an exception to this rule. Although they deal with the defendant's threatened (future) conduct, that conduct must still be *threatened* – i.e. the defendant must have done something in the past to create an imminent prospect that it will act to violate the plaintiffs' rights. Google's desires to sell full books are not imminent in this sense; it has not claimed that it has a right to sell books without authorization.

[29] Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch., 660 F.2d 9 (2nd Cir. 1981).

tures market.[30] The class consisted of traders who had been forced to sell their potato-future contracts at artificially low prices. The settlement, however, released not only these "liquidated" claims but also the "unliquidated" claims of traders who had held onto their contracts but never received the promised potatoes.[31] Only the holders of liquidated claims were to be compensated.

Judge Friendly's opinion was for the most part a careful treatment of typicality, adequacy of representation, and fairness to class members. The named plaintiffs, who held only liquidated claims, in effect used the unliquidated claims as an additional bargaining chip to enhance their own recovery. The court was having none of it: "An advantage to the class, no matter how great, simply cannot be bought by the uncompensated sacrifice of claims of members . . . ."[32]

The opinion also, however, thought through the relationship between the scope of a class-action lawsuit and the permissible scope of a proposed settlement. It drew an explicit parallel between preclusion due to litigation and releases in a settlement:

> If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either.[33]

Then, in a footnote, it reasoned that the outer limit is defined not by the complaint, but by the underlying facts:

> We assume that a settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint but depending upon the very same set of facts. This is not such a case.[34]

That is, the unliquidated claims were in theory susceptible to settlement, but only by named plaintiffs who stood in the same factual shoes as the class members who held them.

The "identical factual predicate" language itself comes from *TBK Partners, Ltd. v. Western Union Corp.,* decided the following year.[35] Here, the proposed settlement released not only federal securities claims but also appraisal claims that could only be heard in New York state court. This time, the Second Circuit upheld the settlement. It quoted *National Super Spuds*'s "very same set of facts" language, and emphasized the point by citing *Robertson v. National Basketball Association*,[36] a straightforward case about the preclusive effect of a class action settlement in which "both suits hinged on the same operative factual predicate."[37] The court went on:

> We therefore conclude that in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that

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[30] *See* Leist v. Simplot, 638 F.2d 283 (2nd Cir. 1980), *aff'd sub nom.* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982).

[31] Nat'l Super Spuds, 660 F.2d, at 13 n.4.

[32] Nat'l Super Spuds, 660 F.2d, at 19.

[33] Nat'l Super Spuds, 660 F.2d, at 18.

[34] Nat'l Super Spuds, 660 F.2d, at 18 n.7

[35] TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456 (2nd Cir. 1982).

[36] Robertson v. Nat'l Basketball Ass'n,, 622 F.2d 34 (2d Cir. 1980).

[37] TBK Partners, 675 F.2d at 460.

> underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.

"Relitigation," of course, is a preclusion term, and *Robertson* itself was framed in terms of the "*res judicata* effect of [a] judgment."[38] What is more, the language itself – "factual predicate," "same set of facts" – is the language of preclusion law, and the language of jurisdiction. Compare the "transaction, or series of connected transactions" language used by the Second Restatement of Judgments,[39] and the "common nucleus of operative fact"[40] language of supplemental jurisdiction. These are the tests courts use to determine when one claim is closely enough related to another that the two should be dealt with in a single judgment, and thus it should be no surprise that we see similar language cropping up when it comes to deciding the scope of a class-action settlement. A class-action settlement, after all, is just another way of producing a judgment.[41]

C. Identical Factual Predicates and Future Conduct

Other cases applying the identical factual predicate doctrine to past conduct are similar to *National Super Spuds* and *TBK Partners*. The doctrine functions as a test for internal conflicts and adequacy of representation: the release of unrelated claims is a sign that some class members' interests are being sacrificed to favor other class members. But a few cases have applied it to future-conduct claims. Their facts are instructive.

Schwartz v. Dallas Cowboys Football Club gives one helpful analysis.[42] The lawsuit alleged that the NFL and its member teams had conspired to fix the prices of NFL games on satellite TV by requiring that consumers buy a season's worth of games in order to view any individual game. The proposed settlement would have required the NFL to offer individual games at $29.99, along with the season package for $159. In exchange, they would have been required to release antitrust claims against the NFL for its satellite, broadcast, cable, or Internet broadcasts of NFL games, including for conduct undertaken each year the settlement remained in effect. The court rejected the settlement, explaining:

> The release is also too broad because it bars later claims based on future conduct. Although the law permits a release to bar future claims based on the past conduct of the defendant, this release would bar later claims based not only on past conduct but also future conduct.[43]

This is precisely the distinction between future *claims* and future *conduct* made in Part II, *supra*. The court went on to say:

> For example, while the release properly bars future claims regarding the bundling of NFL games on satellite television, which forms the basis of this litigation, it also

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[38] Robertson, 622 F.2d at 35.

