FUTURE CONDUCT AND THE LIMITS OF CLASS-ACTION SETTLEMENTS*

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This Article identifies a new and previously unrecognized trend in class-action settlements: releases for the defendant's future conduct. Such releases, which hold the defendant harmless for wrongs it will commit in the future, are unusually dangerous to class members and to the public. Even more than the "future claims" familiar to class-action scholars, future-conduct releases pose severe informational problems for class members and for courts. Worse, they create moral hazard for the defendant, give it concentrated power, and thrust courts into a prospective planning role they are ill-equipped to handle.

Courts should guard against the dangers of future-conduct releases with a standard and a rule. The standard is heightened scrutiny for all settlements containing such releases; the Article describes the warning signs courts must be alert to and the safeguards courts should insist on. The rule is parity of preclusion: a class-action settlement may release future-conduct claims if and only if they could have been lost in litigation. Parity of preclusion elegantly harmonizes a wide range of case law while directly addressing the normative problems with future-conduct releases. The Article concludes by applying its recommendations to seven actual future-conduct settlements, in each case yielding a better result or clearer explanation than the court was able to provide.

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INTRODUCTION

Class action lawyers have a new toy: the future-conduct release.[1] A settlement containing such a waiver forgives the defendant for

1. This footnote provides a brief overview of federal class action litigation under Rule 23 of the Federal Rules of Civil Procedure for the reader in need of a primer or a review. *See* FED. R. CIV. P. 23. State class actions are discussed briefly *infra* Part IV.B.

In a class action, one or more named parties sue or are sued "as representative parties on behalf of all members [of the class]." FED. R. CIV. P. 23(a). They may do so if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. Courts commonly also require that it be feasible to determine objectively who is a member of the class. *See, e.g.*, *In re* Fosamax Prods. Liab. Litig., 248 F.R.D. 389, 395–96 (S.D.N.Y. 2008). In addition to satisfying these common prerequisites, each class must be certified under one of three subsections of Rule 23(b): 23(b)(1), when class members' rights are inextricably linked; 23(b)(2), when "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"; and 23(b)(3), when "questions of law or fact common to class members predominate over any questions affecting only individual members[] and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b). Members of a class certified under Rule 23(b)(3) may exclude themselves from the class; however, this right is not guaranteed by the Federal Rules for members of classes certified under the first two subsections. *See* FED. R. CIV. P. 23(c)(2).

A case may proceed as a class action only if the court certifies it as one after entering findings that the prerequisites above are satisfied, FED. R. CIV. P. 23(c)(1)(A), and directs appropriate notice to the class, FED. R. CIV. P. 23(c)(2). Any judgment in the case, whether favorable or not, will be binding on class members. *See* Pelt v. Utah, 539 F.3d 1271, 1284 (10th Cir. 2008) (noting that "[i]t is well settled that a class action judgment is binding on all class members" provided that "absent members were 'in fact' adequately represented by parties who are present"). After certification, any settlement or voluntary dismissal of class members' "claims, issues, or defenses" requires court approval. FED. R. CIV. P. 23(e). If the settlement would bind class members, the Rule requires further notice to class members, an opportunity for them to object, a finding by the court that the settlement is "fair, reasonable, and adequate," and, for Rule 23(b)(3) classes, a further opportunity for class members to opt out. *Id.* It is possible to file simultaneously a

trespasses it has not yet committed. For example, the proposed Google Books settlement would have released Google from liability for copyright infringements committed well into the twenty-second century.[2] Others would give defendants permission to commit trespasses, create nuisances, adopt poison pills, and perhaps even violate the antitrust laws.[3]

This is new. And it is a problem. To see why, consider a more familiar problem in class-action settlements: future claims. Some of the victims of a mass toxic tort will take years to get sick. A badly designed settlement can trade away the victims' rights before they even know what is at stake.[4] The 1984 Agent Orange settlement simply did not provide for payments to veterans who died or were disabled after 1994.[5] Veterans who developed cancer later in the 1990s found the compensation fund gone.[6] All that was left was the clause of the settlement purporting to bar their claims.[7]

class settlement and a motion for certification contingent on approval of the settlement but in general a so-called "settlement class" must satisfy all of the usual prerequisites for certification. Amchem Prods. v. Windsor, 521 U.S. 591, 619–22 (1997).

Class-action litigation is lawyer-directed rather than client-directed. The class is represented by class counsel, FED. R. CIV. P. 23(g)(1), but class counsel "may not have a full client-lawyer relationship with each member of the class." MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 13 (2010). While class counsel have a fiduciary duty to "fairly and adequately represent the interests of the class," FED. R. CIV. P. 23(g)(4), this is a "duty to the class as a whole [that] frequently diverges from the opinion of . . . the named plaintiff." Walsh v. Great Atl. & Pac. Tea Co., Inc., 726 F.2d 956, 964 (3d Cir. 1983). Indeed, a settlement may be approved even over the objections of one or more named representatives. *See* Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 590–91 (3d Cir. 1999).

2. *See* Amended Settlement Agreement § 17.3, Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 CV 8136-DC), ECF No. 770-2 [hereinafter Authors Guild Settlement] (stating that settlement "shall expire on the date on which the last U.S. copyright in any Book or Insert terminates"). Since copyright endures for seventy years after the death of the author, 17 U.S.C. § 302(a) (2006), the books of an author who died in 2050 would have been governed by the settlement through 2120. Any document from the *Authors Guild* case identified with an ECF number is available through http://thepublicindex.org.

3. *See infra* Part V.

4. *See, e.g.*, Stephenson v. Dow Chem. Co., 273 F.3d 249, 255 (2d Cir. 2001) (introducing plaintiffs as two Vietnam veterans who developed cancer after the 1994 cut-off date for compensation under the settlement), *aff'd in part by an equally divided court*, *vacated in part*, 539 U.S. 111 (2003); *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 746–48, 862 (E.D.N.Y. 1984) (approving settlement of future claims against chemical companies by Vietnam veterans exposed to Agent Orange), *aff'd* 818 F.2d 226 (2nd Cir. 1987).

5. *Stephenson*, 273 F.3d at 253.

6. *See, e.g.*, *id.* at 255–56.

7. *See id.* at 253. The Second Circuit held that the interests of these future victims had not been adequately represented in the prior litigation, and thus vacated the settlement as to them. *Id.* at 261.

Courts and scholars have come to recognize the extraordinary dangers of future-claim releases for class members. In a pair of decisions rejecting sweeping asbestos settlements, the Supreme Court held that the interests of present and future victims are so unavoidably opposed that the one group cannot "fairly and adequately protect the interests" of the other.[8] The result is that class counsel seeking a quick payout for present victims are not allowed to sell the defendant the class's future claims on the cheap—at least not if the court is doing its job. Scholars have produced a voluminous literature on the "futures problem," debating when future-claim releases are appropriate and how best to police their use.[9]

8. FED. R. CIV. P. 23(a)(4); *see* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856–57 (1999); Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 625 (1997).

9. The term "futures problem" comes from Geoffrey C. Hazard Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1902–03 (2000). For discussion of the issues future claims raise, see generally Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485 (2003) (discussing contractarian justifications for ex ante resolution of claims); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (describing dangers of collusion between defendants and class counsel, particularly where future claims are concerned); Howard M. Erichson, *Uncertainty and the Advantage of Collective Settlement*, 60 DEPAUL L. REV. 627 (2011) (describing different forms of uncertainty in class litigation, some of them tied to uncertainty about future events); Deborah R. Hensler, *Bringing* Shutts *into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 UMKC L. REV. 585 (2006) (proposing that courts should require that settlements compensate present and future claimants equally); Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649 (2008) (discussing how settlement designs can accentuate or dissipate intraclass conflicts, with application to future claims); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 345 (1999) (describing future-claim settlements as "the secular equivalent of a plenary indulgence"); Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787 (2004) (discussing treatment of future claims in Agent Orange litigation); Susan P. Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995) (describing in detail the problematic terms in one settlement); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581 (2003) (discussing whether present and future claimants should be included in the same class); Linda S. Mullenix, *Back to the Futures: Privatizing Future Claims Resolution*, 148 U. PA. L. REV. 1919 (2000) (examining the future of future claims resolution following the Supreme Court's *Amchem* and *Ortiz* decisions); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287 (2003) (discussing different ways of characterizing present and future claimants); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002) [hereinafter Nagareda, *Autonomy, Peace, and Put Options*] (arguing that future claimants should be given "put options" to sell their claims at a later date); Richard A. Nagareda, *Future Mass Tort Claims and the Rule-Making/Adjudication Distinction*, 74 TUL. L. REV. 1781 (2000) (comparing different institutional mechanisms for handling future claims); Alex Raskolnikov, *Is There a Future for Future Claimants After* Amchem Products, Inc. v. Windsor*?*, 107 YALE L.J. 2545 (1998) (proposing a "global limited fund mandatory

settlement class action with a modified pro rata distribution of benefits for past and future claimants" as a fair and efficient way to deal with mass torts); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Actions for Future Loss*, 88 VA. L. REV. 1871 (2002) (arguing that mandatory global class actions can best compensate victims while providing optimal deterrence of socially undesirable conduct); George Rutherglen, *Future Claims in Mass Tort Cases: Deterrence, Compensation, and Necessity*, 88 VA. L. REV. 1989 (2002) (commenting on Rosenberg's argument); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941 (1995) (arguing for stronger back-end opt-out rights whenever the value of claims is initially unpredictable); Robert P. Schuwerk, *Future Class Actions*, 39 BAYLOR L. REV. 63 (1987) (arguing that future class actions should only be employed where stringent preconditions are satisfied); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994) (describing potential conflicts between present and future claimants); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439 (1996) (discussing the problem of future injury in the context of asbestos litigation and suggesting changes to the Federal Rules of Civil Procedure to protect future claimants); Diane P. Wood, *Commentary on* The Futures Problem*, by Geoffrey C. Hazard, Jr.*, 148 U. PA. L. REV. 1933 (2000) (providing an overview of Hazard's *The Futures Problem* and suggesting some changes to the analysis in that article); Note, *And Justiciability for All? Future Injury Plaintiffs and the Separation of Powers*, 109 HARV. L. REV. 1066 (1996) ("explor[ing] the justiciability of actions by future injury plaintiff actions by examining whether a claim of future injury in a class action presents, in any scenario, an Article III case or controversy"); Jeremy Gaston, Note, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 TEX. L. REV. 215 (1998) (arguing for a "bright line denial of standing to exposure-only claimants in mass tort class actions who seek compensation for their future injuries"); Elizabeth R. Kaczynski, Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 COLUM. L. REV. 397 (1985) (arguing that including future members in class actions "is inconsistent with both the explicit requirements and the theoretical underpinnings of Rule 23" and poses "a serious threat to the due process rights of future members"); Daniel M. Weddle, Note, *Settlement Class Actions and "Mere-Exposure" Future Claimants: Problems in Mass Toxic Tort Liability*, 47 DRAKE L. REV. 113 (1998) (discussing the major problems facing exposure-only future claimants, ways in which courts have dealt with these issues, and proposed solutions).

The issue of future claims is also a problem of substantive tort law. *See generally* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002) (aiming to "illuminate and help guide tort practice by attending to a set of theoretical and conceptual questions" raised by "future injury" or "inchoate tort" cases, including the role of "injury" in tort law); Andrew R. Klein, *Fear of Disease and the Puzzle of Futures Cases in Tort*, 35 U.C. DAVIS L. REV. 965 (2002) (examining treatment of fear of disease in toxic tort cases and asserting that courts should permit claimants to recover damages for emotional distress whenever that fear of disease is reasonable). Because of these tort-law issues, which vary significantly between states, it is not possible to state a simple and general rule on when a future claim based on past conduct ripens into one capable of being litigated. In an asbestos-exposure case, for example, ripeness will depend on the legal viability of medical-monitoring and increased-risk claims and fact-bound issues about the threshold of injury that qualifies as compensable. In general, mere exposure to a substance capable of causing harm will not suffice, but where beyond that lies the line between "present" and "future" claims is a matter of great and active dispute.

Another significant distinction worth noting is that between present and future *claimants*. In some cases—such as the *Authors Guild* case—there is no significant division within the class because the future claims are all held by persons who also hold present claims. In other cases, such as the mass asbestos cases, many of the holders of future

Future-*conduct* releases, though, are a bridge beyond future-*claim* releases. Consider a simple hypothetical future-conduct settlement. The Warhol Soup Company sells a bad batch of tomato soup, leading to a well-publicized outbreak of twenty-four hour food poisoning. A class-action firm files a suit on behalf of a class of all of Warhol's customers, then negotiates a settlement. In return for cash payments to class members with documented illness, they will give Warhol Soup a general release for liability arising out of its conduct, past and future.

There is something obviously wrong with this settlement. But it is not the same something courts and scholars usually talk about when they talk about "future claims." There are no present-future conflicts within the Warhol Soup class; the stomach bug has already done most of the harm it will ever do, and the settlement is perfectly uniform toward class members.[10] Instead, the settlement is flawed in other ways. For example, the compensation schedule may have been designed with gastroenteritis in mind, but what if next time it's botulism? Worse, the settlement is likely to lead to more food poisoning in the future because it undermines Warhol Soup's incentive to be careful going forward.

Thus, future-conduct releases raise the stakes for class members. Past-conduct settlements are limited to compensation for harms the defendant has already caused (even if those harms have not yet manifested themselves). But future-conduct releases can change the world in ways that cause entirely new harms to class members. Because they deal so extensively with the unknown and changeable future, future-conduct settlements can be unusually hard for courts and class members to understand. They can create serious moral hazard for the released defendant in subtle and surprising ways. Future-conduct releases increase the risks that the reviewing court will miss the warning signs and approve a bad settlement.

There is also a more fundamental problem: courts should not be in this business at all. Future-conduct releases open the door to sweeping prospective changes in the substance of the law. This is the

claims have no present claims. In these cases, there are difficult problems about whether, and under what circumstances, the holders of future claims may be placed in the same class as the holders of present claims. *Amchem* analyzed this issue in terms of adequate representation: the future claimants could not be included because they were not vigorously represented by their own unconflicted class counsel. Amchem Prods. v. Windsor, 521 U.S. 591, 621 (1997).

10. Thus, proposals designed to ensure equality between present and future claimants do not really speak to future-conduct settlements. *See, e.g.*, Hensler, *supra* note 9, at 588.

province of legislation, not adjudication. The Warhol Soup settlement is tantamount to tort reform: it takes future product-liability cases out of the judicial system entirely. But this is not tort reform enacted by a democratically elected and politically accountable legislature and imposed equally on all businesses. Instead, it is a private agreement for the benefit of a single company, drafted in secret by a handful of lawyers and "enacted" by a judge. In the words of the Department of Justice, this is "a bridge too far."[11]

Few actual class-action lawyers are this unsubtle. But they are hardly unambitious or unimaginative. The Google Books settlement would have established the world's largest bookstore.[12] The settlement would have bound millions of class members[13] and payments to copyright owners could have reached into the billions of dollars.[14] The pending $7 billion settlement in an antitrust lawsuit against Visa and MasterCard would prevent businesses—including ones not yet in business—from objecting to many of their policies until 2021.[15] Other class-action settlements have tried to use future-

11. Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement at 3, Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 Civ. 8136-DC), ECF No. 922 [hereinafter Statement of Interest II].

12. *See infra* Part I.A.

13. *See* Plaintiffs' Supplemental Memorandum Responding to Specific Objections at 2 n.2, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136-DC), ECF No. 955 (estimating class size at "hundreds of thousands, or millions"); Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 WIS. L. REV. 479, 545 n.350 (2011) (giving reasons for estimate that settlement class could number tens of millions).

14. "Google . . . scanned more than 12 million books," *Authors Guild*, 770 F. Supp. 2d at 670, a large percentage of which are in copyright, *see* Samuelson, *supra* note 13, at 545 n.350 ("Google has estimated that 20 percent of the books it has scanned so far from libraries are in the public domain . . . ."). The settlement called for $45 million in up-front payments directly to copyright owners. *See* Authors Guild Settlement, *supra* note 2, § 2.1. Future revenue streams under the settlement were necessarily an estimate, but the United States book market currently brings in revenue of about $27 billion a year. *Book Pub. in the US: Market Research Report*, IBISWORLD (June 2012), http://www.ibisworld.com/industry/default.aspx?indid=1233. If half that market had moved to e-books, and Google took ten percent of the market, and ten percent of Google's share came from books under the settlement, that would have yielded settlement-related revenues to Google of $135 million a year. If the settlement had been a success and catapulted Google to a position of dominance in the e-book market, those numbers could have been much, much higher.

15. *See* Class Settlement Agreement ¶ 2(b), *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720-JG-JO (E.D.N.Y. filed July 13, 2012), ECF No. 1588-1 (defining settlement class to include "all persons, businesses, and other entities that as of the Settlement Preliminary Approval Date *or in the future* accept [Visa or MasterCard]" (emphasis added)); *id.* ¶¶ 39–65 (twenty-seven-page description of new rules to be adopted by Visa and MasterCard); *id.* ¶ 71 (stating that the release precludes class members from seeking relief "relating to the period after the date of the Court's entry of the Class Settlement Preliminary Approval Order with respect to any Rule of any

conduct releases to transfer easements to telecommunications companies,[16] to insulate the NFL's pay-per-view packages from antitrust scrutiny,[17] and to nullify shareholder objections to the News Corporation's anti-takeover defenses.[18] If the courts were to allow future-conduct releases in general, the sky would be the limit: it is possible to imagine doing eminent domain or health-care reform through an appropriately crafted settlement.[19]

The courts have recognized that future-conduct releases raise difficult questions. But they have not been able to give satisfying answers. In a May 2011 decision, *Authors Guild v. Google, Inc.*,[20] the Southern District of New York rejected the Google Books settlement.[21] But five months later, in In re *Literary Works in Electronic Databases Copyright Litigation*, the Second Circuit held that an extraordinarily similar settlement authorizing electronic databases to sell online access to articles was potentially permissible.[22] Each settlement would have allowed the defendant to make class members' copyrighted works available online[23] in exchange for

[defendant] . . . as it . . . may be modified in the manner provided in [the settlement]"); *see also* Adam J. Levitin, An Analysis of the Proposed Interchange Fee Litigation Settlement 14–19 (Aug. 21, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133361 (discussing settlement's releases with skepticism).

16. *See* First Amended & Restated Class Settlement Agreement at 13, Uhl v. Thoroughbred Tech. & Telecomms, Inc., No. IP00-C-1232-B/S, 2001 WL 987840 (S.D. Ind. Aug. 28, 2001), *aff'd* 309 F.3d 978 (7th Cir. 2002), *available at* http://www.fiberopticfundi.com/adobe/SettlementAgreementForWeb.pdf (defining "Settlement Class Claims" to include claims that "may be asserted now or in the future . . . relating to . . . [defendant's future] installation, operation, maintenance, renewal, marketing, and transfer [of a fiber-optic cable]").

17. *See* Revised Stipulation and Settlement Agreement, ¶ II.y, Schwartz v. Dallas Cowboys Football Club, Ltd., 157 F. Supp. 2d 561 (E.D. Pa. 2001) (no. 97-cv-5184), *available at* http://web.archive.org/web/20011218215257/http://www.nfllawsuitsettlement.com/stipagreement.shtml (defining "Released Class Claims" to include any claim "subsequently arising out of or resulting from . . . conduct authorized by the Agreement").

18. *See* UniSuper Ltd. v. News Corp., 898 A.2d 344, 347–48 (Del. Ch. 2006) ("In the Redrafted Settlement, the parties included a provision clarifying that the release does not extend to 'claims challenging the merits of future conduct . . . .' The same sentence, however, contains a parenthetical excepting claims relating to the adoption of the October 2006 Rights Plan.").

19. *See infra* Part II.

20. 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

21. *Id.* at 679.

22. *See In re* Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 247–49 (2d Cir. 2011).

23. *Compare* Authors Guild Settlement, *supra* note 2, § 10.1(d) (defining released claims to include "after the Effective Date, any act or omission authorized by this Amended Settlement Agreement"), *and id.* § 4.2 (authorizing sale of digital books to consumers), *with* Settlement Agreement § 13.b, In re *Literary Works*, 654 F.3d 242 (MDL

payments to class members.[24] They purported to apply the same legal test.[25] They were even negotiated by the same class counsel.[26] And yet releases that "exceed[ed] what the Court may permit"[27] in *Authors Guild* were "not improper" in *Literary Works*.[28] In other future-conduct cases, the Seventh Circuit held that it was broadly free to "address the entire suit" and approve such releases,[29] but the Delaware Court of Chancery held flatly the opposite: "The rule in Delaware is that a release cannot apply to future conduct."[30]

If the courts are adrift when dealing with future-conduct releases, one reason may be that they have had little help from the scholarly community. The scholarship on future-conduct releases is all but nonexistent.[31] No one has ever clearly distinguished future-claim releases from future-conduct releases. A few articles recognize that class actions raise troubling issues when they purport to adjudicate the rights of "future class members" who will be injured by actions the defendant takes in the future.[32] But in many future-conduct-release cases, these "future class members" are the same people as

No. 1379) (providing that articles may "be electronically reproduced, distributed, displayed, licensed, sold, or adapted by [defendants]").

24. *Compare* Authors Guild Settlement, *supra* note 2, § 4.5(a)(i) (requiring Google to pay to copyright owners seventy percent of net revenues from future sales of the digital books covered by the settlement), *and id.* § 5.1(a) (requiring Google to make one-time payment of sixty dollars for each book previously digitized), *with* Settlement Agreement § 4, In re *Literary Works*, 654 F.3d 242 (MDL No. 1379) (creating schedule of one-time payments for the articles covered by the settlement), *and id.* § 5.a (reducing payments by thirty-five percent for those authors who opt out of allowing future uses).

25. *Compare Authors Guild*, 770 F. Supp. 2d at 675 ("identical factual predicate"), *with* In re *Literary Works*, 654 F.3d at 248 ("identical factual predicate") (quoting TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 460 (2d Cir. 1982)). The identical factual predicate doctrine is discussed in more detail *infra* Part IV.B.

26. *Compare Authors Guild*, 770 F. Supp. 2d at 669 (listing appearance of Michael J. Boni for Author Plaintiffs), *with* In re *Literary Works*, 654 F.3d at 244 (listing appearance of Michael J. Boni for plaintiffs). *See generally Michael J. Boni*, BONI & ZACK LLC (2010), http://bonizack.com/michael-j-boni (listing Boni's experience as lead counsel on both settlements).

27. *Authors Guild*, 770 F. Supp. 2d at 677.

28. In re *Literary Works*, 654 F.3d at 248.

29. Uhl v. Thoroughbred Tech. & Telecomms., Inc., 309 F.3d 978, 984 (7th Cir. 2002).

30. Unisuper Ltd. v. News Corp., 898 A.2d 344, 348 (Del. Ch. 2006).

31. Samuel Bray has discussed "preventive adjudication," in which "a plaintiff seeks only a declaration and does so to avoid *future* harm." Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1276 (2010). This concept focuses on purely declaratory relief: i.e., judgments that merely restate more clearly the contents of pre-existing legal norms. But a defining characteristic of future-conduct releases is that they can deliberately alter parties' rights prospectively; they go beyond the merely declaratory.

32. *See, e.g.*, Schuwerk, *supra* note 9, at 67 (defining "future class members" to include "persons who, at the time of inquiry, have not had the type of contact or relationship with the defendant that gives rise to the litigation").

the present class members who indisputably have present claims against the defendant.[33]

This Article fills this gap. It makes three contributions to the literature on class actions. First, it identifies a novel feature of class-action settlements: future-conduct releases by class members. Second, it explains why such releases can be dangerous to class members and to society. Third, it explains what to do about it.

Courts should not prohibit future-conduct releases outright. Instead, they should guard against the dangers these releases pose with a standard and a rule. The standard is an enhancement of the Rule 23(e) requirement that a court may only approve a class-action settlement on a finding that it is "fair, reasonable, and adequate."[34] The Article supplies a list of factors courts should incorporate into the Rule 23(e) inquiry when they are faced with a future-conduct settlement. Those factors will help courts think through the distinctive risks of future-conduct settlements and identify appropriate safeguards.

The rule is simpler: a settlement may release only those claims that the class could have lost in litigation. The common thread running through the problems with future-conduct releases is that they sever the connection between the settlement and the underlying lawsuit. The Warhol Soup settlement is not really a "settlement" of the product-liability lawsuit; it is a freestanding, prospective change in the applicable law. The class action is just an excuse, a procedural vehicle that gets the parties into court and is then turned around to bind class members to the terms of the deal. The result is like a mass-market contract with none of the respect for personal autonomy—or like negotiated rulemaking with none of the procedural safeguards. What it is not like is a lawsuit litigated through to judgment. Requiring parity between litigation and settlement brings future-conduct releases back to earth: it restores the essential nexus that makes settlements a proper use of judicial power in the first place.

Heightened scrutiny and parity of preclusion aren't just good ideas: they're the law. Each is rooted in the text of Rule 23 and in the Constitution. Heightened scrutiny flows from the provisions in Rule 23 that ensure adequate representation for class members at all times and from the Due Process Clause. Parity of preclusion, for its part, is jurisdictional: future-conduct claims that could not be precluded in litigation are categorically unripe. They do not present live "questions

33. Future class members are discussed further *infra* note 236.
34. *See* FED. R. CIV. P. 23(e)(2).

of law or fact" with respect to which a class could be certified under Rule 23, and they are not part of the same Article III case or controversy as the underlying lawsuit.

The Article will proceed in five parts, with the Google Books settlement serving as a running example. Part I will explain in detail how future-conduct releases work. Part II will explain the normative problems such releases raise. Part III will introduce and defend the heightened-scrutiny standard as a simple and administrable response to their dangers. Part IV will do the same for the parity-of-preclusion rule. Part V will apply the Article's recommendations to concrete cases. A brief Conclusion will do exactly what it says on the tin.

I. FUTURE-CONDUCT RELEASES

In order to understand why future-conduct releases in class-action settlements are dangerous, it is necessary to understand clearly what a "future-conduct release" is. The place to start is with the preeminent modern example of one, the rejected Google Books settlement in *Authors Guild v. Google Inc*.

A. *An Example: Google Books*

The Google Books project is the company's "moon shot,"[35] with the explicit goal of creating a new Library of Alexandria.[36] Google ultimately hoped to include a digital copy of every book ever printed in this universal library.[37] In 2004, Google began partnering with research libraries, which supply Google with books from their

35. Jeffrey Toobin, *Google's Moon Shot*, THE NEW YORKER, Feb. 5, 2007, at 30 (quoting Marissa Mayer).

36. *See* Brief of Google, Inc. in Support of Motion for Final Approval of Amended Settlement Agreement at 66–67, Authors Guild v. Google Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 CV 8136-DC) [hereinafter Brief of Google in Support] (claiming that fire set by Julius Caesar in 47 B.C. caused the destruction of 700,000 volumes in the Library and calling settlement "another small step toward the vision that the Alexandrian Library represents"); Sergey Brin, *A Library to Last Forever*, N.Y. TIMES, Oct. 9, 2009, at A31 (describing Google Books as a program to prevent the loss of human knowledge, as occurred in the burning of the Library of Alexandria). Google's account of the destruction of the Library is disputed by scholars. *See* EDWARD ALEXANDER PARSONS, THE ALEXANDRIAN LIBRARY: GLORY OF THE HELLENIC WORLD 288–319 (Am. Elsevier Publ'g Co., Inc. 1952) (surveying ancient sources on what did or did not happen to the Library in 47 B.C.). Ironically, this is the very book Google's brief cites as an example of a scholarly work that the settlement would have helped preserve and make available. *See* Brief of Google in Support, *supra*, at 66–67. History aside, the metaphor itself is problematic. *See* Mary Murrell, *Digital + Library: Mass Book Digitization as Collective Inquiry*, 55 N.Y.L. SCH. L. REV. 221, 226–31 (2010) (tracing history of "universal library" metaphor).

37. *See* Toobin, *supra* note 35, at 30.

collections.[38] Google takes the books offsite, photographs them using specially built book scanners, and processes the images with software to reconstruct the text of the books.[39] The text is fed into an index so that Google Books' users can search for terms in the text of the scanned books.[40] If the library wishes, it can receive a digital copy of the book in return.[41]

Copyright law complicated things, as it always does. Some books were in the public domain, and some copyright owners gave Google explicit permission.[42] But for everything else, Google displayed only short "snippets" as search results: an eighth of a page around the place the search term appears in the book.[43] After objections from copyright owners, Google added an opt-out: a book's copyright owner could prevent it from being scanned at all.[44] This was not sufficient for authors and publishers, who filed suit in the fall of 2005 in two parallel lawsuits, one of them styled as a class action.[45] It was widely expected that Google's defense would center on fair use.[46]

38. For a detailed history of the project, lawsuit, and settlement through the end of 2009, see generally Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTELL. PROP. L. 227 (2009).

39. *See* Deposition of Daniel Clancy, Authors Guild v. Google at 63, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 CV 8136-DC), filed as exhibit 10 to Declaration of Edward Rosenthal, Authors Guild v. HathiTrust, No. 11-CV-6351 (S.D.N.Y. June 29, 2012), ECF No. 114-10 (describing the scanning process).

40. *Id.* at 64–66.

41. *See, e.g.*, Cooperative Agreement Between Google Inc. and the Regents of the Univ. of Mich./Univ. Library § 2.5 (Dec. 14, 2004), http://thepublicindex.org/docs/libraries/michigan.pdf. Further agreements between Google and its partner libraries are available at http://thepublicindex.org/documents/libraries.

42. *See What You'll See When You Search on Google Books*, GOOGLE BOOKS, http://books.google.com/intl/en/googlebooks/screenshots.html (last visited Jan. 4, 2013) (describing and illustrating full view and limited preview).

43. *See id.* (describing and illustrating snippet view).

44. *See* Adam M. Smith, *Making Books Easier to Find*, OFFICIAL GOOGLE BLOG (Aug. 12, 2005, 1:31 PM), http://googleblog.blogspot.com/2005/08/making-books-easier-to-find.html.

45. *See* Class Action Complaint, Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 CV 8136); Complaint, McGraw-Hill Cos., Inc. v. Google Inc., No. 05 CV 8881 (S.D.N.Y. Oct. 19, 2005). The two cases were "coordinated for all pre-trial purposes." Case Management Order Regarding Coordination and Scheduling at 1, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 CV 8136-JES), ECF No. 29. In 2011, the Authors Guild and other authors' groups sued five of Google's library partners over their use of the digital copies. *See* Complaint at 1–2, Authors Guild, Inc. v. HathiTrust, No. 11 CIV 6351 (S.D.N.Y. Sept. 12, 2011).

46. Fair use is an affirmative defense to copyright infringement that permits a defendant to argue that her conduct, as measured by four open-ended and capacious factors, is more socially beneficial than enforcement of the plaintiff's copyright would be. *See* 17 U.S.C. § 107 (2006). "The policies underlying modern fair use law include promoting freedom of speech and of expression, the ongoing progress of authorship,

Google's fair use argument is persuasive but hardly conclusive, and scholarly opinion is split on whether fair use applies.[47]

Complicating matters even further were the "orphan books"—books under copyright, but whose copyright owners cannot be located by someone wanting to make use of the work.[48] Although estimates of the number of orphan books vary widely—from well under 500,000 to two million or more[49]—their existence makes it all but impossible

learning, access to information, truth telling or truth seeking, competition, technological innovation, and privacy and autonomy interests of users." Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541–42 (2009). A fair use win on summary judgment would have terminated the lawsuit in Google's favor. *Cf.* Viacom Int'l Inc. v. YouTube, Inc. 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010), *aff'd in part and vacated in part*, 676 F.3d 19 (2d. Cir. 2012) (awarding summary judgment to Google in a putative class action prior to class-certification motions, specifically finding no infringement due to the Digital Millennium Copyright Act's safe harbor provision).

47. *Compare* Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19, 24–37 (2010) (arguing that a court would have found fair use), *and* Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L. REV. 87, 126–39 (2006) (giving reasons to support the fair use argument), *with* Doug Lichtman, *Copyright as Innovation Policy: Google Book Search from a Law and Economics Perspective*, *in* 9 INNOVATION POLICY AND THE ECONOMY 55, 62 (Josh Lerner & Scott Stern eds., 2008), *available at* http://www.nber.org/chapters/c8184.pdf?new_window=1 (arguing that "Google's fair use claim fails in its current form because its legal argument and its actual practices both sweep too broadly"). Some scholars take a middle ground. *See* Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1855–60 (2007) ("The unpredictability and the ex post discretionary nature of the present [fair use] doctrine make it a highly unsuitable foundation on which to build a proper opt-out regime for digital libraries."); Steven Hetcher, *The Half-Fairness of Google's Plan to Make the World's Collection of Books Searchable*, 13 MICH. TELECOMM. & TECH. L. REV. 1, 21–58 (2006) (arguing that snippets are a fair use, but that the database and library digital copies are not); Douglas Lichtman, *Google Book Search in the Gridlock Economy*, 53 ARIZ. L. REV. 131, 137–42 (2011) (arguing that narrower versions of the Google Books program targeted at orphan works would be fair); Samuelson, *supra* note 13, at 487–93 (giving arguments on both sides). Several courts have held that Google's Web search engine makes fair uses of the webpages it crawls and indexes. *See* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 719–25 (9th Cir. 2007); Field v. Google Inc., 412 F. Supp. 2d 1106, 1117–23 (D. Nev. 2006). The plaintiffs, however, dispute the analogy between books and webpages. *See* Plaintiffs' Memorandum of Law in Opposition to Defendant Google's Motion to Dismiss at 17 n.8, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 CV 8136-DC), ECF No. 997.

48. *See generally* U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS 2 (2006) (" 'orphan works[]' is a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner."), *available at* http://www.copyright.gov/orphan/orphan-report.pdf.

49. *See* Michael Cairns, *580,388 Orphan Works—Give or Take*, PERSONANONDATA (Sept. 9, 2009), http://personanondata.blogspot.com/2009/09/580388-orphan-works-give-or-take.html (estimating an upper bound of 580,388 orphan books published in the United States since 1920); JOHN P. WILKIN, COUNCIL ON LIBRARY & INFO. RES., BIBLIOGRAPHIC INDETERMINACY AND THE SCALE OF PROBLEMS AND OPPORTUNITIES

to create a comprehensive book search engine through individual negotiations. Congress has twice considered but not passed legislation to allow broader uses of orphan works.[50] Even those bills, however, would not have enabled Google Book Search, because they would have required a specific and "diligent" effort to locate the owner.[51]

In October 2008, following two and a half years of intense and secret negotiations[52] the parties announced a proposed settlement. It ran to over 140 pages with more than a dozen attachments.[53] Between then and the February 2010 fairness hearing, the settlement received hundreds of objections including two Statements of Interest submitted by the United States government raising antitrust and class-action concerns.[54]

Under the settlement, Google would have been allowed to continue scanning and searching books, much as before.[55] In return, it

OF "RIGHTS" IN DIGITAL COLLECTION BUILDING (Feb. 2011), http://www.clir.org/pubs/ruminations/01wilkin/wilkin.html/wilkin.pdf (estimating in the conclusion that 2.5 million orphan books in a collection of 5 million books have been digitized by Google and its library partners).

50. *See* Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2d Sess. 2008) (passed in the Senate Sept. 28, 2008 and referred to the House Committee on the Judiciary); Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2d Sess. 2006) (referred to the House Committee on the Judiciary).

51. *See* Shawn Bentley Orphan Works Act of 2008 § 2 (amending 17 U.S.C. § 514(b)(2)(A) to define "qualifying searches" as requiring "a diligent effort"); Orphan Works Act of 2006 § 2 (amending 17 U.S.C. § 514(a)(1)(i) to require "a reasonably diligent search"). The Acts were not drafted with mass digitization projects like Google's in mind; U.S. Copyright Office, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document*, U.S. COPYRIGHT OFF. (Oct. 2011), http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf.

52. Roy Blount Jr., *$125 Million Settlement in* Authors Guild v. Google, THE AUTHORS GUILD (Oct. 28, 2008), http://www.authorsguild.org/advocacy/125-million-settlement-in-authors-guild-v-google/.

53. *See* Declaration of Michael J. Boni in Support of Plaintiffs' Motion for Preliminary Settlement Approval at 4, 134, 144, Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 CV 8136-DC), ECF No. 56.

54. *See* Statement of Interest of the United States of America Regarding Proposed Class Settlement, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 CV 8136-DC), ECF No. 720 [hereinafter Statement of Interest I]; Statement of Interest II, *supra* note 11. *See generally Responses*, THE PUBLIC INDEX, http://thepublicindex.org/documents/responses (last visited Jan. 4, 2013) (collecting objections to the Authors Guild Settlement). In the fall of 2009, the parties withdrew the settlement and replaced it with an amended one that was narrower in various ways. *See* Authors Guild Settlement, *supra* note 2. This Article will discuss only the terms of the amended settlement, except where the initial settlement's terms raise an issue particularly on point with the analysis.

55. *See* Authors Guild Settlement, *supra* note 2, § 1.52 (defining "Display Uses" to include "Snippet Display"); *id.* § 1.147 (defining "Snippet Display" as "up to three (3) 'snippets' (each snippet being about three (3) to four (4) lines of text) per search term per user"); *id.* 2.2 (authorizing Google to make "Display Uses"); *id.* § 3.1 ("Google may, on a

would have paid $60 for each book that it had scanned, for a total of at least $45 million.[56] Beyond that, the settlement would have authorized some new major uses of the scanned books. Google would have sold online access to individual e-books,[57] and also offered an all-new all-you-can-read subscription service to libraries and other institutions.[58] In addition, Google would have shown search users previews of up to 20% of each book.[59] And finally, it would have created a "Research Corpus" for large-scale computational analyses of the texts by scholars.[60]

Google would have kept 37% of the revenue;[61] the rest would have been directed to a new Book Rights Registry for distribution to copyright owners who stepped forward to claim their books.[62] Those who did claim their books could choose whether to include them in the various revenue-generating programs.[63] The procedures for

non-exclusive basis, Digitize all Books and Inserts obtained by Google from any source . . . .").

56. *See id.* § 5.1(a) (defining "Cash Payments" as at least $60 per book); *id.* § 5.1(b) (requiring Google to contribute at least $45 million to fund Cash Payments); *id.* Attachment C (providing "Plan of Allocation" for payments among copyright owners).

57. *See id.* § 4.2 (establishing Consumer Purchase program). Google's eBookstore is extremely similar to the proposed Consumer Purchase program under the settlement. *See Books on Google Play*, GOOGLE PLAY, https://play.google.com/store/books?feature=corpus_selector (last visited Jan. 4, 2013). The key difference is that books in the eBookstore are there with the explicit opt-in permission of copyright owners, whereas the settlement would have allowed Google to include books whose copyright owners had not affirmatively opted out.

58. *See* Authors Guild Settlement, *supra* note 2, § 4.1 (establishing Institutional Subscription program). Google would also have been permitted—although not required—to give colleges and public libraries limited free access to the Institutional Subscription. *See id.* § 4.8 (authorizing Public Access service).

59. *See id.* § 4.3 (establishing Preview Use program); *id.* § 3.14 (allowing advertising on preview webpages).

60. *See id.* § 7.2(d); Brief for Digital Humanities and Law Scholars as Amicus Curiae Supporting Defendant at 1–3, Authors Guild v. Google, Inc., No. 05 Civ. 8136 (S.D.N.Y Aug. 3, 2012), ECF No. 1055.

61. *See* Authors Guild Settlement, *supra* note 2, § 4.5(a) (setting revenue split to be given to copyright owners at 70% of net revenues); *id.* §§ 1.89–1.90 (defining net revenues to exclude 10% for Google's operating costs).

62. *See id.* art. VI (establishing Registry and defining its duties, which also included negotiating with Google over subscription pricing, auditing Google's accounting, and negotiating with Google the terms of three additional uses: print-on-demand, downloadable copies (*e.g.* in PDF or EPUB format), and a subscription for individual consumers).

63. Class action scholars refer to these options as "back-end opt-out rights" to distinguish them from the right to opt out of the settlement itself. *See*, *e.g.*, Nagareda, *Autonomy, Peace, and Put Options*, *supra* note 9, at 758; Rhonda Wasserman, *The Curious Complications with Back-End Opt-Out Rights*, 49 WM. & MARY L. REV. 373, 383–84 (2007). They are options available within the settlement itself to class members who are otherwise bound by its terms. *See id.* at 379. As with everything else in the Google Books

dividing the money and control of a book between authors and publishers were complex, requiring a separate sixteen-page attachment.[64] Owners who did not claim their books would have been represented by an Unclaimed Works Fiduciary within the Registry,[65] which would have held their money for at least ten years, then given it to "literacy-based charities."[66] The settlement was immensely complicated; this overview describes only the terms directly relevant to its class-action *bona fides*.[67]

settlement, their details were complicated. The settlement let class members irrevocably remove their books from being scanned at all, but only for a limited time. *See* Authors Guild Settlement, *supra* note 2, § 3.5(a). It also gave them the option to exclude their books from being included in the revenue models or shown to users, an option they could toggle on or off at any time. *See id.* § 3.5(b).

64. *See* Authors Guild Settlement, *supra* note 2, Attachment C.