[39] § 24(1).

[40] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). *Cf.* Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3rd Cir. 1994) ("same nucleus of operative facts").

[41] What about *TBK Partners*'s language that a claim could be released even if it "might not have been presentable in the class action?" That issue will be dealt with *infra* in Part VI; it is best understood as referring to claims that could have been presented in a lawsuit in a *different court* than the one approving the settlement, not to claims that could not have been presented at all.

[42] Schwartz v. Dallas Cowboys Football Club, 157 F. Supp. 2d 561 (E.D. Pa.)

[43] Schwartz, 157 F. Supp. at 578.

> bars future claims for conduct such as the future bundling of games on cable television and the Internet. As discussed above, the legality of these practices under the antitrust laws was not litigated in the present suit.[44]

Perhaps significantly, the court did not say "*past* bundling of NFL games on satellite television." Instead, it seemed to imply that it was the expansion to cable and the Internet that was problematic. The identical factual predicate test, therefore, recognized that these "unlitigated future claims" were not, by their nature, based on the same facts as the antitrust claims in the underlying lawsuit.

The other case thinking through the application of the identical factual predicate doctrine to future conduct is *UniSuper Ltd. v. News Corp.*[45] There, a class of shareholders objected to the News Corporation's announcement that it planned to adopt a poison pill in 2005. The proposed settlement, filed in early 2006, would have released News Corp. from liability for adopting the pill in at an October 2006 shareholder meeting. The court considered this categorically impermissible:

> Thus, it follows that a release is overly broad if it releases claims based on a set of operative facts that will occur in the future. If the facts have not yet occurred, then they cannot possibly be the basis for the underlying action. . . .
>
> The October 2006 Rights Plan will be adopted, pursuant to a shareholder vote, at the October 2006 shareholders meeting. I agree with Liberty that a date five months hence is clearly in the future. The rule in Delaware is that a release cannot apply to future conduct. Defendants cite no authority for the proposition that there is an exception for future conduct arising out of, or contemplated by, the settlement itself. Viewed another way, no facts relating to the October 2006 Rights Plan were alleged in the underlying action, much less were they part of the underlying action's operative facts. For these reasons, I conclude that the release is overly broad in that it attempts to release claims arising from an event that has not yet happened, viz., the October 2006 Rights Plan.

There are two ways to think about these cases. One is to read *Schwartz* broadly and take *UniSuper* at face value. On this view, class-action settlements can never release future-conduct claims held by the class, because the relevant conduct, being in the future, will never be "identical" to the past conduct being litigated in the case, and such settlements can never be approved. This approach focuses on the distinction between past conduct and future conduct. This was the view advanced by many objectors in the Google Books case. It would obviously have voided the proposed settlement. It would also void any settlement that allowed Google to continue scanning books and displaying snippets: those are also future acts.

The other way to think about these cases is to read *Schwartz* narrowly and take *UniSuper* to be overstated. On this view, class-action settlements can release future-conduct claims held by the class if the relevant conduct is a continuation of the past conduct being litigated in the case. This approach focuses on the relationship between the lawsuit and the settlement. This was the view advanced by the Department of Justice in the Google Books case. It would also have voided the proposed settlement, but it would have permitted a settlement that allowed Google to continue

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[44] Schwartz, 157 F. Supp. at 578.

[45] UniSuper Ltd. v. News Corp., 898 A. 2d 344 (Del. Ct. Chanc. 2006)

scanning books and displaying snippets: those are future acts that are identical in kind to Google's past acts.

On balance, the latter view is more persuasive. It permits the complete settlement of entire disputes. Note that the holding in *UniSuper* effectively made impossible any settlement that would have allowed News Corp. to go ahead with its poison pill. Similarly, it would prohibit a scanning-and-snippets settlement in the Google Books case. Both of these settlements are meaningful compromises of the underlying dispute; they involve specific, predictable future acts; they allow a court to dispose of issues over which it already has complete jurisdiction, rather than extending the court's reach to issues not really in controversy between the parties. All in all, the release of future-conduct claims based on the continuation of past conduct seems consistent with the sources on which the identical factual predicate doctrine draws.