65. *See id.* § 6.2(b)(iii). Notwithstanding the name, the settlement did not actually require the Unclaimed Works Fiduciary to be vested with enforceable fiduciary duties. *See* Letter from Institution for Information Law and Policy at 2, *Authors Guild*, No. 05 Civ. 8136, ECF No. 856. It was added to the settlement because of the conflict of interest inherent in having copyright owners who had claimed their books sharing in revenue meant for those who had not. *See* Statement of Interest I, *supra* note 54, at 9–10; James Grimmelmann, *The Google Book Search Settlement: Ends, Means, and the Future of Books*, AM. CONST. SOC'Y FOR L. & POL'Y (Apr. 15, 2009), https://www.acslaw.org/sites/default/files/Grimmelman_Issue_Brief.pdf.

66. *See* Authors Guild Settlement, *supra* note 2, § 6.3(a).

67. For discussion of the copyright issues the settlement raised, see generally Katharina de la Durantaye, *H Is for Harmonization: The Google Book Search Settlement and Orphan Works Legislation in the European Union*, 55 N.Y.L. SCH. L. REV. 157 (2010) (describing settlement's role in advancing conversations about orphan works in the United States and in the European Union); Bernard Lang, *Orphan Works and the Google Book Search Settlement: An International Perspective*, 55 N.Y.L. SCH. L. REV. 111 (2010) (assessing settlement against limitations imposed by copyright treaty system); Lateef Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitized Textual Information*, 55 N.Y.L. SCH. L. REV. 77 (2010) (arguing that Google's digitization of books advances the distributive goals of copyright law); Sag, *supra* note 47 (comparing the settlement to the hypothetical results of litigation); Samuelson, *supra* note 13 (arguing that the settlement could implement forms of copyright reform that Congress would likely not be able to pass).

For antitrust discussion, see generally Einer Elhauge, *Why the Google Books Settlement Is Procompetitive*, 2 J. LEGAL ANALYSIS 1 (2010) (arguing that the settlement is legal under antitrust law); Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J. COMP. L. & ECON. 383 (2009) (asserting that the opt-out provision could raise antitrust concerns); Yuan Ji, Note, *Why the Google Book Search Settlement Should Be Approved: A Response to Antitrust Concerns and Suggestions for Regulation*, 21 ALB. L.J. SCI. & TECH. 231 (2011) (concluding that the settlement would not have granted exclusive orphan book access to Google or anticompetitive pricing power to the Rightsholders); Christopher A. Suarez, Note, *Continued DOJ Oversight of the Google Book Search Settlement: Defending Our Public Values and Promoting Competition*, 55 N.Y.L. SCH. L. REV. 175 (2010) (arguing that the settlement fails antitrust scrutiny).

On privacy issues, see generally Elisabeth A. Jones & Joseph W. Janes, *Anonymity in a World of Google Books: Google Books, Privacy, and the Freedom to Read*,

Returning to the settlement's treatment of future conduct, the operative clause read:

> 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 . . . .[68]

In turn, the settlement defined "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 . . . .[69]

POL'Y & INTERNET, no. 4, 2010, at 43, http://www.psocommons.org/cgi/viewcontent.cgi?article=1072&context=policyandinternet (teasing out the differences in reader privacy protections between public libraries and Google Books); Kathleen E. Kubis, Note, *Google Books: Page by Page, Click by Click, Users Are Reading Away Privacy Rights*, 13 VAND. J. ENT. & TECH. L. 217 (2010) (proposing a comprehensive federal privacy statute).

For an overview of the relationships among these issues, see generally James Grimmelmann, *The Elephantine Google Books Settlement*, 58 J. COPYRIGHT SOC'Y U.S.A. 497 (2011) (connecting antitrust, copyright, and class-action concerns); Grimmelmann, *The Google Book Search Settlement*, *supra* note 65 (arguing that settlement raises significant concerns in multiple areas).

68. Authors Guild Settlement, *supra* note 2, § 10.2(a).

69. *Id.* § 10.1(f) (indentation added to show structure). A "Rightsholder" was defined as any person who owned a copyright in a book as of January 5, 2009. *Id.* §§ 1.13, 1.19, 1.134. Thus, class membership was closed as of a certain date, and the set of books to which the settlement applied was also closed. In contrast, the set of claims released by these class members with respect to these books was open-ended, because it included future claims based on Google's future conduct. Thus, the settlement reached future conduct, but not future authors or future books. To understand the difference, contrast a

This definition neatly split into two parts. Clause (A) covered past conduct: it released claims arising out of Google's actions before the date the settlement was to take effect.[70] Clause (B) covered future conduct: it released claims arising out of Google's actions afterwards. Thus, if Google digitized a book the day before the Effective Date, it would have been past conduct shielded by clause (A); if Google digitized a book the day after the Effective Date, it would have been future conduct shielded by clause (B).

The two prongs, past and future, had very different scopes. Clause (A) hewed closely to specific and identified actions that Google had already undertaken: digitizing books, making a search index, and showing snippets to search users.[71] But clause (B) was much broader. It covered "any act or omission authorized" by the settlement.[72] So to understand its scope, one must read the other hundred and forty pages of the settlement. Those pages included individual book sales, the subscription service, excerpts shown as free previews to users, computational research, and everything else the settlement allowed Google to do.[73] If the settlement had been approved, then clause (A) would have resolved the underlying lawsuit, while clause (B) would have gone further and authorized Google's universal bookstore.

When the court rejected the settlement in March 2011, this distinction between past-conduct releases and future-conduct releases was central to its reasoning:

book published in 2008 but not scanned by Google until 2108 with a book published and scanned in 2010. The former would have been covered by the settlement, and the latter would not.

It is unclear what effect the limiting phrase "every Claim . . . that . . . could have been asserted" was intended to have. Claims arising out of the controversial parts of the settlement—Google's sales of complete books—could not have been asserted in the lawsuit, because they were not ripe. *See* Authors Guild, Inc. v. HathiTrust, No. 11 CV 6351(HB), 2012 WL 4808939, at *7–8 (S.D.N.Y. Oct. 10, 2012) (holding that claims against Google's library partners for distributing complete books were not ripe because a " 'mere possibility' that one of Plaintiffs' works might be included on a future list of orphan works or made available is not enough" to create a ripe dispute). But the entire settlement was premised on the assumption that it would indeed authorize the sale of complete books. The most likely possibilities are that the parties did not appreciate that these future-conduct claims were unripe or that that the language of "claims that could have been asserted" is such standard boilerplate in settlements that they were reluctant to tamper with it. Neither possibility is reassuring about the competence of class counsel in future cases to draft effectively tailored future-conduct releases; *see also infra* Part V.A (discussing ripeness issues in litigation against Google and its library partners).

70. *See* Authors Guild Settlement, *supra* note 2, § 1.53 (defining "Effective Date").

71. *See id.* § 10.1(f)(A).

72. *See id.* § 10.1(f)(B).

73. *See supra* notes 55–60 and accompanying text.

> The [settlement] can be divided into two distinct parts. The first is a settlement of past conduct and would release Google from liability for past copyright infringement. The second would transfer to Google certain rights in exchange for future and ongoing arrangements, including the sharing of future proceeds, and it would release Google (and others) from liability for certain *future* acts.[74]

According to the court, the future-conduct releases were impermissible: "this second part of the [settlement] contemplates an arrangement that exceeds what the Court may permit under Rule 23."[75]

B. *Defining Future-Conduct Releases*

There are three features of this example worth emphasizing:

- The settlement used releases.
- The releases applied to future conduct.
- The releases were given by the class.

The next three sections consider each of these features in turn.

1. *Releases* for Future Conduct Given by a Class

Every settlement includes at least two kinds of terms: the *releases* of legal claims given by the plaintiff, and the *relief* it obtains in return. Typically, a plaintiff has nothing to fear from the relief—these terms can only benefit it. Thus, even though the Google Books settlement would have created a $34.5 million Book Rights Registry and given it numerous responsibilities, these were not reasons to be concerned.[76] Even relief involving far-off future action on the defendant's part is common. Class-action settlements regularly establish claim-processing facilities, fund educational programs, or even provide medical services to class members.[77] Extinguishing asbestos claims in

74. *See* Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 676 (S.D.N.Y. 2011).

75. *Id.* at 677. For the history of the lawsuit following the settlement's rejection, see *infra* Part V.A.

76. *See* Authors Guild Settlement, *supra* note 2, § 2.1(c) (obligating Google to fund the Registry with an initial $34.5 million and summarizing its responsibilities).

77. *See*, *e.g.*, *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., MDL No. 1203, No. 99-20593, 2000 U.S. Dist. LEXIS 12275, at *69–72, *79–82 (E.D. Pa. Aug. 28, 2000) (approving settlement creating a trust to pay class members' claims, providing free echocardiograms for class members, and establishing a $25 million fund for heart-disease medical research and education). The Diet Drugs fund, approved in 2000, is still open. *See generally* AHP DIET DRUGS SETTLEMENT, http://www.settlementdietdrugs.com (last visited Jan. 4, 2013) (providing information about Diet Drugs fund for class members).

bankruptcy requires the creation of a trust that may need to be kept open for decades.[78]

Rather, it is the releases given by class members that make a settlement dangerous to them.[79] (The same is true in individual settlements: a party is at risk because of what it gives up, not because of what it gets.) But because it is a release that makes a settlement a settlement, the mere fact that a settlement contains releases is not a reason to reject it. Every settlement does. The objectors who called the Google Books settlement a "commercial transaction" were wide of the mark.[80] As William Rubenstein has observed, much of modern

78. *See* 11 U.S.C. § 524(g) (2006) (permitting a bankruptcy court approving a plan of reorganization in Chapter 11 to issue an injunction preventing future claims against a debtor "seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products," but only if the plan also establishes and funds a trust that "will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner"). Section 524(g), the so-called "Manville Amendment," was enacted in 1994 to bless and codify the procedure followed in the six-year journey through bankruptcy of the Johns-Manville Corporation. *See generally* Mark D. Plevin et. al., *The Future Claims Representative in Prepackaged Asbestos Bankruptcies: Conflicts of Interest, Strange Alliances, and Unfamiliar Duties for Burdened Bankruptcy Clients*, 62 N.Y.U. ANN. SURV. AM. L. 271, 278–80 (2006) (providing an overview of how § 524(g) of the Bankruptcy Code deals with future claims in asbestos-related litigation). The original Manville Trust, established in 1988, is still open. *See* Financial Statements and Report of Manville Personal Injury Trust for the Period Ending March 31, 2011, *In re* Johns-Manville Corporation, No. 82 B 11656 (Bankr. S.D.N.Y. Apr. 29, 2011), *available at* http://www.mantrust.org/FTP/2011FirstQ.pdf (reporting $1.06 billion in assets and over 20,000 open claims).

79. This Article focuses on releases because they are the most common kinds of concessions given by a plaintiff class. But this focus should not be taken to imply that other forms of concessions are harmless. When a class promises to pay money, or concedes liability, or makes promises, these terms also expose the class to harm. Indeed, there have been notorious abuses in which class members found themselves out of pocket at the end of the day. *See*, *e.g.*, Kamilewicz v. Bank of Bos. Corp., 92 F.3d 506, 508–09 (7th Cir. 1996) (refusing to allow collateral attack on a class-action settlement that obligated class members to pay attorneys' fees in excess of their recoveries). The case drew a strong dissent. *See* Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1349–53 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc). But these other devices have generally been recognized as dangerous, and subjected to blistering criticism. *See*, *e.g.*, Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1067–68 (1996) (criticizing underlying settlement in *Kamilewicz*). This Article seeks to bring the same kind of sunlight to future-conduct releases.

80. *See* Objection of Scott E. Gant to Proposed Settlement, and to Certification of the Proposed Settlement Class and Sub-Classes at 5, Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y 2011) (No. 05 CV 8136), ECF No. 141 ("commercial transaction"); Objection of Amazon.com, Inc., to Proposed Amended Settlement at 1, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 CV 8136), ECF No. 823 ("business arrangement"); Objections of Microsoft Corp. to proposed Settlement and Certification of Proposed Settlement Class and Sub-Classes at 22, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 CV 8136), ECF No. 276 ("business deal").

class-action practice is transactional.[81] Class members sell their claims to the defendant in exchange for payment. The defendant wants to purchase finality, and the settlement process is simply an extended negotiation over the terms of the deal. The defendant might promise to change its behavior, or to pay class members money, or to undertake other obligations to make their lives better. The question for the court is whether they receive sufficient compensation for the releases they give.[82]

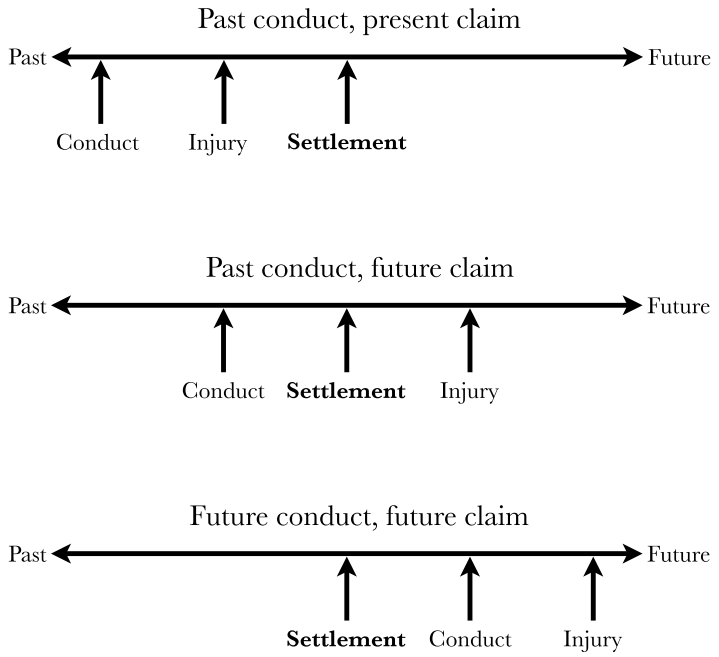
2. Releases for *Future Conduct* Given by a Class

There are two distinctions about future-conduct releases worth making: between *future* conduct and *past* conduct, and between future *conduct* and future *claims*. Both can be illustrated with the hypothetical Warhol Soup example. Suppose that Batch 15M-1928, made and sold in 2010, was tainted with pathogenic E. coli. Contrast three possible settlements of a resulting class-action lawsuit:

- Consumers who have gotten sick from Batch 15M-1928 release their claims against Warhol in exchange for $50 payments. This is a settlement of present claims arising out of past conduct. Consumers who get sick in 2015 can still sue.
- Consumers who ~~have gotten sick~~ will get sick from Batch 15M-1928 release their claims against Warhol in exchange for $50 payments. This is a settlement of future claims arising out of past conduct. Consumers who get sick in 2015 from the delayed consequences of eating soup from Batch 15M-1928 cannot sue and must be content with the fixed $50 payments instead. Those who get sick in 2015 from eating other batches made in later years can sue.
- Consumers who ~~have gotten sick~~ will get sick from ~~Batch 15M-1928~~ future batches of Fifteen Minutes of Tomato release their claims against Warhol in exchange for $50 payments. This is a settlement of future claims arising out of future conduct. Consumers who get sick in 2015 cannot sue and must be content with the fixed $50 payments instead, no matter when the soup they ate was made.

81. *See* William Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 372–73 (2001).

82. *See* FED. R. CIV. P. 23(e)(2) (permitting approval of settlement only on a judicial finding that it "fair, reasonable, and adequate").



Past-conduct releases are almost completely at the discretion of the party giving the release. Not so with future-conduct releases: sometimes, public policy prohibits them. So, for example, the Supreme Court has held that "there can be no prospective waiver of an employee's rights under Title VII."[83] Of course, this limit applies also to settlements; if it did not, the civil rights laws could be evaded by the "settlement" of a collusive lawsuit.[84]

This substantive rule against future-conduct releases is not universal: some areas of law have it, others do not. The key question—albeit one that is not made explicit in the case law—appears to be whether the area of law has a public policy against private ordering. Anti-discrimination law obviously does: even if a particular individual were willing to be subjected to invidious discrimination, it would still be against public policy because it would

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

84. *See* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 854 (5th Cir. 1975) ("Clearly apart from compliance or noncompliance with the decrees, the release cannot preclude a suit for *any* form of appropriate relief for *subsequent* injuries caused by *future* acts or undertakings the effects of which are equivalent to the otherwise compromised, noncompensable effects of past discriminations covered by the complaint or the decrees."); *see also* 29 U.S.C. § 626(f)(1) (2006) (allowing knowing and voluntary waivers of age discrimination claims); *id.* § 626 (f)(1)(C) (prohibiting waivers of age discrimination claims "that may arise after the date the waiver is executed").

tend to lock in a system of subordination and stereotyping that would harm others. So does antitrust law: its *raison d'être* is to prohibit forms of private ordering that have serious negative effects for competition and consumers.[85]

Other areas of law do not have a substantive policy against future-conduct releases. Copyright law depends on voluntary licensing to compensate authors and get works to the public;[86] a rule against future-conduct releases would make prospective licensing harder or impossible, to the great detriment of authors, publishers, and readers.[87] Sometimes the analysis requires more detailed factual attention, as with the rule against prospective waivers of liability for harm caused negligently by "one charged with a duty of public service," such as a doctor.[88]

Although these public-policy limits sometimes emerge in class actions, they stem from the substantive law, not from the class-action form. A good example is *Williams v. Vukovich*,[89] a case involving racial discrimination by the Youngstown police department.[90] The court rejected a proposed consent decree[91] that would have "waive[d]

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

86. *See*, *e.g.*, 17 U.S.C. § 101 (2006) (distinguishing "transfer of copyright ownership" from a "nonexclusive license"); *id.* §§ 112(e)(2) (exempting voluntary license negotiations over certain ephemeral recordings from the antitrust laws); *id.* § 205(e) (establishing priority as between nonexclusive licenses and transfers).

87. *See* Transcript of Fairness Hearing at 143, Authors Guild v. Google, Inc., No. 05 Civ. 8136 (S.D.N.Y. Feb. 18, 2010) (argument of Daralyn Durie on behalf of Google) ("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.").

88. RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981). This example reflects a balance between a general backdrop of freedom of contract and more specific oversight of the regulated professions. *See id.* cmt. a.

89. 720 F.2d 909 (6th Cir. 1983).

90. *See id.* at 912; *see also* Transcript of Fairness Hearing, *supra* note 87, at 48–49 (argument of David Nimmer on behalf of Amazon.com, invoking *Vukovich*).

91. A consent decree is "an agreement between the parties to end a lawsuit on mutually acceptable terms which the judge agrees to enforce as a judgment." Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 325 (1988). It differs from an ordinary civil settlement in that the court retains jurisdiction to enforce the agreement's terms: the parties "can resolve disputes [about the settlement's terms] and get enforcement without filing a new suit and starting at the end of the queue." Frank H. Easterbrook, *Justice and Consent in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 20 (1987). It may be modified or vacated by the court due to changed circumstances. *See* Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 378–81 (1992).

Class-action settlements and consent decrees overlap. A class-action settlement may include provisions providing for ongoing relief; when it does, the agreement is both a class-action settlement and a consent decree. *See, e.g.*, Local No. 93, Int'l Ass'n. of

the ability of minorities to complain about discrimination which may occur in the future" by allowing the Youngstown police department to use a new examination system even if it had discriminatory impact.[92] The court held that a "waiver of future discrimination is impermissible": a rule that is specific to civil rights law, but not to class actions.[93]

3. Releases for Future Conduct *Given by a Class*

Releases by classes are categorically different than releases by individuals.[94] The legal system already leaves individuals to make their bargains, for good or for ill. Ordinary contracts are full of

Firefighters v. City of Cleveland, 478 U.S. 501, 508–09 (1986). And like class-action settlements, consent decrees require judicial approval. *See id.* at 525 ("[A] consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction."); Sys. Fed'n No. 91, Ry. Emp. Dept. v. Wright, 364 U.S. 642, 651 (1961) ("The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. . . . [T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. . . . [T]he adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives . . . ."). *See generally* Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291 (1988) (discussing contract and judicial decree paradigms of consent decrees).

Still, it is important to distinguish the different kinds of terms that may appear in a settlement. The essential aspect of a consent decree is that it is a *decree*: it invokes the court's equitable powers, functions as injunctive relief, and can be enforced by holding the violator in contempt of court. United States v. City of Miami, 664 F.2d 435, 439–40 (5th Cir. 1981) (per curiam). Whether a class-action settlement includes any such provisions is independent of the scope of the releases it contains. *See generally* DOUG RENDLEMAN, COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT 399–401 (2010) (discussing the theoretical and practical aspects of consent decrees).

92. *Vukovich*, 720 F.2d at 926.

93. *Id.*

94. This Article discusses only class actions, rather than other forms of nonclass aggregation, such as shared representation, coordinated pretrial processing, and mass arbitration. There are two reasons. First, a proper treatment of nonclass aggregation would greatly expand the scope of the Article. Second, the Article is principally concerned with the unjustified use of judicial power to impose terms on class members, a concern that plays out very differently when the aggregation shapes class members' rights and options less directly. *See generally* Elizabeth Chamblee Burch, *Procedural Justice in NonClass Aggregation*, 44 WAKE FOREST L. REV. 1 (2009) (developing theory of procedural justice for nonclass aggregation that draws on class-action scholarship); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000) (developing theory of professional ethics for nonclass aggregation that draws on class-action scholarship); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105 (2010) (identifying situations raising aggregate-litigation concerns); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011) (describing common aggregation problems in class actions and nonclass litigation).

releases for present and future claims based on past and future conduct, as in the warranties section of a contract for the sale of services. The same autonomy principle that lets Adam sign a contract hiring Steve to cut down trees on Adam's land also lets Adam release Steve from liability for trespass and conversion when Steve cuts them down. If Adam wants to give Steve those releases as part of a settlement of an active lawsuit, the legal system will let him: it has already conceded the general principle.

But class litigation is inherently representational, and that changes matters.[95] 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 a settlement—that is, by invoking the court's power to impose a settlement on absent members of the class.[96] This requires justification in a way that individual releases do not. We let individuals make improvident decisions on their own behalf; but we try not to let class counsel make improvident decisions on behalf of class members.

What matters is the character of the release, not the character of the lawsuit. 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.

Cases sometimes speak broadly about class-action settlements that "provide[] broader relief than the court could have awarded after a trial."[97] Uniformly, however, these cases deal with broad relief given

95. *See generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (discussing history of representative litigation); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990) (reviewing YEAZELL) (same); Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577 (2011) (challenging contemporary theories of representation).

96. This is the defining feature of representational litigation—that the judgment will be binding on "absent" class members who were not before the court. *See, e.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 367 (1921) ("If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented."). Articles with useful discussion of representation in class actions include Bone, *The Puzzling Idea*, *supra* note 95, at 577; Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1857 (1998); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 224 (2003).

97. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 179, 185 (2d Cir. 1987) (quoting Local No. 93, Int'l Assoc. of Firefighters v. Cleveland, 478 U.S. 501, 525 (1986)).

to the class rather than with broad releases given by the class. For example, in *Local No. 93, International Association of Firefighters v. Cleveland*,[98] minority firefighters sued Cleveland for racial discrimination.[99] The city agreed to a consent decree that reserved some promotions for minorities.[100] A group of white firefighters intervened and objected 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.[101] The Supreme Court upheld the consent decree, explaining:

> 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.[102]

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 who would be bound by its releases.[103] 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 given by the class in a Rule 23(e) review: it speaks of "relief" to the plaintiffs, not the "releases" given by the plaintiffs.[104] This is why the cases offering "detailed structural arrangements addressing matters well beyond the generalized allegations of the complaint" are simply not relevant to future-conduct releases by a class.[105] Similarly, the recent ALI Principles of the Law of Aggregate Litigation state, "Class actions may also be settled on terms that may include remedies

98. 478 U.S. 501, 504 (1986).
99. *Id.* at 504.
100. *Id.* at 507–08.
101. *Id.* at 507, 511.
102. *Id.* at 525 (internal citations omitted).
103. *See* Martin v. Wilks, 490 U.S. 755, 761 (1989).
104. *See Firefighters*, 478 U.S. at 504. The *Authors Guild* court therefore erred when it accepted the parties' arguments that the *Firefighters* test governed. *See* Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 675 n.7 (S.D.N.Y. 2011). It compensated for that error, however, by concluding that the test was not satisfied, writing that "that the released claims would not come within 'the general scope of the case made by the pleadings.' " *Id.* at 679 (quoting *Firefighters*, 478 U.S. at 525).
105. Brief of Google in Support, *supra* note 36, at 9 (listing cases).

not available in contested lawsuits . . . ."[106] The choice of wording is significant: the court may award "remedies" not available through litigation, not "releases."

* * *

Standing alone, none of these three features is novel. Courts and scholars understand clearly the differences between promises and releases, between past conduct and future conduct, and between individual and class litigation. Even in pairs, they are all old hat. It is only the combination of the three that is unfamiliar: releases for a defendant's future conduct by a class.

II. PROBLEMS WITH FUTURE-CONDUCT RELEASES

It is well understood that class-action settlements are dangerous to class members. The attorney-directed nature of class litigation creates structural incentives for class counsel to be disloyal to their "clients" in the class.[107] The settlement negotiations feature the defendant on one side and class counsel on the other. The defendant would like to purchase "global peace" from the class and is prepared to pay for it. The broader the releases, the more it will pay. Class counsel, for their part, are paid in proportion to the size of the deal. This common interest naturally pushes toward settlements with the

106. THE AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.01(a) (2010).

107. *See, e.g.*, LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA 335–73 (2011) (discussing the abuse of contingency fees in class actions); Coffee, *supra* note 9, at 1367–84 (describing incentives for class counsel in the mass tort context and the resulting danger of collusion with the defendant); Koniak, *supra* note 9, *at* 1051–86 (describing in detail the problematic terms in one settlement); *cf.* Ortiz v. Fibreboard Corp., 527 U.S. 815, 852 (1999) ("Class counsel thus had great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class."). For a discussion of possible responses to this problem, see generally John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000) [hereinafter Coffee, *Class Action Accountability*] (arguing that problems of collusion could be avoided by promoting client autonomy rather than class cohesion); John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288 (2010) (extending argument of *Class Action Accountability* with evidence and models from European practice); Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000) (arguing that problems of abusive class actions can be solved without abandoning the device); Issacharoff, *supra* note 9 (discussing class governance mechanisms to temper the risks of ineffective or disloyal class counsel); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65 (2003) (same); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435 (2006) (same); Wolfman & Morrison, *supra* note 9 (same).

broadest possible releases. Meanwhile, both defendant and class counsel would rather sign off on a settlement that pays class counsel a little than one that pays class members a lot. This leads to settlements that "pay" for broad releases in coin that does not really benefit class members, such as coupons worth less than their nominal value, "*cy pres*" awards to unrelated charities, side payments to the attorneys' individual clients outside of the settlement, and better relief for some class members than for others. The possibility, nay probability, of collusive sweetheart settlements drives the Rule 23(e)(2) requirement that courts approve only those settlements that are "fair, reasonable, and adequate."[108]

With this backdrop in mind, this Part will compare future-conduct settlements to their past-conduct siblings. The baseline for the comparison will be a run-of-the-mill settlement of a Rule 23(b)(3) class action for money damages,[109] as in the first (past conduct, past

108. FED. R. CIV. P. 23(e)(2).

109. This choice could be challenged on two grounds. First, it takes a plaintiff class action as the baseline, although Rule 23 explicitly permits a class to "sue or be sued." FED. R. CIV. P. 23(a). Defendant class actions are "rare as unicorns," and with good reason. Coffee, *Class Action Accountability*, *supra* note 107 at 388. Because a defendant class (or a plaintiff class facing counterclaims) risks actual liability, not just the loss of a right to sue, it presents the higher-stakes concerns discussed in *infra* Part II.A. And there have been notorious abuses of defendant class-actions due to the practical difficulty of finding appropriate class representatives and financing their work. *See, e.g.*, Richardson v. Kelly, 191 S.W.2d 857, 864 (Tex. 1946) (refusing to allow collateral attack on a judgment in a defendant class action where the plaintiff had hand-picked representative defendants to avoid those who were likely to seriously contest the suit). *Richardson* involved a case litigated to judgment rather than settled, but it illustrates well the mischief that is possible when class representatives can obligate class members to make payments. *See* ZECHARIAH CHAFEE JR., SOME PROBLEMS OF EQUITY 239–42 (1950) (criticizing *Richardson*); Russell P. Duncan, Note, *Judicial Enforcement of Administrative Duty:* W.R. Grace & Co. v. CAB, 55 YALE L.J. 831, 836 (1946) (calling *Richardson* "unfair"); Harold Hoffman, Comment, *Denial of Due Process Through Use of the Class Action*, 25 TEX. L. REV. 64 *passim* (1946) (discussing *Richardson*). For these reasons, "stricter due process considerations put greater limits on the use of defendant classes than plaintiff classes." 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4:48 (4th ed. 2011). Thus, courts have already responded to the ways in which defendant class actions deviate from the plaintiff-class baseline by imposing additional safeguards, confirming that the plaintiff-class baseline is the appropriate one.

Second, the Article takes a rule 23(b)(3) opt-out class as its baseline, rather than a mandatory class under subsections (b)(1) or (b)(2). Here the choice is primarily one of expository simplicity. The claims that could be extinguished and the issues that could be resolved in a mandatory class action do not exceed those at stake in a Rule 23(b)(3) class action. The prerequisites to the mandatory class actions do not create new opportunities for abuse, and the question of notice and opt-out rights is for the most part independent of the question of future conduct. The one exception is that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985) creates a link between opt-out rights and the risks a class faces in litigation. *See also infra* Part III (discussing *Shutts*).

claims) and second (past conduct, future claims) versions of the Warhol Soup hypothetical.[110] The risks of future-conduct releases to class members 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.

It is worth exploring just how it is that releases can be so uniquely creative. A promise not to sue is effectively a grant of permission, which in turn gives the released party freedom of action. Consider the Google Books settlement, and ask how it is that a one-paragraph release could bring a universal bookstore into being. Without the releases, the settlement's principal programs—selling complete copies of books—would have been open-and-shut copyright infringement. This is how the settlement works: delete clause (B) from the definition of Google Released Claims and Google would lack the legal cover it needs. True, the settlement also obligated Google to fund and launch the bookstore, but the bookstore would have been legally possible only by virtue of the releases given by class members.[111]

It should be clear that one can do a remarkable amount with appropriately drafted releases. Here are a few more ambitious possibilities:

Alternative Tort Compensation: Following the Deepwater Horizon explosion, BP voluntarily created the Gulf Coast Claims Facility (GCCF); those injured by the oil spill could make claims by giving up their right to sue.[112] But with future-conduct releases and a

110. *See supra* Part I.B.2.

111. *See* Authors Guild Settlement, *supra* note 2, §§ 2.1(c), 10.1(b). Even more dramatically, the authors and publishers would have been required to give extensive releases to each other, the effect of which would have been to allocate the revenues from any given book among possible claimants in a way that need not track the original contract, and then to channel them into a mandatory arbitration program for resolving any disputes. *See id.* art. IX (requiring arbitration) & Attachment A (establishing author-publisher procedures); Objections of Science Fiction & Fantasy Writers of America, Inc., & American Society of Journalists & Authors, Inc., to the Amended Settlement Agreement at 16–22, Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 1:05-cv-08136-DC), ECF No. 864.

112. *See generally* Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819, 825 (2011) ("[I]t is difficult to discern any basis for legitimacy for the GCCF. For those

little forethought, BP could have achieved the same results far more cheaply. Suppose that following an earlier, minor spill, BP had faced a class-action lawsuit on behalf of all residents of the Gulf States. Then suppose it had settled that lawsuit with a future-conduct release shielding it from liability for any future spills, in exchange for establishing a $1 billion compensation fund, against which all future claims must be directed.[113]

Land Assembly: A developer wishing to build a skyscraper on a currently occupied city block brings a quiet title suit against a class of all the landowners on the block. The class representative and developer then negotiate a mandatory, non-opt-out settlement that will pay each class member 105% of the appraised value of her land in exchange for a release of any right to sue the developer for its actions in knocking down the current buildings on the block, erecting the skyscraper, and operating it for the next seventy-five years. This is privatized eminent domain via class-action settlement.

Health Care Reform: A class of policyholders sues all the major healthcare insurers in the United States, alleging a conspiracy to fix prices. Over time, the settlement negotiations metastasize, and what emerges is a proposed settlement that comprehensively establishes new rules on reimbursement limits, acceptable grounds for rescission, claims processing procedures, choice of doctors, and so on. The insurers agree to these new terms; the policyholders agree to give up all future claims except for violation of the new terms. This is the Patient Protection and Affordable Care Act, but accomplished through a class-action settlement.[114]

These hypothetical settlements are problematic in ways that go beyond their use of future-conduct releases. The oil-spill settlement, for example, raises serious commonality issues in lumping together victims injured in different ways by different spills. The land assembly settlement might be considered fundamentally unfair because it coerces a sale. And the health-care reform settlement calls into the question the ability of the named plaintiffs to represent such a

concerned with the rule of law, equity, and fundamental fairness, the GCCF ought to be a cause for concern.”).

113. This amount, while large enough to seem plausible ex ante, would have been grossly inadequate ex post. GCCF actually paid out over two billion dollars. *See* GULF COAST CLAIMS FACILITY, OVERALL PROGRAM STATISTICS 4 (Oct. 7, 2011), http://web.archive.org/web/20101216023532/http://gulfcoastclaimsfacility.com/GCCF_Overall_Status_Report.pdf.

114. *See* Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) (“PPACA”) (codified as amended in scattered sections of 26 and 42 U.S.C.). This hypothetical was suggested by Susan Koniak.

sprawling class on such a wide range of matters. One hopes that a court would be sensitive to these issues. But the fact that these hypothetical future-conduct settlements make even the most ambitious (and ethically problematic) actual class-action settlements look downright reasonable in comparison should be setting off alarms.

The rest of this Part will explore the specific dangers posed by future-conduct releases. To summarize: there is more at stake in future-conduct releases, they are harder to understand, they create unique design problems, the aggregation of rights is itself dangerous, and courts are the wrong institutions to be making such decisions.

A. High Stakes

In the past-conduct version of the Warhol Soup settlement, the soup has already been manufactured, sold, and eaten. This is both bad news and good news for consumers. The bad news is that the legal system cannot keep them from getting sick; the good news is that the legal system cannot make them any sicker. The status quo is that they have been injured and have not yet been compensated. In the best case they will be fully compensated and in the worst case they will not—but only compensation is at risk, not the extent of their injuries.

While past-conduct releases are limited by past harms, future-conduct releases raise the stakes to include future harms as well. These harms need never happen. If the soup settlement releases Warhol Soup from liability for future batches of soup, many more people may get sick than if the settlement is silent on future conduct or if Warhol agrees never to sell it again. A past-conduct settlement of the Google Books case would cover eight years; a future-conduct settlement would run for over a hundred. The breathtaking ambition of the hypothetical oil-spill, skyscraper, and health-care settlements is possible only because of their use of future-conduct releases.

Put another way, the potential outcomes can display much higher variance when class-action settlements can include future-conduct releases, and some outcomes are much more negative for class members. At least with a past-conduct settlement, the outcomes are bounded below by the status quo; not so with a future-conduct settlement. Higher variance, of course, need not imply lower expected returns. If class members are fully compensated for the increased risk of harm they bear, a settlement containing future-conduct releases could in theory be good for them. Unfortunately, there are also good reasons to believe that courts will systematically get many of these decisions wrong.

B. *Uncertainty*

As the saying goes, it's tough to make predictions, especially about the future. Future-conduct releases by their very nature require predictions. The attorneys drafting the settlement, the class members considering whether to opt out or object to it, and the court deciding whether to approve it all must do so from a position of ignorance about what will happen. That is, the procedural posture of a settlement containing future-conduct releases inherently creates informational problems.

Of course, even past-conduct settlements can depend on predictions. This is why the future-claims cases are so vexing. 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.[115] Seemingly "comprehensive" settlements in mass-tort cases have unraveled badly: initial estimates about the ultimate number and extent of class members' injuries have frequently proven to be far too optimistic.[116]

Future-conduct settlements take these informational problems to an entirely different level. The court must now predict the consequences not of events that have already happened, but of events that have yet to happen. These are predictions about the results of predicted conduct: predictions on stilts. The defendant's conduct becomes a new moving part. Each option to act in one way or another creates a new set of possible outcomes the court must analyze; as the number of independent decisions the defendant is allowed increases, the number of outcomes increases exponentially. The more complex the settlement, the more the possible futures will diverge in subtle and hard-to-predict ways. Courts are spectacularly badly positioned to carry out the necessary analysis. In the words of Samuel Issacharoff on class-action settlements, "Perhaps in no other context do we find courts entering binding decrees with such a complete lack of access to

115. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997) (discussing difficulty of giving adequate notice "to legions so unselfconscious"); Hazard, *supra* note 9, at 1910 (discussing intractability of "unknown claims on the part of unknown claimants").

116. *See, e.g.*, RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 111–13 (2007) (describing the unraveling of Owens-Corning asbestos settlement program); *id.* at 143–48 (describing unraveling of fen-phen settlement); Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 601–05 (1996) (describing the unraveling of the Johns-Manville asbestos trust).

quality information and so completely dependent on the parties who have the most to gain from favorable court action."[117]

For example, one of the least knowable questions about the Google Books settlement was also one of the most important: how the books would be priced. For individual book sales, Google pledged to develop an algorithm that would set a profit-maximizing price for each book.[118] But the algorithm itself was not in existence: it was specified only by a few vague and mutually inconsistent phrases in the settlement.[119] Similarly, the subscription service was to be priced to meet two objectives in significant tension: "revenue at market rates" for copyright owners and "broad access" for the public.[120] Under such circumstances, it was impossible to make any reliable predictions about how books would be priced if the settlement went into effect—and yet such predictions were key to answering such basic questions as whether the settlement would bring in enough money to make the Registry sustainable, whether the subscription's pricing would unreasonably put the squeeze on libraries, and whether the coordinated pricing would amount to an anti-competitive price-fixing scheme.

117. Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 808 (1997); *cf.* Schuck, *supra* note 9, at 973 (calling adjudication a "poorly informed decisionmaking process" with limited "policy coherence and general applicability").

118. *See* Authors Guild Settlement, *supra* note 2, § 4.2(b)(i)(2) (indicating that the price is to be determined by an algorithm "that Google will design to find the optimal price for each such Book"); *id.* § 4.2(c)(i) (specifying price points). Here is the specification of the algorithm itself:

> The Pricing Algorithm shall base the Settlement Controlled Price of a Book, on an individual Book by Book basis, upon aggregate data collected with respect to Books that are similar to such Book and will be designed to operate in a manner that simulates how an individual Book would be priced by a Rightsholder of that Book acting in a manner to optimize revenues in respect of such Book in a competitive market, that is, assuming no change in the price of any other Book.

Id. § 4.2(c)(ii)(2); *see also* Elhauge, *supra* note 67, at 37–38 (admitting that the original settlement's specification was ambiguous and giving interpretation of amended settlement's specification).

119. *See* Letter from Institution for Information Law and Policy, *supra* note 65, at 5 (noting contradiction between settlement's mandate to find the individually optimal price for each book and its specification of the initial distribution of prices).

120. Authors Guild Settlement, *supra* note 2, § 4.1(a)(i); *see also* Academic Author Objections to the Google Book Search Settlement at 3–5, Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 1:05-cv-08136-DC), ECF No. 336 [hereinafter Academic Author Objections] (expressing concern about lack of constraints on subscription pricing and describing pricing oversight procedures as "byzantine, even Kafkaesque").

Similarly, unpredictability is one of the significant problems in the health-care hypothetical. The U.S. health-care compensation system is already so intricate that it displays unexpected emergent behavior, and no one has more than a general idea of what consequences the Affordable Care Act will bring. If the Act were a settlement, would it be "fair, reasonable, and adequate" to patients? Are you sure?

C. Moral Hazard

Future-conduct releases are also hard to get right because the future can be changed. A badly designed future-conduct release can create perverse incentives. Releasing a past-conduct claim affects only the price the defendant must pay ex post for its alleged breach of duty. But to release future-conduct claims is to tamper with incentives. By displacing the potential liability the defendant would otherwise face, a settlement can leave the defendant with less ex ante reason to care about harms it could still prevent. Some such issues will arise in any settlement with forward-looking terms, but with future-conduct releases, the moral hazard can infect the defendant's primary conduct, not just the compensation.

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.[121] For class actions over past conduct, this

121. The leading deterrence theorist is David Rosenberg. *See generally* Rosenberg, *supra* note 9 (arguing that an insurance fund model of class action judgment incorporates both deterrent and insurance functions of mass tort liability); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002) (arguing that mandatory class action litigation is the only means of effective deterrence); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 395 (2000) ("[D]ifferential access to the scale economies from class-wide litigation undermines the primary goals of tort law: effective and administratively efficient deterrence . . . ."); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984) (arguing that preclusion of mass tort claims frustrates the deterrence goal of the tort system). But he is hardly alone in emphasizing the deterrence function. *See, e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1309–12 (2002); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1536 (2006); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflicts of Interest*, 4 J. LEGAL STUD. 47, 49 (1975); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 106 (2006); Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1312–17 (2003); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1417 (2003). The approach has a long history. *See*

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.[122] This is a more complicated challenge, and harder to get right.