It is therefore submitted that the *UniSuper* court took too narrow a view of what "identical" facts constituted. The gravamen of the plaintiffs' claims was that the poison pill would violate their rights; the defendant's past conduct mattered not in itself but because it was in preparation for the actual adoption of the poison pill. If News Corp. had done enough toward adopting the poison pill that the court would have been able to enjoin the adoption, then it is fair to say that this "future" conduct would have been a continuation of the pre-adoption past conduct. And if the court had ruled against the plaintiffs on the merits of their claim, then News Corp. would have been free to adopt the pill – precisely the settlement term that the court would not even consider. Proper challenges to this settlement could have focused on the adequacy of representation provided by class counsel, and the sufficiency of the compensation provided to class members. But these are threshold questions of the class certification decision and factors for the multi-factor balancing test, not per se bars on the releases.

In contrast, it is submitted that the *Schwartz* court reached exactly the right result. A challenge to the NFL's satellite bundling should not become a vehicle to bless its cable and Internet bundling practices as well. Because of the medium-by-medium structure of telecommunications regulation, those other media raised substantially different legal issues, nor did the settlement require that the NFL's offerings on cable and the Internet parallel the offerings it made via satellite. These are not "identical" factual predicates; in preclusion terms, they do not rise out of the same "transaction or occurrence," nor do they raise the "same issue" of law.

D. The Factual Predicate for the Google Books Releases Was Not "Identical"

At this point, Judge Chin's discussion of the relationship between the Google Books settlement and underlying lawsuit largely speaks for itself. Having indicated the distinction between the settlement's past-conduct and future-conduct provisions, he writes:

> This case was brought to challenge Google's use of "snippets," as plaintiffs alleged that Google's scanning of books and display of snippets for online searching constituted copyright infringement. Google defended by arguing that it was permitted by the fair use doctrine to make available small portions of works in response to search requests. There was no allegation that Google was making full books available online, and the case was not about full access to copyrighted works. The case

> was about the use of an indexing and searching tool, not the sale of complete copyrighted works.[46]

The emphasis here is slightly off, but the gist is correct. The emphasis on what the case was "about" is imprecise; it would be better to describe the suit in terms of particular *claims* based on particular *conduct*. Here, Google's conduct consisted of scanning copyrighted books, creating a search index, and displaying short snippets in response to search queries. The plaintiffs' claims were that these uses by Google constituted copyright infringement. Fair use enters by providing Google with a potential defense, but the scope of that defense is also tied to specific uses, so fair use would have been evaluated as to the display of snippets, not as to the sale of complete books.

Next, Judge Chin correctly emphasizes the legal differences between the lawsuit and the programs to be authorized by the settlement:

> Google did not scan the books to make them available for purchase, and indeed, Google would have no colorable defense to a claim of copyright infringement based on the unauthorized copying and selling or other exploitation of entire copyrighted books. Yet, the ASA would grant Google the right to sell full access to copyrighted works that it would otherwise have no right to exploit.[47]

This too is correct. Google could not plausibly have won the right to sell complete copies of books in an infringement lawsuit. These copyright infringement claims for Google's future conduct could not have been lost by the class in the lawsuit, because Google's past conduct had not put such claims in play. Thus, a settlement that released it from liability for selling complete books in the future would have gone beyond the claims at issue in the lawsuit, to reach future conduct that was not a continuation of Google's past conduct.

Judge Chin concludes:

> Applying *Wal-Mart Stores*, I conclude that the released conduct would not arise out of the "identical factual predicate" as the conduct that is the subject of the settled claims.[48]

He offers no further analysis for this point, but our discussion of the history of the identical factual predicate doctrine shows that it is correct. The doctrine requires precisely the inquiry into the defendant's past conduct and the possible claims based on that conduct that Judge Chin conducted. And whether one takes a broad or narrow reading of the future-conduct identical factual predicate cases, *Schwartz* and *UniSuper*, the outcome here is the same. The future conduct the Google Books settlement would have released would have been different in kind from Google's past conduct, not a continuation of it. Google had not and would not have sold complete books, and so, on either reading, such releases were "a bridge too far." Judge Chin's opinion reached a normatively and doctrinally correct result.

VI. Responding to Objections

The objectors to the Google Books settlement threw a wide variety of settlement caselaw at it. Its defenders responded with an even more extensive array of claimed precedents for it.

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[46] Authors Guild at 24–25.
[47] Authors Guild at 26.
[48] Authors Guild at 28.