This is of course the principal danger in the oil-spill hypothetical.[123] If the terms of the compensation fund are not properly calibrated, then BP may find it profitable to take fewer precautions than would be socially optimal, or than the tort system would have required. Indeed, if the fund is established with a one-time payment, it will give the company no incentive at all to care about future safety!

The Google Books settlement also illustrates the challenges involved. The pricing and auditing provisions were both vague and complex.[124] It was not immediately obvious what Google's pricing incentives were, or what the Registry's incentives to monitor Google were. If the prices had been set too high, Google could have been the agent of a conspiracy in restraint of trade.[125] If the prices had been set too low, Google could have flooded the market with cheap copies and destroyed the books' future value to copyright owners.[126] Similarly, there was a telling mistake in the original settlement's protections for owners of unclaimed works. The settlement reallocated some of the unclaimed funds to copyright owners who did claim their books,

Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 714 (1940).

122. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970) (discussing broadly the roles of specific and general deterrence in accident law). This use of the terms is consistent with Calabresi's distinction between directly prohibiting particular acts (specific deterrence) and putting costs on those whose activities cause them (general deterrence). *See id.* at 68–77. It is also consistent with the usual criminal-law senses of the terms: specific deterrence targets the individual, general deterrence targets others in the same shoes.

123. *See supra* notes 112–13 and accompanying text.

124. The pricing provisions have already been discussed. On the auditing provisions, see Authors Guild Settlement, *supra* note 2, §§ 4.2(c)(ii)(3), 4.2(c)(iii), 4.6(e).

125. *See* Suarez, *supra* note 67, at 190–213 (arguing that there is a risk of anticompetitive pricing); Academic Author Objections, *supra* note 120, at 3 (discussing risks of "price-gouging"). *But see* Elhauge, *supra* note 67, *passim* (arguing in detail that Google's incentives would have been socially optimal and that copyright owners themselves would have monitored it).

126. *Cf.* Letter from Institution for Information Law and Policy, *supra* note 65, at 3 (noting lack of oversight for underpriced unclaimed books).

giving the claiming owners an incentive to pressure the Registry not to be diligent in searching out owners of unclaimed works.[127]

D. Concentrated Power

The defining feature of class-wide future-conduct releases is that they give the defendant prospective freedom to act in a way that affects large numbers of class members at once.[128] This is a form of power, and it can sometimes be turned around against class members. For example, concentrated power is the great danger in the healthcare reform settlement hypothetical. The settlement could provide the legal cover to cartelize the defendant insurers, freeing them from public oversight and market discipline.[129] Patient class members could end up being practically helpless against the negotiating power of the new settlement-produced insurer cartel:

127. *See* Settlement Agreement, *supra* note 2, § 6.3(a) (providing for allocation of unclaimed funds); Statement of Interest I, *supra* note 54, at 9 (criticizing allocation); Brief of Amicus Curiae Institute for Information Law and Policy at 16, *Authors Guild*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 Civ. 8136), ECF No. 239 (same).

128. In familiar Hohfeldian terms, a future-conduct release is the exercise of a power to relinquish a right held by the releasor, so that the releasee's duty becomes a privilege. *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–33 (1913) (presenting schema for the consistent use of terminology to describe bilateral legal relationships). In less familiar Hohfeldian terms, the class action transforms a paucital relationship between class members (defined by "a unique right residing in a person . . . and availing against a single person . . . or else . . . one of a *few* fundamentally similar, yet separate rights, availing . . . against a few definite persons") into a multital relationship (defined by "a large *class* of *fundamentally similar* yet separate rights, actual and potential, residing in a *single* person . . . but availing *respectively* against persons constituting a very large and indefinite class of people"). Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 718 (1916). *See generally* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 780–89 (2001) (reviving and extending Hohfeld's paucital/multital distinction). The point of the distinction, for Hohfeld and for Merrill and Smith, is that it marks the boundary between contract/in personam rights and property/in rem rights. Thus, another way of understanding the effect of class-wide future-conduct releases is that they put property rights in play, not just individual obligations. *Cf.* James Grimmelmann, *The Amended Google Books Settlement Is Still Exclusive*, CPI ANTITRUST J. *passim* (Jan. 26, 2010), *available at* https://www.competitionpolicyinternational.com/the-amended-google-books-settlement-is-still-exclusive (expressing concern that settlement would give Google de facto exclusive control over orphan works).

129. *Cf.* Picker, *supra* note 67, at 406–07 (expressing concern that the settlement process would be used to claim immunity from future antitrust scrutiny under the Noerr-Pennington doctrine). The amended settlement specifically responded to Picker's concern by adding what Picker called a "no Noerr" clause. *See* Authors Guild Settlement, *supra* note 2, Attachment L, ¶ 17 ("This Final Judgment and Order of Dismissal is not intended to and does not provide any antitrust immunities to any Persons or parties.").

precisely the opposite of what the original class action was supposed to accomplish.

The key here is that more is different. The settlement can bestow collective advantages on the defendant that go beyond the sum of the individual releases it obtains. Centralizing all of these rights in one party gives it concentrated power. Sometimes, centralization can be a good thing, particularly in overcoming anticommons problems.[130] This, for example, might make the hypothetical skyscraper settlement attractive in avoiding hold-up by holdouts.[131]

Some anticommons, however, are good things. As the skyscraper hypothetical also illustrates, there are countervailing reasons why we ordinarily want to make involuntary land assembly hard, notwithstanding the risk of foregoing a parcel's highest and best use. Widely dispersed property rights protect individual autonomy, diverse values, and healthy communities.[132] Dispersed ownership can also serve social goals by making it hard to engage in undesirable uses, like the overdevelopment of greenfield land.[133] 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.[134]

It gets worse. We ordinarily think of class-action lawsuits as implicating only the rights of class members and defendants.[135] When

130. *See* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES 182–85 (2008) (discussing anticommons problems); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 667–73 (1998) (introducing anticommons theory).

131. *Cf.* D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation* 5, 48–66 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Paper No. 12–42, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2122877 (arguing for class-action and non-class-aggregation procedures designed to allow class members to "bundle claims and thus capture the surplus that would otherwise go unrealized" by avoiding holdout problems).

132. *See generally* Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 927–32 (2010) (synthesizing scholarship on use of property law to promote human flourishing, virtue, freedom, and democracy).

133. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 32–37 (2003).

134. *See* Grimmelmann, *The Elephantine Google Books Settlement*, *supra* note 67, at 517–19 (discussing linked concentration-of-power concerns in the Google Books settlement).

135. Indeed, the Supreme Court has emphatically insisted that non-parties to a suit are not generally bound by a judgment. *See* Taylor v. Sturgell, 553 U.S. 880, 904 (2008) (rejecting theory of virtual representation); Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 198–203 (2009) (discussing *Taylor*). Even in a class action,

a class-action settlement grants rights to the defendant that involve its future conduct, however, the settlement may practically determine the rights and interests of third parties—even though they are not formally bound to its terms. Consider again the healthcare insurance settlement hypothetical. Doctors were not defendants or members of the class. But if the settlement excluded all reimbursement for cardiac stents and required approval of two referring physicians before paying for visits to dermatologists, then cardiologists and dermatologists could reasonably object that the settlement would effectively preclude their rights.

The antitrust objections to the Google Books settlement reflect these concerns. The accumulation of pricing power in Google and the Registry would have created a market-dominant player at the stroke of a pen.[136] Google's competitors feared that it would leapfrog to a position of unfair advantage;[137] libraries and academics feared that

parties are not generally bound unless they are actually made members of the class. *See* Martin v. Wilks, 490 U.S. 755, 761 (1989). The specific result in Martin was reversed by statute, *see* Civil Rights Act of 1991, Pub. L. 102–166, § 108, 105 Stat. 1071, 1076 (codified at 42 U.S.C. § 2000e–2(n) (2006)), but the general principle remains.

136. In addition to the fact that the settlement itself was being used as a coordinated license grant by competitors in the book market, Google would have had de facto exclusivity as to orphan works, and the institutional subscription would have been a product with no close substitutes.

137. The *Authors Guild* opinion discusses antitrust issues, but only briefly. *See* Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 682–83 (S.D.N.Y. 2011). More extensive discussion can be found in the filings. *See* Objection of Amazon.com, Inc., to Proposed Amended Settlement at 10–21, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 823; Objection of Amazon.com, Inc., to Proposed Settlement at 15–31, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 206; Objection to Class Action Settlement and Notice of Intent to Appear on Behalf of Class Members AT&T Corp. and Affiliates at 12–21, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 863; Objections of Microsoft Corp. to Proposed Amended Settlement and Certification of Proposed Settlement Class and Sub-Classes at 15–25, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 874; Statement of Interest II, *supra* note 11, at 16–23; Statement of Interest I, *supra* note 54, at 16–26; Objection of Yahoo! Inc. to Final Approval of the Proposed Class Action Settlement at 21–26, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 288; Brief Amicus Curiae of Consumer Watchdog in Opposition to the Proposed Settlement Agreement at 18–22, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 263; Supplemental Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement Between the Authors Guild, Inc., Association of American Publishers, Inc., et al., and Google Inc. *passim*, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 840; Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement Between the Authors Guild, Inc., Association of American Publishers, Inc., et al., and Google Inc. *passim*, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No 282. *But see* Elhauge, *supra* note 67, *passim* (offering spirited and detailed antitrust defense of the settlement); Plaintiffs' Supplemental Memorandum Responding to Specific Objections at 138–54, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 955; Brief of Google, Inc. in Support of Motion for Final Approval of Amended Settlement Agreement

Google would use its judicially granted exclusivity to price the must-have subscription service extortionately.[138] The fear of concentrated power is also clearly at work in objections that the Google Books settlement would have led to the loss of reader privacy.[139] Google's privacy policies are one thing if it is one bookseller among many in a crowded market, but quite another if Google is the only source for millions of orphan books.

E. Separation of Powers

Future-conduct settlements can make prospective changes affecting large numbers of people in complex ways. This is the province of legislation and rulemaking.[140] For reasons of technical competence and democratic accountability, decisions of this sort are committed to the political branches.[141] Judges are limited in the

at 28–51, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 941; Amicus Brief of Antitrust Law and Economics Professors in Support of the Settlement *passim*, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 275 (same as Elhauge, *supra*, in brief format); Randal C. Picker, *Assessing Competition Issues in the Amended Google Book Search Settlement* 3–5 (Univ. of Chi. Inst. for Law & Econ. Olin Research Paper Series, Working Paper No. 499, 2009), *available at* http://ssrn.com/abstract=1507172 (giving reasons to believe that antitrust scrutiny could be deferred until after implementation of settlement). The arguments given by the settlement's antitrust defenders were notably more detailed than those given by most of the objectors.

138. *See* Library Ass'n Comments on the Proposed Settlement at 19–21, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 387 (expressing concern but recommending continued oversight rather than rejection of the settlement); Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN L. REV. 1308, 1333–44 (2010) (describing "[l]ibrary and [a]cademic [r]esearcher [n]ightmares" including price-gouging and exacerbated inequality among institutions).

139. *See* Privacy Authors and Publishers' Objection to Proposed Settlement at 8, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 325; Brief Amicus Curiae of the Center for Democracy & Technology in Support of Approval of the Settlement and Protection of Reader Privacy at 7–11, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), ECF No. 314; Memorandum of Points and Authorities in Support of EPIC's [Electronic Privacy Information Center] Motion to Intervene at 14–15, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 Civ. 8136), *available at* http://thepublicindex.org/docs/letters/epic.pdf.

140. *See* NAGAREDA, *supra* note 116, at 61 ("Adjudication characteristically deals with the legal consequences of past conduct for particular purposes. . . . Rulemaking, by contrast, characteristically involves the setting of legal standards for the future that bind the public at large.").

141. *See, e.g.*, MARTIN REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009) (arguing that broad swaths of class-action law are democratically illegitimate because they cause courts to reach beyond the judicial function); James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1534 (1973) [hereinafter Henderson, *Judicial Review*] ("But courts are not suited to the task of establishing specific product safety standards . . . ."); James A. Henderson, Jr., *Comment: Settlement Class Actions and the Limits of Adjudication*, 80

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.[142] In Richard Nagareda's words, "[T]he basis for the implied delegation of bargaining power to class counsel must arise from matters that preexist the class action itself and, accordingly, . . . a class settlement—unlike public legislation—enjoys no general mandate to alter unilaterally the rights of class members."[143]

By having a single group draft a settlement, the class-action process tends toward central planning. By submitting that settlement to a judge for approval, it channels everything through the actor least competent to make the intricate technical decisions and contestable value tradeoffs required.[144] Because the judge is not permitted to modify the settlement but must give an up-or-down ruling on it,[145] the class-action settlement process delegates tremendous agenda-setting power to the attorneys.[146] We should not expect the resulting arrangements to reflect anything like majoritarian preferences. They are not "appropriate for judicial, as opposed to legislative, resolution."[147]

The healthcare reform hypothetical is a good illustration of these dangers. Congress spent months of intense debate and horse-trading on the Affordable Care Act; the near-complete attention of the

CORNELL L. REV. 1014 *passim* (1995) [hereinafter Henderson, *Settlement Class Actions*] (extending argument to mass tort class actions).

142. *See, e.g.*, Lon L. Fuller, *The Form and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978) (developing idea that a "situation of interacting points of influence" is "beyond the proper limits of adjudication").

143. Nagareda, *supra* note 96, at 156–57.

144. *See* Fuller, *supra* note 142, at 394–404 (arguing that "polycentric" tasks—in which each decision has complex repercussions—are "inherently unsuited to adjudication"); Henderson, *Judicial Review*, *supra* note 141, at 1534 (arguing that "[c]ourts are inherently unsuited" to such "polycentric" tasks as establishing product safety standards for manufacturers).

145. *See, e.g.*, Holmes v. Cont'l Can Co., 706 F.2d 1144, 1160 (11th Cir. 1998) ("Courts are not permitted to modify settlement terms or in any manner to rewrite the agreement reached by the parties.").

146. *See, e.g.*, Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1236 (1982).

147. Golan v. Holder, 132 S. Ct. 873, 894 (2012) (citing Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 677–78 (S.D.N.Y. 2011)).

nation's political institutions was focused on the issue.[148] What emerged was a complex compromise, one that achieved majority support in Congress only through extensive modification to meet the demands of numerous constituencies.[149] As printed in the Statutes at Large, it takes up 906 pages.[150] If all of this could have been done instead by a court, why even have a Congress?[151] The point is even starker with the skyscraper settlement. Eminent domain is supposed to be an inherently public process for which the political branches can be held accountable: the Public Use Clause prohibits privatizing the process.[152] A class-action settlement, however, is drafted by a private party and overseen only by the judicial branch: precisely the opposite of the way the system is supposed to work.[153]

Sometimes, judges cannot avoid being caught up in these "legislative" functions. The rise of structural reform litigation—lawsuits challenging school segregation, prison overcrowding, police brutality, and other systemic governmental abuses—required judges to engage deeply with the creation and governance of institutions, and to make prospective decisions about how they would be run in ways that would affect large populations.[154] In all of these cases,

148. *See generally* LAWRENCE R. JACOBS & THEDA SKOCPOL, HEALTH CARE REFORM AND AMERICAN POLITICS: WHAT EVERYONE NEEDS TO KNOW (2010) (describing history of PPACA).

149. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2675 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

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

151. *Cf.* Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011) ("[T]he establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court. . . . The questions of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among private, self-interested parties."); *id.* at 680 (deferring to Congress in setting copyright policy in response to technological change); *id.* at 685–86 (deferring to Congress given the international ramifications of the settlement); Samuelson, *supra* note 13, at 482 ("An intriguing way to view the GBS settlement is as a mechanism through which to achieve copyright reform that Congress has not yet been and may never be willing to do.").

152. *See, e.g.*, William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782–83 (1995) (arguing that courts' role in enforcing the Public Use clause should focus on failures of the political process).

153. *Cf.* Rubenstein, *supra* note 81, at 432 ("[D]ealmaking appears to contradict a fundamental premise of adjudication—namely, that the substantive outcomes of cases should depend upon the application of pre-existing legal norms.").

154. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (describing new "public law litigation" model that departs from traditional party-centric adversarial model and requires "complex forms of ongoing relief" (internal quotation marks omitted)); Owen M. Fiss, Foreword, *The Forms of Justice*, 93

however, the problem comes at the remedial stage.[155] 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.[156] 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.[157] There is no alternative to judicial involvement; there is no road around the swamp.[158]

In contrast, a future-conduct settlement is never necessary in this sense.[159] Litigation is always an option. The resulting judgment will define the defendant's rights and duties vis-à-vis the class, and it will therefore provide a roadmap for their future dealings.[160] The outcomes available in litigation may not be socially optimal, but if they are not, it is the legislature's responsibility to fix the problem, not the courts'.[161] The purpose of class certification is "to generate

HARV. L. REV. 1, 2–3 (1979); Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 125 (1982) [hereinafter Fiss, *The Social and Political Foundations of Adjudication*].

155. The signal remedial innovation of public-law litigation was its development of novel injunctions on the defendant institutions. *See generally* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978) (describing increased use of structural injunctions in civil rights litigation and providing jurisprudential justification of the practice). This immediately distinguishes it from the imposition of future-conduct releases on class members. For a discussion of the historical link between reform litigation and modern class action procedure, see generally David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

156. *See* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 467 (1980) (arguing that structural reform cases are driven by recognition of new constitutional rights).

157. *See* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 692 (1982).

158. Indeed, in these situations, settlements risk becoming ways to avoid enforcing the law. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that the judicial role is "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them").

159. *Cf.* Henderson, *Settlement Class Actions*, *supra* note 141, at 1021 (contrasting public-law litigation with settlements that "delegate[] power to the powerful").

160. Indeed, this is a strong argument against future-conduct settlements. They deprive others on the plaintiff side the benefit of an actual ruling on the issue in question while giving the defendant benefits denied to others in its position. *Cf.* Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 154, at 121. (arguing for public value of open litigation); *infra* Part III.B.4 (discussing danger of a settlement good for one defendant only).

161. This point depends on a normative belief about the proper roles of courts and legislatures in a democratic system. *Compare* Chayes, *supra* note 154, at 1297–98 (defending expansive judicial role), *and* Fiss, *The Social and Political Foundations of Adjudication*, *supra* note 154, at 126–27 (same), *with* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 22–23 (1977) (arguing against expansive judicial role), *and*

common answers apt to drive the *resolution* of the litigation," not social reform.[162]

III. A STANDARD: HEIGHTENED SCRUTINY

Future-conduct releases are unusually dangerous to class members, and sometimes even to society. Courts can and should respond to these dangers by scrutinizing settlements containing future-conduct releases more closely, and in some cases prohibiting them entirely. The former is a standard; the latter is a rule. Start with the standard.

A. *Doctrinal Justification*

The presence of a future-conduct release is, at the very least, a major warning sign that this is not a run-of-the-mill settlement.[163] Courts should, nay *must*, look on future-conduct settlements with more than their usual skepticism.[164] They are required to do so by the

ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 197 (2004) (same). The same decisions must also be made in debates about the judicial role in supervising class actions. *Compare* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 559 (1994) (arguing for active judicial role), *with* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 258–59 (1988) (expressing skepticism about Judge Weinstein's close involvement in brokering the Agent Orange settlement); *see also* REDISH, *supra* note 141, at 27 (arguing that democratic principles require more stringent limits on class actions). As a matter of doctrine, the decision has already been made in favor of a limited judicial role. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 861 (1999) ("[W]e are bound to follow Rule 23 as we understood it upon its adoption, and . . . we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act."); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628–29 (1997) ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.").

162. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (emphasis omitted and added) (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 974, 131–32 (2009)).

163. *Cf.* Issacharoff, *supra* note 117, at 833 ("Any class seeking to bind future claimants or foreclose future harms should also be suspect—particularly if these future claims do not create an active case or controversy under applicable substantive law.").

164. There is precedent for this approach. Courts have learned to identify indicia of potential unfairness and to apply heightened scrutiny to settlements when those indicia are present. For example, compensation to class members in the form of coupons rather than cash is "enough to raise suspicions." *In re* Mex. Money Transfer Litig., 267 F.3d 743, 748 (7th Cir. 2001). Congress has effectively codified this judicial suspicion of coupon settlements. *See* Class Action Fairness Act of 2005, § 3(a), 119 Stat. 4, 6 (codified at 28 U.S.C. § 1712(e) (2006)) (requiring "[j]udicial [s]crutiny of [c]oupon [s]ettlements"). *See generally* Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANAL. 167 (2009) (discussing "facial issues" justifying more than usual scrutiny of settlements).

text of Rule 23, and by the Due Process Clause—and perhaps even by constitutional limits on personal jurisdiction.