Judge Chin's opinion, however, discussed none of these thrusts and parries. His conclusion was correct, but future courts deserve an explanation of why it stands up to these various challenges. This Part will also show something further: how the doctrine rationalizes a wide range of doctrines about settlement, from class-acton law and beyond. The line it draws – although rarely articulated as such – appears throughout the law, and understanding how it applies to future-conduct releases also helps us understand its other manifestations.

A. Is the Identical Factual Predicate Doctrine Too Permissive?

Multiple objectors argued that future-conduct releases are never permissible in a class-action settlement. For the most part, they pointed to the identical factual predicate doctrine cases discussed above, and argued that the doctrine categorically prohibits future-conduct releases. As discussed above, however, the only cases that specifically apply the doctrine to future-conduct releases are *Schwartz* and *UniSuper*, and to the extent these cases stand for this broader rule, they are unpersuasive.

A more interesting line of argument came from Amazon. At the fairness hearing, its attorney, David Nimmer, sought to counter cases that apparently blessed expansive settlements by pointing to a Sixth Circuit case, *Williams v. Vukovich.*[49] There, a group of minority policemen sued the Youngstown mayor and police chief, arguing that the department's examination system illegally discriminated against them. After a protracted dispute, the parties agreed to a consent decree that specified new examination and promotion procedures but would have prevented class members from objecting if the new exams still had an adverse impact on minorities. When several class members objected, the court rejected the settlement:

> Finally, the hiring and promotion sections of the decree are problematic. These sections waive the ability of minorities to complain about discrimination which may occur in the future. The Uniform Guidelines on Employee Selection Procedures promulgated by the Equal Employment Opportunity Commission provide that a selection rate that "is less than [eighty percent] of the rate of the group with the highest rate will generally be regarded ... as evidence of adverse impact." Yet, the hiring section explicitly waives the right to object if the minority passage rate is only fifty-five percent of that of non-minorities. The promotion section is similarly problematic. In both instances, it is possible for the minority pass rate to satisfy the decree, but still have a discriminatory impact on minorities. This waiver of future discrimination is impermissible.[50]

Vukovich, however, proves too much. Although *Vukovich* was a class action, its holding that a "waiver of future discrimination is impermissible" is not specific to class actions. Indeed, its reasoning was based on a Supreme Court case, *Alexander v. Gardner-Denver Co.*,[51] and a Fifth Circuit case, *United States v. Allegheny-Ludlum Industries, Inc.*,[52] neither of which was a class action. *Alexander*, for example, was an individual lawsuit by a single plaintiff bringing a collective bargaining griev-

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[49] Williams v. Vukovich, 720 F.2d 909 (6th Cir. 1983).

[50] Vukovich, 720 F.2d at 926 (citation and footnote omitted).

[51] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[52] United States v. Allegheny-Ludlum Industries, Inc., 517 F. 2d 826 (5th Cir. 1975). Cf. United States v. Trucking Employers, Inc., 561 F. 2d 313 (D.C. Cir. 1977) ("An employer cannot purchase a license to avoid its duty to eliminate practices which perpetuate prior discriminatory acts any more than it can circumvent its responsibility for future acts of purposeful discrimination. In both cases, the strictures of Title VII are absolute.").

ance alleging that he was terminated because of racial discrimination. The Supreme Court stated, "To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII."[53] Thus, *Vukovich* and similar cases stand only for the proposition that claims of racial discrimination cannot be the subject of future-conduct releases, whether in a class-action settlement, an individual settlement, a collective bargaining agreement, an individual contract, or any other voluntary agreement.

The question thus, is whether this same logic applies beyond anti-discrimination law. Nimmer argued that it did, and his focus – copyright law – will serve nicely as an example. Once it is clear that *Vukovich* and other cases prohibiting future-conduct releases in discrimination cases apply equally in individual and class litigation, then Nimmer's argument proves far too much. If there were a similar rule against future-conduct releases in copyright, copyright licensing would become impossible, to the great detriment of authors, publishers, and readers. Even if this were just a rule against future-conduct releases in copyright settlements, it would still cut far too wide a swath: having filed a lawsuit against an alleged infringer, a copyright owner would be forever barred from putting the lawsuit aside and entering into an amicable licensing arrangement.

What, then, is the difference between racial discrimination and copyright? Public policy. Nimmer argued that copyright law inherently prohibits such settlements: Daralyn Durie, representing Google, had a different answer:

> MS. DURIE: . . . Your Honor asked whether it would be permissible to release claims for future discrimination. I would agree that the answer to that question, in all likelihood, is no. That's because discrimination is evil. The dissemination of copyrighted works is not. That is because the purpose of the Copyright Act is to encourage the production of copyrighted works.
>
> THE COURT: Well, some would say the question is: Is copyright infringement evil?
>
> MS. DURIE: Copyright infringement is evil to the extent that it is not compensated and that it harms the economic interests of rights holders.[54]

Although this was an extremely clever bit of lawyering, it failed to convince Judge Chin. His opinion largely agrees with the copyright-owner objectors who characterized copyright as an absolute right to prevent unauthorized use, rather than an economic interest.[55] The truth lies somewhere in between. Copyright's underlying purpose is utilitarian, and it limits authors' rights wherever appropriate to "promote the Progress of Science and useful Arts," but it does give authors "exclusive" rights protected by injunctions, statutory damages, and the other remedial indicia of a property rule. Given the need for licensing to effectuate copyright's statutory scheme, however, Judge Chin was probably wrong on this point.

What is really at stake here is not whether the future conduct being released is "evil" or not. Instead, it is whether the releases apply to causes of action created by a body of law with a public policy against private ordering. Anti-discrimination law is an obvious example of an area with a policy of overriding agreements to discriminate. Even if a particular individual was willing

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[53] Alexander, 415 U.S. at 51.

[54] Fairness Hearing Transcript at 143.

[55] *See* Authors Guild at 32 ("A copyright owner's right to exclude others from using his property is fundamental ad beyond dispute.").

to be subjected to invidious discrimination, it would still be against public policy, because it would help lock in a system of subordination and stereotyping that would harm others. In contrast, the Copyright Act explicitly anticipates that parties will engage in extensive private ordering, and does a great deal to facilitate such bargaining, including providing for the divisibility of a copyright into smaller pieces, the recordation of copyright transfers, and a statute of frauds to ensure effective bargaining.

Other examples bear out this distinction. The Restatement of Contracts, for example, against a general backdrop of freedom of contract, prohibits prospective waivers of liability for harm caused negligently by "one charged with a duty of public service," such as a doctor. [56] This rule latter reflects a public policy limiting freedom of contract in the regulated professions, just as lawyers owe non-waivable fiduciary duties to their clients. An even better example is antitrust law; numerous courts prohibit prospective waivers in antitrust cases.[57] The public policy against private ordering here is obvious: the very purpose of antitrust law is to prohibit certain specific forms of private ordering (e.g., collusion among competitors) that have serious negative effects for competition and consumers.

Thus, while there are sometimes public policies against future-conduct releases, those policies are not specific to class actions. Instead, they prohibit the release of claims based in future conduct through any means, whether as part of a class-action settlement or not. These policies are not universal; they do not apply in all areas of law. Although they reflect some of the concerns identified in Part III, they are doctrinally orthogonal to the identical factual predicate doctrine.

B. Is the Identical Factual Predicate Doctrine Too Restrictive?

The doctrine could also be challenged from the opposite direction, by arguments that class-action caselaw actually allows settlements that the doctrine would prohibit. Google and the plaintiffs did just this, offering numerous cases that they claimed provided precedents for the settlement. According to them, these cases permit class-action settlements to release claims not at issue in the underlying litigation. We can divide them into three classes: (1) cases under the identical factual predicate doctrine itself that purport to allow the release of claims beyond those asserted in the class action; (2) other cases approving settlements providing relief not available in the underlying litigation; and (3) real-property cases settled on terms including the transfer of an easement to the defendant.

Judge Chin did not address these arguments – but we will. As we will see, none of them stand up to close inspection. The identical factual predicate doctrine as we now know it will emerge unscathed.

1. Claims "Which Could Not Have Been Presented"

The identical factual predicate doctrine itself seems to contain an enormous loophole. Look again at the full statement of it from *Wal-Mart*:

> The law is well established in this Circuit and others that class action releases may include claims not presented and *even those which could not have been presented* as long

[56] Restatement (Second) of Contracts § 195.

[57] *See, e.g.*, Three Rivers Motor Co. v. Ford Motor Co., 522 F.2d 885 896 n.27(3rd Cir. 1975) (stating that a release may not "waive damages from future violations of antitrust laws" and citing cases).

> as the released conduct arises out of the "identical factual predicate" as the settled conduct.[58]

Other cases use similar language. *TBK Partners* holds that a class action settlement:

> may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented *and might not have been presentable in the class action*.[59]

What are we to make of such statements? The first response is that this language is only one half of a test, the other half of which is the identical factual predicate doctrine. The fact that a claim could not have been asserted in the class action is not a bar to approving it, but only so long as the claim arises from an identical factual predicate as claims that actually were asserted. This proviso takes nothing away from the identical factual predicate doctrine's bite; it defines the field against which the doctrine operates to remove some settlements from consideration.