1. Rule 23

Rule 23(a)(4)'s guarantee of adequate representation requires courts to ensure that class counsel's advocacy reaches a basic threshold of zealousness.[165] But the bargaining around a future-conduct release is so open-ended that there is no meaningful procedural standard by which a court can evaluate whether class counsel have been sufficiently vigorous in the negotiations. Substantive "hard-look" review of the resulting settlement is the only viable alternative.

That review comes from Rule 23(e)(2), which provides that a court may only approve a settlement binding class members on a finding that it is "fair, reasonable, and adequate."[166] The courts of appeals implement this requirement with multi-factor balancing tests.[167] The courts "have wide discretion in assessing the weight and applicability of each factor,"[168] so the special risks of future-conduct releases can easily be folded into these factors.[169]

2. Due Process

Heightened scrutiny goes deeper than just Rule 23: it is also required by the Due Process Clause. In class action cases, Due Process requires adequate representation "at all times,"[170] which in turn requires closer oversight from the court in future-conduct cases.

165. FED. R. CIV. P. 23(a)(4); *see id.* 23(g)(4) (requiring that counsel "must fairly and adequately represent the interests of the class"); *see also id.* 23(g)(1)(B) (stating that the court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class").

166. *Id.* 23(e)(2).

167. *See, e.g.*, Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) (listing eight factors to be considered); City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (listing nine factors to be considered), *abrogated on other grounds*, Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000).

168. 5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 23.164[1] (Jerold S. Solovy et al. eds., 3d ed. 2012).

169. Further, in damages class actions, "class members' interests in individually controlling the prosecution" of the lawsuit and settlement is stronger when the stakes are higher and the outcome will affect them prospectively. FED. R. CIV. P. 23(b)(3)(A). As the settlement becomes more and more sweeping, the court becomes obliged to consider the relative "undesirability of concentrating" resolution "of the claims in the particular forum." *Id.* 23(b)(3)(C).

170. Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 812 (1985). *See generally* Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871 (1995) (discussing *Shutts*).

The higher stakes for class members in future-conduct settlements and the greater risks of error go directly to the first two factors in the *Matthews v. Eldridge*[171] test: the "private interest" at stake and the "risk of erroneous deprivation of such interest."[172] Set against these concerns, the added value of heightened scrutiny is substantial and the cost of closer judicial attention well worth bearing.

This conclusion is reinforced by the Supreme Court's long-standing concern for class members' Due Process rights in cases involving potential conflicts between class members. Such conflicts, of course, go to adequacy of representation; conflicted class representatives are not constitutionally adequate representatives.[173] Future-conduct cases do not necessarily involve internal conflicts. But the important word in that sentence is "necessarily." Future-conduct settlements can involve particularly insidious conflicts that become apparent only over time. The defendant may become able to behave differently toward class members, putting them in different shoes in ways they cannot predict or protect against.

Indeed, absentees qua absentees may be in a particularly vulnerable position in a future-conduct settlement. This was one of the problems with the Google Books settlement. One of the justifications for the settlement was to make orphan books available again. But orphan owners, precisely because of their status as orphan owners, were essentially guaranteed to be absent class members and could be expected not to be active participants in the settlement's administration.[174] The settlement was engineered specifically to take advantage of their absence, and by using future-conduct releases it was able to achieve something very close to an exclusive license to their books, a license good for Google only. Heightened scrutiny is the very least that absent class members deserve when their prospective rights are at stake.

3. Personal Jurisdiction

A close reading of the Supreme Court's leading modern class-action Due Process case, *Phillips Petroleum Co. v. Shutts*,[175] reinforces

171. 424 U.S. 319 (1976).

172. *Id.* at 335.

173. *See* Hansberry v. Lee, 311 U.S. 32, 45 (1940) ("Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.").

174. *See supra* notes 48–51, 66 and sources cited therein.

175. 472 U.S. 797 (1985).

this conclusion.[176] The case is remembered for its holding that Due Process—in the form of personal jurisdiction over class members in a state class action—is satisfied by notice, an opt-out right, and adequate representation.[177] But the assumptions behind that holding are crucial. The Court explained at length the distinctions between class-action plaintiffs and "a defendant in a normal civil suit[.]"[178] A defendant faces "the full powers of the forum State to render judgment against it";[179] class-action plaintiffs are not "haled anywhere to defend themselves upon pain of a default judgment"[180] and are "almost never subject to counterclaims or cross-claims, or liability for fees or costs."[181]

The underlying assumption here is that a plaintiff risks only a choice in action, whereas a defendant can suffer substantial harms from an adverse judgment. But that is precisely the contrast drawn above between a suit for damages and a future-conduct settlement: the latter can expose class members to unbounded future harms. The availability of future-conduct releases in class-action settlements therefore depends on the provision of sufficient procedural protections for class members: again, heightened Rule 23(e)(2) scrutiny is the very least they have a right to expect.[182] Courts that do not provide it may not even have personal jurisdiction over absent class members who give future-conduct releases.[183]

B. *Applying Heightened Scrutiny*

To put heightened scrutiny into practice, courts examining future-conduct releases should direct their attention to the ways those releases can go wrong. Thus, the concerns described above in Part II are a kind of inspection checklist. They are not factors to be balanced: an extreme risk of moral hazard cannot be outweighed by a

176. *Id.* at 810.
177. *Id*. at 812–13.
178. *Id.* at 810.
179. *Id.* at 808 (emphasis omitted).
180. *Id.* at 809.
181. *Id.* at 810.
182. *Cf. id.* at 810 n.2 (reserving judgment over cases in which class members are potentially out of pocket for counterclaims or fees).
183. The argument from personal jurisdiction does not directly apply to cases in federal court applying federal law. *See generally* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068.1 (3d ed. 2002) (discussing personal jurisdiction in federal-question cases). But even there, *Shutts* still provides instructive guidance about the expected burdens and dangers to a party of being a class member in a distant forum. The question of the precise interaction of Rule 4, Rule 23, and the Fifth Amendment is best deferred to another time.

correspondingly low risk of concentrated power. Instead, they give courts a way to think through the likely consequences of approving a settlement. Thus, this section groups its recommendations in terms of those concerns, and offers specific suggestions for ways courts can address some of the different kinds of future-conduct risks when they are present in a settlement.[184]

1. High Stakes

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,[185] the court should expect that they will be given more in return. The court should make a searching effort to identify just what rights the class will be giving up going forward, to put a value on those rights, and to ask whether the settlement appropriately compensates them. At the very least, there should be some additional compensation for these releases over and above what a past-conduct release alone would have warranted.[186] Whenever feasible, class members should be given the choice of whether to accept the future-conduct portion of the settlement, or just the past-conduct portion.[187]

184. These recommendations for heightened scrutiny are not meant to create a hard-and-fast line against future-conduct releases. For one thing, as explained *infra* Part IV.A, some settlements involving future-conduct releases are legitimate and can be fair to class members. For another, this Article already proposes a hard-and-fast line against some future-conduct releases: those that fail the parity-of-preclusion test. Instead, heightened scrutiny is an across-the-board standard intended to direct judicial attention to those aspects of future-conduct releases that are likely to be the most dangerous.

185. *See supra* Part II.A.

186. For example, the settlement in In re *Literary Works in Electric Databases Copyright Litigation* provided for 100% of scheduled payments to class members who gave a future-conduct release, and 65% of the scheduled payments for those class members who gave only past conduct releases. Settlement Agreement § 5.a., *In re* Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242 (2d Cir. 2011), *rev'd and remanded in* Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010) (Nos. 05–5943 & 06–0223) (reducing payments by thirty five percent for those authors who opt out of allowing future uses). The *Authors Guild* settlement also displayed this feature. *Compare* Authors Guild Settlement, *supra* note 2, § 5.1 (one-time payment for past digitization), *with id.* art IV (ongoing payments for future uses).

187. *See* Settlement Agreement, *supra* note 23, § 5.1(a) (allowing class members to opt out of future uses without opting out of the settlement entirely); Authors Guild Amended Settlement, *supra* note 2, § 3.5(b) (allowing class members to opt out of certain future uses without opting out of the settlement entirely). The presence of such an option helps the court in assessing whether the settlement provides sufficient incremental compensation for future-conduct releases, because it requires them to be explicitly valued.

2. Uncertainty

Because future-conduct releases are harder to design,[188] the court must be more skeptical of their terms. Because class members will have less ability to predict the consequences of such releases, the court should require more rigorous notice.[189] Because the court itself will have a hard time evaluating the consequences, it should consider appointing a special master or an independent class representative to serve as a devil's advocate in exploring the possible negative consequences.[190] Because class counsel have weak incentives to get the design right in the long run if their compensation is payable immediately, the court should consider insisting that any awards of attorneys' fees be subject to a deferred compensation scheme that links class counsel's fees to the class's fate going forward.[191]

3. Moral Hazard

Terms that could create perverse incentives on the defendant's part require especially close attention.[192] The court should be careful

188. *See supra* Part II.B.

189. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997) (questioning "whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous" as those in an asbestos future-claims case); Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 811–12 (1985) (discussing notice requirement in class actions).

190. Variants of this idea have been regularly mooted. *See, e.g.*, Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 28 (2002); Lahav, *supra* note 107, at 128–30; Rubenstein, *supra* note 107, at 1453–56; Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. Rev. 461, 529 (2000). This proposal differs in that it focuses on a particular kind of settlement feature that poses special concerns. Still, it may suffer from some of the same concerns identified by other scholars, such as a reluctance by court-appointed guardians to guard. *See* Koniak & Cohen, *supra* note 79, at 1110–11. One analogy could be the "future claims representative" in asbestos bankruptcy cases, who is charged with "protecting the rights of persons that might subsequently assert demands of such kind," i.e., future asbestos tort claims. 11 U.S.C. § 524(g)(4)(B)(i) (2006). The record there, however, is not entirely encouraging. *See, e.g.*, Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 876–89 (2005) (discussing conflicts of interest of futures representatives); Mark D. Plevin et al., *The Future Claims Representative in Prepackaged Asbestos Bankruptcies*, 62 N.Y.U. ANN. SURV. AM. L. 271, 271–72 (2006) (describing capture of future claims representatives by debtors and current claimants); NAGAREDA, *supra* note 116, at 174–82 (discussing possibilities for reform).

191. *Cf.* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1086–98 (2002) (proposing that class counsel in coupon settlements be paid in coupons); Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1441 (2004) (building on earlier proposals by Mark Roe and Thomas Smith to link compensation of future claims representative and compensation to future claimants in § 524(g) proceedings).

192. *See supra* Part II.C.

to detail what the worst-case scenarios for class members are, and to make sure that the settlement has internal safeguards against those scenarios. Because some problems will present themselves only over time, the court should retain jurisdiction so that class members can request modification of the settlement if it later appears that the settlement is going off course.[193] It should also consider requiring that class members have the ability to opt out of the forward-looking provisions of the settlement in the future, once they can see what those provisions actually entail.[194]

4. Concentrated Power

Because future-conduct releases can give the defendant concentrated power,[195] the court should ask whether the settlement would have 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

193. *See* Arata v. Nu Skin Int'l, Inc., 96 F.3d 1265, 1268–69 (9th Cir. 1996) (explaining that a court approving a class-action settlement has the discretion to decide whether to retain jurisdiction). This is precisely what courts in future-claims cases have done. The court that approved the fen-phen settlement "hereby retains continuing and exclusive jurisdiction over this action and each of the Parties . . . to administer, supervise, interpret and enforce the Settlement." Pretrial Order No. 1415 ¶ 11, *In re* Diet Drugs Prods. Liab. Litig., No. 99-20593, 2010 WL 1270348 (E.D. Pa. 2010); *see also* Nationwide Class Action Settlement Agreement with American Home Products Corp. § VIII.B.1, *In re* Diet Drugs Prods. Liab. Litig., No. 99-20593, 2010 WL 1270348 (E.D. Pa. 2010) (providing that the court "will have original and exclusive jurisdiction over all provisions of this Agreement, including the creation and operation of the Settlement Trust"). The settlement has since been amended ten times. *See* Tenth Amendment to the Nationwide Class Action Settlement Agreement with American Home Products Corp., *In re* Diet Drugs Prods. Liab. Litig. (No. 99-20593), 2010 WL 1270348 (E.D. Pa. 2010); *see also* Wasserman, *supra* note 63, at 458 (recommending retained jurisdiction).

194. *See supra* note 63 and accompanying text (discussing back-end opt-out rights). If a future-conduct settlement does not provide for back-end opt-out rights, later courts should be prepared to create them by holding that absent class members were not adequately represented in the initial "litigation." *See generally* Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 B.Y.U. L. REV. 1079, 1126 (2009) (suggesting "the use of an opt-in procedure for unnamed class members as a prerequisite to applying the preclusion doctrines").

195. *See supra* Part II.D.

can also be affected.[196] 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.[197]

5. Separation of Powers

Because future-conduct releases require the court to take on a legislative role,[198] it should exercise great caution. Where the subject 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.[199] If the legislature has not spoken, the court should require that it be able to: the settlement must not lock in an arrangement that is not subject to legislative override if the court has erred.[200] If representatives of the political branches file objections or appear at the fairness hearing, the court should give their views due deference.[201] The court should be

196. *See In re* Masters Mates & Pilots Pension Plan & Irap Litig., 957 F.2d 1020, 1026 (2d Cir. 1992) ("Where the rights of third parties are affected [by a class action settlement], however, their interests too must be considered."). To be clear, I am not suggesting that a future-conduct settlement requires this kind of scrutiny because it could foreclose the rights of third parties by binding them to its terms. That would be obviously problematic, and inconsistent with Supreme Court precedent. *See* Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL. F. 103, 103–04 (1987) (arguing that a consent decree between two parties that transfers the potential rights of a third party requires consent by the third party); *supra* note 173 and accompanying text.

197. *Cf. supra* note 188–90 and accompanying text (discussing appointment of representative for class members with claims based on future conduct). This problem may sometimes be easier. The representative may need only to identify the appropriate third parties so that they can be given appropriate notice, after which they may be able to appear on their own behalf. Where these third parties are sufficiently interested in the settlement to have standing—which in concentrated-power cases they frequently will—courts should be liberal in allowing them to intervene for the limited purpose of filing objections, so that they can both be heard and preserve their right to appeal if the settlement is approved. *Compare* Devlin v. Scardelletti, 536 U.S. 1, 14 (2002) (allowing unnamed class members to appeal from order approving settlement without formal intervention), *with* Marino v. Ortiz, 484 U.S. 301, 304 (1988) (preventing nonparties who have not intervened from appealing order approving settlement).

198. *See supra* Part II.E.

199. *See* Authors Guild v. Google Inc., 770 F. Supp. 2d 666, 677, 680, 685–86 (S.D.N.Y. 2011) (considering copyright policy); *see also* Frew v. Hawkins, 540 U.S. 431, 437 (2004) (holding that a consent decree "must further the objectives of the law upon which the complaint was based").

200. The skyscraper settlement, for example, is effectively irreversible once construction starts. *See, e.g.*, ROBERT A. CARO, THE POWER BROKER 218 (1974) (describing judges and elected officials as "hogtied by the physical beginning of a project").

201. Their views are not entitled to special deference on what the substantive law is; that is "emphatically the province and duty of the judicial department." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Instead, they are entitled to deference in their

concerned if it appears that the settlement will create political or diplomatic trouble for the political branches in their relationships with other jurisdictions.[202] The more far-reaching the settlement, the more reluctant the court should be to act at all.

IV. A RULE: PARITY OF PRECLUSION

The heightened-scrutiny standard applies to all settlements containing future-conduct releases. In a narrower class of cases, it should be supplemented with a bright-line rule that bars such releases entirely. A recurring theme in the normative case against future-conduct releases is that they sever the connection between a settlement and the underlying lawsuit it "settles."[203] If so, then a natural response is to insist on a tighter connection between the two. Since releases are the principal source of danger to class members, it is there that the connection must be reestablished. This is the parity-of-preclusion principle: a class-action settlement should be able to release a future-conduct claim if and only if the claim could have been lost in litigation.

The intuitive case for parity is simple. We have already chosen where to draw the outer boundary around permissible class actions: those choices should also be reflected in the boundaries around permissible class-action settlements. If we trust class counsel enough with a claim to risk it in litigation, we should trust them also to settle that claim. If we do not trust them to gamble with a claim in litigation, we should not let them sell it, either. The job of class representatives is to "litigate the claims presented or settle the claims presented."[204]

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explanations of the political considerations underlying future lawmaking. In the Google Books case, for example, the Register of Copyrights testified to Congress that the settlement could "inappropriately interfere with the on-going efforts of Congress to enact orphan works legislation in a manner that takes into account the concerns of all stakeholders" and subject the United States to "diplomatic stress." *Competition and Commerce in Digital Books: Hearing on the Proposed Google Book Settlement Before the H. Comm. on the Judiciary*, 111th Cong. 68 (2009) (statement of Marybeth Peters, Register of Copyrights).

202. The governments of France and Germany filed amicus briefs objecting to the Google Books settlement, and the German government sent the head of the Division of Copyright and Publishing Law at the Federal Ministry of Justice to speak at the fairness hearing. *See* Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the French Republic, Authors Guild v. Google, No. 05 Civ. 8136 (S.D.N.Y. Sept. 8, 2009); Memorandum of Law in Opposition to the Amended Settlement Agreement on Behalf of the Federal Republic of Germany, Authors Guild v. Google, No. 05 Civ. 8136 (S.D.N.Y. Jan. 28, 2010); Transcript of Fairness Hearing, *supra* note 87, at 69–74.

203. *See supra* Part II.

204. Transcript of Fairness Hearing, *supra* note 87, at 119 (statement of William Cavanaugh).

One might ask whether we should ever allow future-conduct releases by a class. The answer is yes: sometimes we should, because we effectively allow them as a result of litigation. Imagine a simple class action for nuisance against a polluting factory by a few hundred nearby landowners.[205] It is entirely plausible that the landowners will be awarded permanent damages but no injunction.[206] That result is functionally identical to a settlement that includes future-conduct releases in exchange for cash compensation.[207] It would be bizarre to argue that parties should be prohibited from settling on terms that the court itself might quite reasonably have ordered.[208] True, the court will need to make sure the compensation is sufficient, and 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.[209] 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 would be a complete capitulation by the factory, one in which it agrees to shut down. By contrast, if the landowners can give a future-conduct release, then the range of possible settlements reflects the full range of plausible outcomes in litigation.

This example illustrates three things. First, the legal system sometimes already allows plaintiffs to put future-conduct claims in

205. *E.g.*, Freeman v. Blue Ridge Paper Prods., Inc., 551 F.3d 405, 406 (6th Cir. 2008).

206. *See, e.g.*, Boomer v. Atl. Cement Co., 257 N.E.2d 870, 875 (N.Y. 1970) (granting permanent damages in lieu of injunction).

207. This is just a rephrasing of the distinction between property rules and liability rules. Both the permanent damages in lieu of injunction and the settlement for a future-conduct release amount to the transfer of the relevant entitlement to the defendant at an "objectively determined value." Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

208. *See, e.g.*, *In re:* Warfarin Sodium Antitrust Litig., 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); Bonnette v. Long Island Coll. Hosp., 819 N.E.2d 206, 209 (2004) (describing the State's "strong policy promoting settlement"). *But see* Fiss, *supra* note 158, at 1085–87 (arguing that settlement erodes public-law values served by adjudication).

209. Again, this point simply reflects the property-rule/liability-rule distinction. The court awarding liability-rule protection must both define the entitlement and put a value on it, and those tasks are necessary both in settlement and in an ordinary judgment. *See* Calabresi & Melamed, *supra* note 207, at 1092 ("[L]iability rules involve an additional stage of state intervention . . . .").

play. Second, for reasons of judicial economy, the system already prefers to resolve those claims together with the rest of the dispute.[210] And third, the policies promoting settlement counsel in favor of letting parties do by settlement what the court could have imposed on them. Taken together, these points establish the principle: since some class actions really do test the legality of a defendant's future conduct, settlements of those class actions can do so, too.[211]

This Part will flesh out this account of parity of preclusion. Part IV.A will explain what it means to say that a claim "could have been lost in litigation," giving that phrase a precise meaning in terms of preclusion doctrine. Part IV.B will analyze the courts' closest approximation to parity of preclusion: the identical factual predicate doctrine. Part IV.C will defend parity on doctrinal grounds. Part IV.D will answer doctrinal objections. Finally, Part IV.E will defend parity on normative grounds.