There is also a subtler answer, one that explains what this language is doing there in the first place. *TBK Partners* provides a good example. Recall that this was a suit in federal court under the federal securities laws, but the settlement would also have released appraisal claims arising under New York law that were (allegedly) subject to the exclusive jurisdiction of New York state courts. These state claims were based on the identical factual predicate as the federal claims (an alleged failure to preserve a separate corporate identity following a long-term lease of all corporate assets that was in effect a merger), but they could not have been presented in the federal action.

TBK Partners therefore establishes an exception to the rule of parity between litigation and settlement. Consider the matter from the perspective of claim preclusion. It makes sense that a settlement can release a claim that "was not presented" but could have been; the claim would still have been precluded by an adverse judgment. But what about a claim that "might not have been presentable in the class action?" Preclusion law does not reach that far. If the TBK class had lost on the merits, its state-law appraisal claims would not have been barred; claim preclusion does not apply to claims that could not have been brought in the same action. And yet, *TBK Partners* states that a federal class-action settlement can release the state-law appraisal claims, claims that a federal court could never hear. The Supreme Court agreed with this proposition. In *Matsushita Electric Industrial Co. v. Epstein*, it held that a Delaware state-court class-action settlement could preclude a federal court from hearing a subsequent lawsuit on the same underlying conduct, even though the federal courts have exclusive jurisdiction over the securities claims.[60]

TBK Partners, *Matsushita*, and similar cases are best understood as holding that a particular kind of jurisdictional limit on claim preclusion does not apply in the context of a class-action settlement, because the policy behind them is not relevant. Those limits are of the "wrong court" type: the claim itself is justiciable, but some other forum has been designated for hearing it. Thus, in *TBK Partners* the principal obstacle to hearing these claims in the federal action was a jurisdictional conflict; the federal courts were deferring to New York's choice of an exclusively state-court forum. There was no dispute that if these claims had any merit to them, there was a forum perfectly capable of hearing them: a New York state court.

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[58] Wal-Mart, 396 F.3d at 107 (quoting TBK Partners) (emphasis added).
[59] TBK Partners, 675 F.2d at 460.
[60] Matsushita Electric Industrial Co. v. Epstein, 516 U.S. 367 (1996).

These jurisdictional rules advance policies of federalism, and of orderly division of responsibilities within a court system; they keep courts from stepping on each others' toes. In a settlement, however, these policies are comparatively absent. There is no particular purpose in making the parties who are negotiating a settlement of a case in Court A walk down the street to Court B to file a second set of paperwork; indeed, it thwarts the achievement of global peace. The claims to be released must still be based on the same facts; they must still be susceptible to a suit in some court. There is nothing to suggest that *TBK Partners*, which was about the settlement of state claims in federal court, and *Matsushita*, which was about the settlement of federal claims in state court, intended to relax any of the other rules of claim preclusion.

Thus, as applied to future-conduct releases, none of the concerns identified in Part III are addressed by worrying about interjurisdictional conflicts of this sort. Nor are these concerns exacerbated by allowing future-conduct releases for claims that can only be heard in another court but that truly are based on an identical factual predicate as the claims over which the court indisputably has jurisdiction. The doctrine itself is unchanged.

2. Settlements "Provid[ing] Broader Relief Than the Court Could Have Awarded"

The most misused precedent in the Google Books case was *Local No. 93, International Association of Firefighters v. Cleveland*,[61] a 1986 Supreme Court case. There, minority firefighters sued Cleveland for racial discrimination in its promotion practices. The city agreed to a consent decree that provided for more officer positions, with some of the promotional slots reserved for minorities in the first few years. A group of white firefighters intervened to object to the consent decree, alleging that it went beyond the lawsuit by giving promotions to minorities who had not themselves been the victims of racial discrimination. The Supreme Court upheld the consent decree. After concluding that the Civil Rights Act did not prohibit the decree, it turned to the white firefighters' argument about the scope of judicial power:

> It is therefore hard to understand the basis for an independent judicial canon or "common law" of consent decrees that would give § 706(g) the effect of prohibiting such decrees anyway. . . . [A] consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must "com[e] within the general scope of the case made by the pleadings," and must further the objectives of the law upon which the complaint was based. However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. Therefore, a federal court is *not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial*.[62]

Google and the plaintiffs pointed to the language in the last sentence that a decree could "provide[] broader relief than the court could have awarded after a trial." They read the case as establishing a three-part test applicable to settlements as well as consent decrees, then argued that the Google Books settlement passed that test. Although the Department of Justice and others questioned *Firefighters*'s applicability, Judge Chin accepted the framing even as he rejected the set-

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[61] 478 U.S. 501 (1986).