A. Claims that Can and Cannot Be Precluded

To understand how far the parity-of-preclusion principle reaches, it is necessary to be precise about when one could "lose a claim in litigation." And that, in turn, requires us to be precise about the body of law that deals with losing claims in litigation: preclusion doctrine.[212]

Imagine a plaintiff class that sues a defendant and loses. What is the largest possible set of claims that could be precluded against class members as a result? For the sake of the hypothetical, we can assume that the class will bring the broadest possible suit. Because the federal Rules permit plaintiffs to join all of their claims against the defendant in one action,[213] a single class action can litigate every claim arising out of the defendant's conduct that is susceptible to class treatment.[214]

210. This point recalls the maxim that equity will take jurisdiction to avoid a multiplicity of suits.

211. This is most apparent for mandatory class actions by necessity under Rule 23(b)(1)(A), when individual lawsuits would risk "incompatible standards of conduct" for the defendant. FED R. CIV. P. 23(b)(1)(A). The entire point of such a class action is to decide the legality of the defendant's future conduct all at once. Unless some future-conduct releases are available, such class actions can never be settled. The same goes for injunctive-relief class actions under Rule 23(b)(2). "[F]inal injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole" only when there is some future conduct to which that relief could apply. *Id.* 23(b)(2).

212. *See generally* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005) (discussing application of preclusion doctrines to class members).

213. FED. R. CIV. P. 18(a).

214. *See* Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 881 (1984) (finding no preclusive effect on individual claims of discrimination from a judgment in a class

Ripeness, however, will limit the suit to claims arising out of the defendant's past conduct.[215] Pleading doctrines prevent the complaint—and hence the lawsuit—from going beyond what the defendant has actually done.[216] Nor can the class go further by seeking a declaratory judgment or a preventative injunction. Although they deal with the defendant's threatened future conduct, that conduct must genuinely be threatened on the basis of the defendant's actual past conduct.[217]

Claim preclusion will bar all of the claims litigated to a "valid and final" judgment.[218] Again for the sake of the hypothetical we can assume that all of the claims asserted in the complaint are fully

action alleging a pattern or practice of discrimination); RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1980) (denying claim-preclusive effect when the plaintiff "was unable to rely on a certain theory of the case . . . because of the limitations on the subject matter jurisdiction of the courts"); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 863–64 (1999) ("[T]he settlement's fairness under Rule 23(e) does not dispense with the requirements of Rules 23(a) and (b)."); Amchem Prods. v. Windsor, 521 U.S. 591, 620 (1997) ("[Provisions of Rule 23] designed to protect absentees . . . demand undiluted, even heightened, attention in the settlement context.").

215. This line between past and future is no more uncertain than the one courts already must draw between present and future claims. *See generally* Goldberg & Zipursky, *supra* note 9, at 1625 (discussing line between present and future claims).

216. *See* FED. R. CIV. P. 11(b)(3) (stating that an attorney submitting a pleading certifies that its "factual contentions have evidentiary support"); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) ("Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that a complaint must contain "sufficient factual matter" that its " 'claim to relief . . . is plausible on its face' " (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))).

217. On declaratory judgments, see 28 U.S.C. § 2201(a) (2006) (restricting a federal court's ability to award declaratory relief to "a case of actual controversy within its jurisdiction"); Aetna Life Ins. Co. v. Haworth, 300 U.S. 216, 239–40 (1937) ("The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense."). On preventative injunctions, see Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (holding that plaintiff lacked Article III standing to seek an injunction against police use of chokeholds, since there was no "real and immediate threat" that he would be choked in the future). While *Lyons* has been criticized by commentators who regret that it makes some unlawful governmental practices effectively unchallengeable, see, e.g., Richard H. Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 6 (1984), future-conduct releases show that broad justiciability standards are a two-edged sword. While broad justiciability might allow for the vindication of individual rights in cases like *Lyons*, broad justiciability could be used to eliminate individual rights entirely in future-conduct settlements.

218. RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 19 (1980); *see also* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979) (comparing and explaining the doctrines of res judicata and collateral estoppel).

litigated. Since the class can only plead ripe claims, claim preclusion can only bar ripe claims—i.e., those arising out of the defendant's past conduct.[219]

Issue preclusion, however, can effectively extinguish some future-conduct claims. The basic rule of issue preclusion is that parties to a lawsuit may not relitigate any issues decided against them that were "essential" to the judgment.[220] Only past-conduct claims and the issues they present can be litigated—but where a future-conduct claim depends on an issue actually litigated, issue preclusion can apply to it. Thus, issue preclusion can bar those future-conduct claims that share an essential issue with a past-conduct claim that the class could have brought.

The implications for parity of preclusion are straightforward. Any past-conduct claim can be barred by claim preclusion, and hence can be settled. Any future-conduct claim that depends on an issue essential to a past-conduct claim can be barred by issue preclusion, and hence can also be settled. Neither form of preclusion could apply to future-conduct claims that are materially different from any past-conduct claims the class can bring—call them "novel" future-conduct claims—and hence these claims cannot be settled. Ripeness draws the line between "past" and "future" conduct; pleading doctrines enforce that line by preventing the parties from presenting fictional issues. The effect is to require a close connection between the past conduct challenged in the lawsuit and the future conduct permitted by the settlement: generally only a materially identical continuation of the defendant's past conduct will satisfy parity of preclusion.

A court applying this test must exercise care in two respects. The first is that a complaint submitted by class counsel seeking settlement cannot always be taken at face value. The reviewing court must be willing to look beyond the complaint at least to the extent required by *Ashcroft v. Iqbal*[221] and Rule 11. The plaintiffs in the pollution suit would not, for example, have been allowed to submit a complaint

219. It does not matter that claim preclusion also bars any causes of action arising out of the same "transaction, or series of connected transactions," that a plaintiff could have asserted but did not. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1980); *see also* United States v. Tohono O'Odham Nation, 131 S. Ct. 1723, 1730 (2011) (referencing Restatement rule as the "now-accepted test in preclusion"). We have already assumed that the class asserts every cause of action it can.

220. Cooper v. Fed. Reserve Bank, 467 U.S. 867, 874 (1984); RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 27 (1980).

221. 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (citation and internal quotation marks omitted)).

alleging that the factory's employees were about to punch them in the face, then settle the suit by allowing the employees to punch them in the face. That complaint would have been improper, since its factual allegations would have lacked "evidentiary support" and there would have been no nonfrivolous argument for the legal claims arising out of those allegations. The same goes, of course, for a complaint whose relevant facts are the product of collusion, or for one that contains factual and legal allegations that are obviously pretextual. Unsupported matter included in the complaint solely to expand the range of possible settlements must be stricken.[222]

The second point requiring care is the task of determining the scope of issue preclusion due to a hypothetical judgment. It is possible for a judgment to have almost no issue-preclusive effect: e.g., a holding that the defendant did not punch the plaintiff in the face on January 3 will not dispose of any claims (over and above the ones already taken care of by claim preclusion). But it is also possible for a judgment to have substantial issue-preclusive effect. If a court holds that the defendant, and not the plaintiff, holds good title to a parcel of land, a wide range of actual and possible trespass claims will vanish all at once. The outer limit of issue preclusion's effect is therefore determined by the fact-sensitive question of what issues could have been resolved against the class in the underlying lawsuit. Where an essential issue really could have been resolved against the class and really would operate as a bar a future-conduct claim, the class can properly release that claim in settlement.[223]

B. The Identical Factual Predicate Doctrine

The closest that the courts have come to this reasoning is to hold that a class-action settlement may release claims if they arise out of an "identical factual predicate" as the claims asserted in the underlying lawsuit.[224] This doctrine is close enough to the parity of preclusion

222. *See* FED. R. CIV. P. 12(f) (allowing court to "strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter" sua sponte).

223. It is possible to object to this rule on the ground that it encourages the defendant to take aggressive action toward the class in order to increase the number of ripe issues that can be settled. There are three replies. First, that same aggressive action will increase the chances that the defendant will be sued by class representatives who will refuse to settle, providing negative feedback on any increased tendency for the defendant to be aggressive. Second, without a ripeness test, the defendant will never be exposed to any legal risk at all, so imposing one increases the class's leverage. And third, the parity of preclusion rule cannot prevent all abuses of future-conduct releases by itself: that is why courts must still apply a heightened scrutiny standard as well.

224. *See, e.g.*, Hesse v. Spring Corp., 598 F.3d 581, 590 (9th Cir. 2010); Wal-Mart Stores, Inc., v. Visa U.S.A. Inc., 396 F.3d 96, 107 (2d Cir. 2005); *In re* Prudential Ins. Co. of

principle that it can and should be interpreted simply to embody the principle. Indeed, a failure to recognize the general principle is the source of the confusion infecting the identical-factual-predicate doctrine. The courts have not clearly distinguished between the effects of claim and issue preclusion. Instead, as this section explains, they have pushed the logic of claim preclusion beyond what it can reasonably bear in order to accommodate settlements that seem unobjectionable.

The identical-factual-predicate doctrine emerged in *National Super Spuds, Inc. v. New York Mercantile Exchange*.[225] There, a price-fixing lawsuit over potato futures reached a settlement that covered both the "liquidated" claims of traders who had sold their contracts at a loss and the "unliquidated" claims of traders who had held onto their contracts but never received the promised potatoes.[226] Since the class representatives held only liquidated claims, the settlement could easily have been rejected on conflict-of-interest grounds, but Judge Friendly added:

> 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. . . . 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.[227]

This passage is a clear articulation of the close relationship between adequate representation and preclusion.[228] Unfortunately, perhaps because *National Super Spuds* was not a future-conduct case, Judge Friendly drew only on the language of claim preclusion. "[D]epending

Am. Sales Practice Litig., 261 F.3d 355, 367 (3d Cir. 2001). A particularly telling variation comes from *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1992), which asked whether the released and settled claims "arise from the same common nucleus of operative fact." *Id.* at 1288; *see also In re* Phila. Stock Exch., Inc., 945 A.2d 1123, 1146 n.48 (Del. 2008) ("Although the phraseology of these concepts ('identical factual predicate' and 'same set of operative facts') may be different, their substantive meaning is the same."). This is the language of supplemental jurisdiction, *see United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), which reinforces the argument that parity of preclusion is a jurisdictional limit on the federal courts, *see infra* Part IV.C.

225. 660 F.2d 9 (2d Cir. 1981).

226. *See id.* at 13–14.

227. *Id.* at 18 & n.7.

228. *Cf. supra* note 96 (discussing the binding nature of representational litigation).

on the very same set of facts" focuses on the underlying facts of the claims, much as claim preclusion does.[229]

The phrase "identical factual predicate" in this context comes from *TBK Partners, Ltd. v. Western Union Corp.*[230] In approving a broad settlement of past-conduct claims, the court wrote:

> 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 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.[231]

Here, although the court identifies a goal that sounds in issue preclusion ("relitigation of settled *questions*") the actual test uses language that comes from claim preclusion ("identical *factual* predicate"). This slippage is harmless for past-conduct cases, where broad joinder rules mean that anything that was fair game for issue preclusion will be fair game for claim preclusion as well. But it leads to confusion in future-conduct cases. The problem is that focusing on factual similarities, rather than legal similarities, provides little useful guidance as to how far a chain of transactions can be stretched before one of the links breaks.

The courts applying the identical factual predicate doctrine to future-conduct cases have split on precisely this question. The Delaware Chancery Court held that future conduct and past conduct could never share an identical factual predicate: "If the facts have not yet occurred, then they cannot possibly be the basis for the underlying action."[232] But the Second Circuit held that it is "not improper" to release claims for future infringements as long as the complaint "contemplates these alleged future injuries."[233] The *Restatement* explains that the concept of "transaction" is "to be determined pragmatically,"[234] but the courts do not have a good sense of which

229. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1980) (barring claims "with respect to . . . the transaction, or series of connected transactions, out of which the action arose").

230. 675 F.2d 456 (2d Cir. 1982).

231. *Id.* at 460.

232. Unisuper Ltd. v. News Corp., 898 A.2d 344, 347 (Del. Ch. 2006).

233. *In re* Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 248 (2d Cir. 2011).

234. RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1980).

factors are relevant when contemplating a future-conduct release.[235] Parity of preclusion supplies the answer.

C. Doctrinal Justification

Thus far, the case for parity of preclusion has been intuitive rather than doctrinally rigorous. While the identical factual predicate doctrine offers an obvious basis for parity of preclusion, the doctrine itself has never been rigorously grounded. It is general common law, followed by both federal and state courts, but with no explicit basis in constitution, statute, or rule. For some readers, this will be sufficient to justify the principle as a prudential judge-made doctrine. This section will provide a more rigorous foundation for those readers who want one.

The basic structure of the argument is simple: unlitigable class claims are by definition outside the jurisdiction of the federal courts over class actions.[236] The contrast to individual releases, which are effective as a matter of contract law, is instructive. Even when the court enters a contract as a judgment to facilitate enforcement, it is enforcing a private contract. Class-action settlements are not and cannot be contracts, because class representatives are authorized to litigate on behalf of their fellows, not to negotiate contracts. The only way to make a release binding on a class is for the court to use its judgment power—and that it cannot do unless it has jurisdiction over the released claims in the first place. Article III's constitutional limit on federal jurisdiction, statutory limits on federal jurisdiction, and Rule 23's limits on which class actions can be certified by a federal court all point in the same direction. Unlitigable claims are unsettleable because they are categorically unripe.

For space reasons, this Article discusses only federal doctrines that would limit future-conduct releases. But all the same normative arguments apply to state courts, and doctrinally, state jurisdiction is not a free-for-all. States may have broader conceptions of what they consider to be a justiciable case, states may have courts of general

235. *See generally* Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 TEX. L. REV. 1723 (1998) (discussing multiple meanings of "transaction" standard and emphasizing its flexibility).

236. This is not the only parity-based bright-line jurisdictional limit on future-conduct releases one could attempt to defend. Another approach would focus on future *parties* rather than on future-conduct *claims*. *See* Schuwerk, *supra* note 9, at 227. On this theory, future-conduct releases could not bind individuals who were not part of the class at the time of the settlement. The problem with such an approach is that it draws arbitrary distinctions based on whether parties are part of a class for unrelated reasons. A claim-based approach more properly focuses on the actual content of the releases.

subject-matter jurisdiction, and states may have fewer prerequisites to class certification. But the states do still have limits: some matters are too abstract and unripe to present cases their courts will entertain, and some classes are too diffuse for them to certify. The point of parity of preclusion is that *wherever a jurisdiction sets those limits*, they should apply equally in litigation and in settlement.

1. Article III Jurisdiction

Novel future-conduct claims are unripe.[237] They do not present a litigable case or controversy; the federal courts have no jurisdiction over them.[238] Courts do not magically acquire such jurisdiction

237. One could also try to analyze the issue in terms of the related doctrine of Article III standing. *Cf., e.g.*, Gaston, *supra* note 9, at 223–24 (discussing limitations on standing for class action claimants with regard to future injuries). Indeed, standing and ripeness "are closely related, most notably in the shared requirement that the injury be imminent rather than conjectural or hypothetical." Brooklyn Legal Servs. Corp. B v. Legal Servs. Corp., 462 F.3d 219, 225 (2d Cir. 2006). But ripeness, which controls when a claim can be brought, is a better fit for future-conduct releases than standing, which controls who can bring the claim.

Martin Redish and Andrianna D. Kastanek have argued that settlement class actions in general violate Article III because they are non-adversarial. Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 550–51 (2006). This position has not carried the day in the courts, but it applies with even greater force to novel future-conduct settlements, where the claims being settled not only are not being litigated but could not be litigated. Here, however, the lack of an adversarial case is a function of the lack of ripeness, rather than vice-versa.

238. *Cf.* Matthews v. Diaz, 426 U.S. 67, 71 n.3 (1976) (explaining that the district court lacks jurisdiction over class members who "will be denied enrollment' " in Medicare) (quoting Diaz v. Weinberger, 361 F. Supp. 1, 7 (S.D. Fla. 1973)). *Matthews* involved administrative exhaustion, but other cases have issued similar holdings as a matter of Article III. *See, e.g.*, Catron v. City of St. Petersburg, No. 8:09-cv-923-T-23EAJ, 2010 WL 917609, at *2 (M.D. Fla. Mar. 11, 2010) ("Furthermore, the plaintiffs cannot assert a claim on behalf of a nonexistent member of the class who, at some hypothetical time in the future, 'will be' homeless and 'would be' subject to any of the City's alleged 'policies, practices[,] or customs.' " (internal citation omitted)); Minority Police Officers Ass'n of S. Bend v. S. Bend, 555 F. Supp. 921, 924–25 (N.D. Ind. 1983) (holding no jurisdiction to include future minority police officers in employment discrimination case), *aff'd in part, appeal dismissed in part*, 721 F.2d 197 (7th Cir. 1983). While other courts do sometimes certify classes including future class members, *see, e.g.*, Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1335 (2d Cir. 1992) (describing previous class of "all Haitian aliens who are currently detained or who *will in the future* be detained" (emphasis added)), such classes are frequently open to subsequent challenge by class members, *see, e.g.*, *id*. at 1337–38 (rejecting preclusive effect of prior class action against class members on multiple grounds). Such certifications are unnecessary to vindicate the rights of future claimants; a better model is to treat them as beneficiaries of a favorable outcome for the class, while allowing the defendant to rely only on the weaker effect of stare decisis rather than *res judicata* to bind them to an unfavorable result. *See, e.g.*, South v. Rowe, 759 F.2d 610, 614 (7th Cir. 1985) (allowing intervention by formerly future class member); Kaczynski, *supra* note 9, at 411–12.

because the claims arrive at the clerk's office on a piece of paper labeled "Proposed Settlement Agreement" rather than one labeled "Complaint."

This argument does not depend on any particular theory of how far Article III extends. You and I may disagree on which claims actually are ripe, and why. But once we agree that a claim could not be litigated, and that it is so different in kind from any claims that could be litigated that it cannot be precluded by them, we have already decided that it is outside Article III's ambit.[239] Whatever ripeness's limit is, it applies equally in litigation, in preclusion, and in settlement. In a settlement, the parties will all be urging approval, but the court "cannot rely upon concessions of the parties and must determine whether the issues are ripe for decision in the 'Case or Controversy' sense."[240]

Nor is Article III satisfied with respect to future-conduct claims just because some other claims do present a live case or controversy. If you breach a contract with me, I can sue you for the breach. But I cannot also sue to enjoin you from burning down my house. My hypothetical claims against you for the house-burning are not part of the same Article III case or controversy as my contract claims.[241] So too with future-conduct settlements. The court does not acquire jurisdiction over unlitigable future-conduct claims merely because it has jurisdiction over some other, genuine claims by the class.

Indeed, the policies behind the case or controversy requirement are the same ones counseling caution about future-conduct releases. Deferring decisions until better factual information is available about their consequences?[242] Check.[243] Letting individuals make their own

239. *See, e.g.* Schuwerk, *supra* note 9, at 81 ("To the extent those claims have not matured by the time of the court's ruling, they never ripen into the concrete adverseness necessary for a justiciable case or controversy and the court never acquires jurisdiction to pass upon them.")

240. Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974).

241. Standing doctrine is instructive here. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."). This policy appeals to—indeed, derives from—considerations of ripeness. *See id.* (holding that a broader definition of standing would mean that "a federal court would be free to entertain moot or unripe claims"); *cf.* Pagán v. Calderón, 448 F.3d 16, 26 (1st Cir. 2006) ("The standing inquiry is both plaintiff-specific and claim-specific.").

242. *See* WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532.2 (3d ed. 2011) ("[T]he central concern of [ripeness] is that the tendered claim involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all.").

243. *See supra* Part II.A–B.

decisions?[244] Check.[245] Separation of powers?[246] Check.[247] "[R]ipeness is peculiarly a question of timing."[248] It requires courts to wait to decide a claim until it is properly presented, and that is exactly what parity of preclusion accomplishes. It does not keep these matters out of the courts forever, but only until such time as there is a genuine legal dispute about them.[249]

2. Statutory Jurisdiction

Parity of preclusion is also a limit on the statutory jurisdiction of the federal courts. Congress has not even attempted to confer jurisdiction over novel future-conduct claims. Where a district court lacks original jurisdiction over a future-conduct claim standing on its own, there is no provision of federal law that confers such jurisdiction merely because it is included in a class-action settlement. Supplemental jurisdiction extends only to claims that "form part of the same case or controversy under Article III of the United States Constitution" as a claim over which the court has original jurisdiction.[250] Similarly the Declaratory Judgment Act limits itself to "a case of actual controversy" that is already "within [the court's] jurisdiction,"[251] thereby incorporating the Article III limit.

Nor do the Federal Rules attempt to confer such jurisdiction. Rule 82 is crystal-clear: the Federal Rules "do not extend or limit the jurisdiction of the district courts[.]"[252] There is no exception for class

244. *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 310–15 (1979).

245. *See supra* Part II.D.

246. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967) (stating that a "basic rationale" of ripeness is "to protect the agencies from judicial interference until an administrative decision has been formalized").

247. *See supra* Part II.E.

248. Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 140 (1974).