[62] Firefighters, 478 U.S. at 525 (1986) (quoting Pacific R. Co. v. Ketchum, 101 U.S. 289, 297 (1880) (emphasis added).

tlement. In effect, he treated the *Firefighters* test as equivalent to the identical factual predicate doctrine, stating, "Applying *Firefighters*, I conclude that the released claims would not come within 'the general scope of the case made by the pleadings." The language is exactly parallel to the language he used for *Wal-Mart* and the identical factual predicate doctrine.

This was error, because the quoted passage from *Firefighters* was not on point. The allegedly problematic relief in *Firefighters* was a promise made by the individual party (Cleveland) and not the class (the minority firefighters). And while the white firefighters may have disagreed with the consent decree, they were not parties to who would be bound to its releases.[63] Their problem was that they had no legal right to stop Cleveland's new promotion plan, not that they might have had such a right and were being forced to trade it away. *Firefighters* simply has nothing to say about the permissible scope of releases by the class in a Rule 23(e) review.

This article has repeatedly emphasized the fundamental differences between settlement promises given by individuals and releases given by a class. The fact that an individual gives a promise to a class as part of a class-action settlement is of no moment. It is still fundamentally an individual promise, and does not raise the representational concerns that releases given by a class do. This is why the many cases supposedly offering "detailed structural arrangements addressing matters well beyond the generalized allegations of the complaint," in Google's words, are simply not relevant to future-conduct releases by a class or to the identical factual predicate doctrine.[64]

For example, consider *Sansom Comm. v. Lynn*,[65] which Google describes as "find[ing] jurisdiction to enforce consent decree prescribing details for rehabilitation of a block in West Philadelphia, down to the type of stone and wood to be used in construction and 'acceptable letter styles on signs.'"[66] But this was a consent decree whose relevant promises were made by the University of Pennsylvania and urban redevelopment agencies, promises that the University later sought to escape by claiming they were beyond the court's jurisdiction to enter in a consent decree. True, the University had agreed to a decree that "far exceeded the relief available under the NEPA and the NHA," but that was its own, informed choice, and it must live with the consequences. *Sansom* never confronted the question of releases offered by a class, and their analysis is simply inapplicable when a court must decide whether a settlement is fair to absent class members. The same is true of the numerous other cases cited by Google and the plaintiffs.[67]

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[63] *See* Martin v. Wilks, 490 U.S. 755 (1989).

[64] Brief of Google in Support at 9.

[65] Sansom Comm. v. Lynn, 735 F.2d 1535 (3d Cir. 1984).

[66] Brief of Google in Support at 9 (quoting Sansom, 735 F.2d at 1543 n.4 (Becker, J., concurring)).

[67] Cases misleading cited by Google and the plaintiffs but which actually involve promises made *to the class* include In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 179 (2d Cir. 1987); Frew v. Hawkins, 540 U.S. 431 (2004); Jeff D. v. Kempthorne, 365 F.3d 844 (9th Cir. 2004); Duran v. Carruthers, 885 F.2d 1485 (10th Cir. 1989); Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989); Miller v. Woodmoor Corp., No 74-F-988, 1978 WL 1146 (D. Colo. Sept. 28, 1978); and Levin v. Miss. River Corp., 59 F.R.D. 353 (S.D.N.Y. 1973). They also cite two Rule 23(b)(1) cases, Robertson v. Nat'l Basketball Ass'n, 72 F.R.D. 64 (S.D.N.Y. 1976), and White v. Nat'l Football League, 822 F. Supp. 1389 (D. Minn. 1993), which are *sui generis* and raise special issues. In brief, 23(b)(1) class actions are born of necessity, and in these circumstances, class members' rights are so closely bound up with each other that individual lawsuits would be not just unfair but actually impossible. Here, the scope of permissible settlement must be greater if there is to be settlement at all; that increased scope is compensated for by correspondingly stricter prerequisites to bringing such an action and by intensified judicial scrutiny

3. Settlements Transferring Easements to the Defendant

Finally, courts sometimes approve settlements or award judgments in real-property trespass and nuisance cases that result in the transfer of an easement to the defendant. Because an easement is nonpossessory, these settlements are functionally very close to releasing the defendant from liability for its future trespasses, nuisances, and other related real-property torts.[68] Google and the plaintiffs argued that these settlements show that class members can be required to give up claims against the defendant's future conduct.

The leading case here is *Uhl v. Thoroughbred Technology and Telecommunications, Inc.*[69] The plaintiff, a telecommunications company known colloquially as T-Cubed, announced plans to lay fiber-optic cables along a railroad right of way. A class of landowners along the route objected, bringing slander of title and trespass claims that the railroad's easements did not include cable-laying rights. In a settlement filed the same say, the class agreed to grant T-Cubed the necessary easements in exchange for compensation. An objector argued that the settlement was unfair to class members and that the case was nonjusticiable because the class members had only "future claims." The Seventh Circuit upheld the settlement, explaining that the plaintiffs' slander of title claims were already ripe, so that:

> This is enough to permit the court to address the entire suit, including the claims for trespass and the injunction. On these facts, those claims are in no way hypothetical; their immediacy and their relation to the slander claim is enough to permit the court to address the entire controversy.[70]

Google and the plaintiffs cited *Uhl* to argue that courts routinely "have approved settlements that confer future rights on the defendants in exchange for an additional benefit to the plaintiffs."[71] But a closer reading of *Uhl* shows that it does not sweep so broadly. T-Cubed's past conduct – its announcement of plans to lay cable – really did open it to a slander-of-title suit. That suit would have tested T-Cubed's right to lay cable, and if T-Cubed had won, its newly-confirmed easements would have protected it also from the trespass claims. True, T-Cubed had not actually gone on anyone's land. But considering its course of conduct, it is factually reasonable to say that the future-conduct cable-laying would have been a continuation of the past-conduct announcement.[72] The other easement cases are to similar effect: in each, the defendant ended up with no more than it had already acted as though it had a right to.

It is worth thinking about the role that the slander-of-title tort plays in the analysis. The existence of the tort moves forward in time the point at which a landowner can bring a lawsuit against a would-be trespasser. In that respect, it transforms a future claim into a present claim. This is typical of the line between future and present *claims*, which can depend on the vagaries of state pleading doctrine. Some states recognize a cause of action for "medical monitoring": a vic-

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[68] If anything, the transfer of an easement is more burdensome to class members than a future-conduct release. The owner of a parcel burdened by an easement is prohibited from blocking the easement owner's access.

[69] 309 F.3d 978 (7th Cir. 2002).

[70] Uhl, 309 F.3d at 984.

[71] Google Brief in Support at 12.

[72] This conclusion is debatable to the extent that it depends on the factual finding that T-Cubed really had announced such plans. There is more than a whiff of collusion about *Uhl* and other railroad-corridor settlement class actions. *See* Alison Frankel, *Blood on the Tracks*, AM. LAW., June 3, 2002, at 74. But that, of course, is a problem to which courts are already supposed to be sensitive. Occasionally, some of them are.

tim who has a heightened risk of illness can sue for the cost of the ongoing diagnostic tests that will alert her if she does in fact develop the illness. Other states do not recognize this cause of action: a similarly-situated victim can sue only when she develops the illness. The victim in the first state has a present claim; the victim in the second state has only future claims.

Uhl demonstrates that some of this ambiguity infects the identical factual predicate doctrine to the extent that the scope of settlement depends on which claims are ripe enough to be precluded. Courts should deal with this issue by being sensitive to the functional goals of the doctrine as applied to future-conduct releases: using parity between litigation and settlement to avoid badly designed settlements that harm class members in unpredictable ways and usurp legislative power. The railroad easement settlements seem reasonable to the extent that the railroads started off with colorable claims to already own the necessary easements to lay cable, so that these settlements really did give away only those claims that could plausibly have been lost in the litigation itself.

Another easement case, *Alvarado v. Memphis-Shelby County Airport Authority*, illustrates the informational angle.[73] With FAA approval, the Airport Authority planned to expand operations atthe Memphis International Airport. Nearby landowners sued in a class action, claiming inverse condemnation. The settlement required class members who did not opt out to transfer an avigation easement to the Airport Authority in exchange for compensation. Functionally, this is eminent domain via class-action settlement. But notice the procedural posture: the plaintiffs sued in inverse condemnation: that is, they asked the court not to block the taking but to provide them with just compensation for it. That's what the tort is for, and the settlement reflected a result of the sort entirely consistent with litigation. The outcome is entirely consistent with the identical factual predicate doctrine, and we can give the *Alvarado* court the last word: "The release in the settlement agreement is not a general release, but a release which reserved certain claims and barred only prospective claims of the same character as set forth in the restated complaint."

CONCLUSION

[To come]

[73] No. 99-5159, 2000 WL 1182446 (6th Cir. Aug. 15 2000).