249. One might object that a person considering an action that might be held to infringe a group's rights would be unwilling to take the steps that would create a ripe question, and therefore the issue would never come before the courts. So, for example, if Alice is considering putting up a factory but is afraid her neighbors will sue for nuisance, she might never make the investment without an advance settlement to insulate her from liability, and so the issue will never come before a court at all. But we have already made that decision. We made it when we refused to let the neighbors sue Alice in advance, because the issue was unripe. And we made it again when we refused to let Alice bring a declaratory judgment action against the class, again because the issue was unripe. All that parity of preclusion requires is that we repeat this decision for settlements as well as lawsuits. Claims that are unripe in the one are unripe in the other.

250. 28 U.S.C. § 1367(a) (2006).

251. *Id.* § 2201(a) .

252. FED R. CIV. P. 82. By way of contrast, the Rules Enabling Act's famous proviso that the Rules "shall not abridge, enlarge or modify any substantive right," 28 U.S.C.

actions or for settlements. A court that lacks jurisdiction over a claim in class-action litigation does not magically acquire jurisdiction because the class action settles.

3. Rule 23

Rule 23 itself does not allow novel future-conduct claims to be part of a class action. A settlement-only class action may not circumvent the threshold requirements of Rule 23(a)(2).[253] A class can be certified only with respect to "common questions of law or fact."[254] Novel future-conduct claims present neither. There are no common questions of fact because there cannot be: there are no facts about the conduct yet, only possibilities.[255] And there are no common questions of law because the legal claims are unripe. If there were a common, ripe issue of law shared by the class, then issue preclusion could apply.[256]

Other parts of Rule 23 reinforce the interpretation that the phrase "common questions of law or fact" in 23(a)(2) refers only to actual, litigable claims and genuine, present issues of law. The "claims or defenses of the representative parties" can only be typical if class

§ 2072(b) (2006), does not provide an independent limit on the settlement of novel future-conduct claims. A broad settlement power may be an arbitrary and unfair delegation to class counsel of the procedural ability to compromise substantive rights, but it does not itself abridge them. While others have raised Rules Enabling Act objections to expansive class actions, *see, e.g.*, Paul D. Carrington & Derek T. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 492–93 (1997); Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1314–15 (2006), in the words of Rocket J. Squirrel, "But that trick never works." The Supreme Court has been notably unreceptive to arguments that provisions of the Federal Rules exceed the authority delegated by Congress in the Act. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1448 (2010) (holding that Rule 23 is within the scope of the Rules Enabling Act even when it conflicts with a state law prohibiting certain forms of class actions). *But see* Wal-Mart v. Dukes, 131 S. Ct. 2541, 2561 (2011) (invoking Rules Enabling Act as support for narrow construction of Rule 23).

253. Amchem Prods, Inc. v. Windsor, 521 U.S. 591, 619–22 (1997).

254. FED R. CIV. P. 23(a)(2).

255. *See* James Grimmelmann, *Three Theories of Copyright in Ratings*, 14 VAND. J. ENT. & TECH. L. 851, 877 (2012) (discussing existential status of "facts" about future events).

256. Of course, a class concerned about future conduct may share some common factual and legal questions. So, for example, a group of individuals with a shared disease who are concerned about working conditions at a proposed factory may have in common the question of whether the disease qualifies as a "disability" under the Americans with Disabilities Act, 42 U.S.C. § 12102 (2006). But this question can only be resolved in a lawsuit properly presenting it: a lawsuit about conditions at an actual factory, not a purely hypothetical one. The same limit applies to settlements.

members have "claims" in the first place.[257] It only makes sense for the court to "define . . . the class claims, issues, or defenses" if the class action will actually be limited to those "claims, issues, or defenses."[258] And the class action will result in a "judgment": i.e., the exercise of the court's adjudicatory power.[259] Rule 23 treats the class action as a mechanism for aggregating existing, litigable claims; novel future-conduct releases transgress that limit.[260]

D. Answering Doctrinal Objections

This section answers two objections to the jurisdictional justification for parity of preclusion. Both of them claim that federal courts routinely approve settlements that would be flatly illegal under parity of preclusion. Some cases, like *Firefighters*, approve settlements that provide broader relief than would have been available at trial. Others, like the Supreme Court's *Matsushita Electric Industrial Co. v. Epstein*,[261] approve settlements that release claims that could never have been heard in the forum court at all. Neither objection is on point; understanding why requires closer attention to the cases in question.

1. Remedies Not Available at Trial

The first objection is that some cases approve consent decrees, as in *Firefighters*, that "provide[] broader relief than the court could

257. FED R. CIV. P. 23(a)(3).

258. FED R. CIV. P. 23(c)(1)(B); *see also id.* 23(c)(2)(B)(iii) (requiring notice of "the class claims, issues, or defenses"; *id.* 23(e) (allowing settlement of "[t]he claims, issues, or defenses"). Adam Milasincic argues that Rule 23(c)(1)(B) is an "easy-to-satisfy administrative instruction" intended only to "separat[e] the certified from the noncertified," but even this Rule 23(c)(1)(B) minimalist accepts by assumption that the class action must actually be confined to "claims, issues, or defenses." Adam Milasincic, Note, *Disorder Certifying a Class: Misinterpretations of Rule 23(c)(1)(B) and a Proposed Alternative*, 97 VA. L. REV. 979, 1006, 1017 (2011).

259. FED R. CIV. P. 23(c)(2) ("class judgment"); *id.* 23(c)(3) ("judgment"); *id.* 23(d)(1)(B)(ii) (notice of "proposed extent of the judgment").

260. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1443 (2010) ("A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits."). Scholars presently debate the extent to which the class is more than just a scaled-up version of joinder. *See generally* Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459 (1983) (exploring "broad patterns" of the joinder and representational models of class actions); Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939 (2011) (discussing "aggregation" versus "entity" views of class actions); Redish & Kastanek, *supra* note 237 (objecting to class actions as qualitatively different from conjoined individual lawsuits).

261. 516 U.S. 367 (1996).

have awarded after a trial."[262] If courts have jurisdiction to award broader remedies, why not to impose broader releases? For example, in *Sansom Committee. v. Lynn*,[263] the Third Circuit approved a consent decree that was "several hundred pages long and set[] out precise specifications for everything from the type of stone and wood that [could] be used in rehabilitating the houses to . . . methods of vermin control and refuse disposal."[264]

The answer is simply that remedies and releases really are different. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[265] The concerns that limit the application of this equitable power—such as federalism and separation of powers[266]—are substantially weaker in consent decrees because the defendant has individually agreed to waive such protections.[267] As long as the remedies "spring from and serve to resolve a dispute within the court's subject-matter jurisdiction"[268] the court has the power to put them in a consent decree.[269] Releases for novel future-conduct claims, on the other hand, "resolve" nothing: the entire point of the discussion above is that they deal with nonjusticiable claims outside the court's subject-matter jurisdiction.[270]

262. Local No. 93, Int'l Ass'n. of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986); s*ee also supra* notes 97–106 and accompanying text.

263. 735 F.2d 1535 (Becker, J., concurring).

264. *Id.* at 1543 n.4: *see also* Brief of Google in Support, *supra* note 36, at 9 (quoting *Sansom*).

265. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

266. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 124–33 (1995) (Thomas, J., concurring) (giving history of structural injunction jurisprudence and arguing for narrower judicial equitable powers).

267. *Firefighters*, 478 U.S. at 525 ("However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree.").

268. *Id.*

269. The same is true of the numerous other cases cited by Google and the plaintiffs in *Authors Guild*. Cases that actually involve promises made *to* the class include *Frew v. Hawkins*, 540 U.S. 431 (2004); *Jeff D. v. Kempthorne*, 365 F.3d 844 (9th Cir. 2004); *Kozlowski v. Coughlin*, 871 F.2d 241 (2d Cir. 1989); *Duran v. Carruthers*, 885 F.2d 1485 (10th Cir. 1989); In re *"Agent Orange" Product Liability Litigation*, 818 F.2d 179 (2d Cir. 1987); *Miller v. Woodmoor Corp.*, No 74-F-988, 1978 WL 1146 (D. Colo. Sept. 28, 1978); and *Levin v. Mississippi River Corp.*, 59 F.R.D. 353 (S.D.N.Y. 1973). Google and the *Authors Guild* plaintiffs cited two Rule 23(b)(1) cases, both of which required stringent prerequisites to ensure that the future-conduct claims being released had been at stake in the underlying lawsuits challenging the professional leagues' draft systems. *See* White v. Nat'l Football League, 822 F. Supp. 1389, 1390 (D. Minn. 1993); Robertson v. Nat'l Basketball Ass'n, 72 F.R.D. 64, 64 (S.D.N.Y. 1976), *aff'd* 556 F.2d 682 (2d Cir. 1977).

270. *See supra* Parts IV.C.1–.2.

2. Multi-Jurisdiction Releases

The second objection is that the Supreme Court in *Matsushita Electric Industrial Co. v. Epstein*[271] approved:

> 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.[272]

At first blush, this language seems inconsistent with parity of preclusion: it permits the settlement of claims that perhaps could not have been litigated. But there is a subtle difference, related to *why* those claims could not have been presented. The quoted language comes originally from *TBK Partners v. Western Union Corp*.[273] The class action there 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.[274] These state claims were based on the same factual allegations 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.[275] *Matsushita* presented the reverse situation: the release of exclusively federal claims in state courts.[276]

In both situations, the claim itself is justiciable, but a rule of subject-matter jurisdiction has allocated the claim to a different court. These rules advance policies of federalism and of orderly division of responsibilities within a court system; they keep courts from stepping on each other's toes. These policies are important in litigation; much less so in settlement. There is no useful purpose to be served in making the parties who are filing a settlement in one court walk down the street to file a second set of paperwork in another court.

Because the purpose of parity of preclusion is to prevent the settlement of unlitigable claims, it makes sense to adopt this generous attitude toward which claims (and issues) are capable of being litigated. For a class-action settlement to release a claim, it is enough

271. 516 U.S. 367 (1996).
272. *Id.* at 377 (internal quotation marks omitted).
273. *See* 675 F.2d 456, 460 (2d Cir. 1982).
274. *Id.* at 458–60.
275. *See id.*
276. *See Matsushita*, 516 U.S. at 367. *Matsushita* itself can be distinguished on a second ground: it was decided as a matter of statutory full faith and credit and so did not truly confront the jurisdictional issue. *Id.* at 373.

that it could be precluded by a class action in *any* court, not just by a class action in the forum court.[277] These claims are effectively litigable in the other court; indeed, they could be settled there. A settlement in the forum court should also be able to release them.

The harder part is explaining why such releases do not violate the jurisdictional arguments given above. A claim that could not have been brought in a forum for reasons of subject-matter jurisdiction cannot be precluded under claim preclusion.[278] But parity of preclusion embraces issue preclusion as well, and issue preclusion is more willing to consider the policies underlying the allocation of jurisdiction among courts.[279] *Matsushita* illustrates precisely how this flexibility can work: in considering the preclusive effect Delaware would give to a settlement entered by one of its courts, the Supreme Court explicitly thought through the federalism polices at stake and Delaware's judgments about the authority vested in its courts.[280] *TBK Partners* did much the same in reverse, and even identified the common essential issue: "the correct valuation of whatever reversionary interest was owed to Gold & Stock's shareholders."[281] This is the correct approach.

E. Normative Justification

Informally, parity-of-preclusion means that future-conduct claims may be released only when they are closely connected to something the defendant has already done. This restriction addresses many of the normative concerns with future-conduct releases identified in Part II. It does not address them completely, so there is still also a need for heightened Rule 23(e)(2) scrutiny. But it does so effectively enough that parity-of-preclusion marks a normatively attractive dividing line between potentially permissible future-conduct releases and absolutely forbidden ones. Once again, it is helpful to group the analysis by those normative concerns.

277. *But see* Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266, 274 (7th Cir. 1998) (reading *TBK Partners* and other cases "as pertaining broadly to the law of 'releases' rather than narrowly to the issue of federal court jurisdiction"). *Williams* is discussed on other grounds and criticized herein. *See infra* Part V.C.

278. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1980).

279. *Id*. § 28(3) (explaining that preclusive effect depends on "differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them").

280. *See Matsushita*, 516 U.S. at 377–79, 382–83.

281. TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 460–61 (2d Cir. 1982).

1. High Stakes

It is almost tautological that parity of preclusion can only reduce the stakes of potential settlements. If a given claim was at risk in litigation, then the stakes are already high enough to include it. True, a complaint can be drafted broadly, but we tolerate broad complaints in litigation already[282] and trust courts to ensure that class members are adequately represented to the extent of those claims.[283] If the scope of settlement authority were narrower, counsel could have the incentive to litigate weak and risky claims rather than accepting a beneficial settlement. Moreover there are still limits on even a broadly drafted complaint.[284] There is no way that authors and publishers could have lost the right to stop Google from selling complete copies of their books, no matter how broad their pleadings. For one thing, since Google did not sell and was not about to sell complete books, such claims would have been categorically unripe.[285] For another, the infringement case would have been so unequivocal that a court could easily conclude that there was no colorable risk of loss.[286]

2. Uncertainty

Grounding future-conduct releases in the defendant's past conduct introduces specificity: we can better anticipate the future if we know that it will be like the past. This makes it easier to predict the relevant conduct and its consequences, thereby 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. It is much easier to feel comfortable about a settlement allowing Google

282. *See* FED. R. CIV. P. 18(a) (permitting a party to join in one complaint "as many claims as it has against an opposing party").

283. *See* FED. R. CIV. P. 23(g) (establishing standards for the appointment of class counsel, including that counsel will "fairly and adequately represent the interests of the class").

284. *See supra* Part IV.A (discussing pleading doctrines).

285. *See* Authors Guild, Inc. v. HathiTrust, No. 11 CV 6351(HB), 2012 WL 4808939, at *7–8 (S.D.N.Y. Oct. 10, 2012) (holding that claims against Google's library partners for cancelled plan to distribute complete copies of books were unripe); Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 678 (S.D.N.Y. 2011) ("Google did not scan the books to make them available for purchase . . . .").

286. Indeed, the *Authors Guild* court did just that. *Authors Guild*, 770 F.Supp.2d at 678 ("Google would have no colorable defense to a claim of infringement based on the unauthorized copying and selling or other exploitation of entire copyrighted books."); *see also* Transcript of Fairness Hearing, *supra* note 87, at 150 ("THE COURT: If Google had been digitizing entire books and not just making portions available but making the entire portions available and indeed selling them, would that be something that Google would have tried to defend? MS. DURIE: Selling the work, no.").

to create a search index than about one allowing it to sell books. The search index Google has spent the last seven years building is a very good illustration of how a search index would work, whereas basic features of the proposed bookstore and subscription service were still giant question marks as of the time the settlement was rejected. Past performance is no guarantee of future results, but it is better than past nothing.

3. Moral Hazard

It is harder to set up perverse incentives if one does not have novel conduct to work with. 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. The court can similarly have more confidence that the arrangement it is blessing is not unduly dangerous, if it has managed to exist already without problem. Moreover, a defendant seeking to undertake an activity will need to be prepared to actually engage in the activity, without the cover of the settlement, and risk the consequences. This skin in the game gives the class more negotiating leverage because it leaves litigation as a credible threat.[287]

4. Concentrated Power

Future-conduct releases can still give a defendant concentrated power, but with parity of preclusion, that power is limited to the continuation of the power the defendant has already claimed. This pulls potential challenges forward in time: for example, antitrust suits by third parties need not wait until after the settlement. Parity also assists the defendant's competitors, because if the defendant could have obtained the rights it seeks through litigation, anyone similarly situated 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.[288]

287. *Cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997) ("Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer."). Crucially, this alternative would also produce the attorney's fees needed to motivate class counsel to consider litigation instead of settlement.

288. *See generally* Grimmelmann, *supra* note 128 (discussing obstacles standing in the way of potential competitors looking to establish similar programs).

5. 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. The decisions of the legislature are still given effect through the bodies of law that shape and constrain the underlying lawsuit. The resulting settlements may have substantial prospective effects and apply broadly, but they are no longer wholly untethered from legislative enactments. 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.

V. APPLICATIONS

Not only are heightened scrutiny and parity-of-preclusion normatively attractive when considered in the abstract, they also yield sensible results when applied to specific cases. This Part considers a test suite of seven actual settlements containing future-conduct releases. In each case, applying this Article's recommendations—heightened scrutiny and parity-of-preclusion—yields doctrinally and normatively appealing results for clearer and more generalizable reasons than the courts themselves have given.

A. Authors Guild v. Google, Inc.

Parity of preclusion asks whether the plaintiff authors and publishers could have lost in litigation their future-conduct claims against Google for selling complete books. The answer is clearly "no," and *Authors Guild* supplies a clear, cogent explanation of why. The underlying lawsuit did not bring claims predicated on a theory of infringement for selling complete books:

> 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. . . . There was no allegation that Google was making full books available online, and the case was not about full access to copyrighted works.[289]

289. *Authors Guild*, 770 F. Supp. 2d at 678. Indeed, now that the case has returned to litigation, the Authors Guild does not allege that Google sells complete books. *See* Plaintiffs' Statement of Undisputed Facts in Support of Their Motion for Partial Summary Judgment (redacted), *Authors Guild,* 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 1:05-CV-08136-DC), ECF No. 1054 ¶ 53 ("Google has digitally copied over four million in-copyright English language books[;] . . . distributed complete digital copies of over 2.7 million of in-copyright books to libraries[;] . . . and displayed verbatim expression as

More importantly, the plaintiffs could not have brought claims predicated on such a theory:

> 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.[290]

Taken together, these two points show that the parity-of-preclusion test unambiguously forbade the settlement. There was no plausible way that Google's conduct in scanning and indexing books could have put in play the class's future claims for future sales of complete books. No possible fair use victory in the underlying lawsuit could have given Google the rights the settlement conferred on it, because the scope of the fair use defense is tied to specific uses. It would have been evaluated as to the display of snippets, not as to the sale of complete books. *Authors Guild* thus reaches the right result.

Unfortunately because the court was saddled with the identical factual predicate doctrine, it surrounded these two passages with other statements whose relationship to the core preclusion issue is less clear. The court gave this discussion of the "scope of the pleadings":

> The parties argue that the pleadings are not limited to plaintiffs' claims with respect to the display of snippets, citing the Third Amended Complaint. While it is true that the pleadings refer to broader conduct (including the creation of ''digital copies'' of books), the copying and display of copyrighted material occurred in the context of ''Google Book Search,'' which ''is designed to allow users to search the text of books online. The digital archiving of the Books that are the subject of this lawsuit was undertaken by Google as part of Google Book Search.''[291]

This passage was a nonresponsive answer to an irrelevant argument. It does not matter that the complaint went beyond scanning and snippet display if Google's past conduct did not put the legality of full-text sales in play. To the extent that the complaint objected to

snippets from millions of in-copyright books over the Internet in response to search requests from its users.").

290. *Authors Guild*, 770 F. Supp. 2d at 678.

291. *Id.* (citations omitted).

full-text sales, it raised only unripe, nonjusticiable claims. That the scanning and snippet display took place "in the context of 'Google Book Search' "[292] says nothing, by itself, about what legal issues the suit raised.

Similarly, the court went on to write:

> The ASA would grant Google control over the digital commercialization of millions of books, including orphan books and other unclaimed works. And it would do so even though Google engaged in wholesale, blatant copying, without first obtaining copyright permissions. While its competitors went through the ''painstaking'' and ''costly'' process of obtaining permissions before scanning copy- righted books, ''Google by comparison took a shortcut by copying anything and everything regardless of copyright status.'' As one objector put it: ''Google pursued its copyright project in calculated disregard of authors' rights. Its business plan was: 'So, sue me.' "[293]

The tone of moral condemnation was understandable, if unwarranted—but the idea that Google should not be rewarded for its "shortcut" was exactly backwards. The problem with the settlement was that it went beyond the underlying lawsuit. If Google had not scanned books at all, the settlement would have been even more unwarranted, more hypothetical, more disconnected from the lawsuit. The court should have been more concerned that Google was trying to get the benefits of a full-books settlement without exposing itself to any meaningful risk, than that Google acted too aggressively in scanning books.

The parity-of-preclusion principle shows that a narrower settlement of the case could have included some future-conduct elements.[294] Imagine a scanning-and-snippets settlement: one that allows Google to scan books, build a search index, and show snippets to users, in exchange for some compensation to class members. Such a settlement would pass muster under the parity-of-preclusion test, because these are precisely the activities it has been engaged in for the last eight years. If Google wins its pending motion for summary judgment on its fair use defense, it will be legally entitled to keep on

292. *Id.*

293. *Id.* at 678–79 (citations omitted).

294. *See* Statement of Interest II, *supra* note 11, at 8 ("[A] properly defined and adequately represented class of copyright holders may be able to settle a lawsuit over past conduct by licensing a somewhat broader range of conduct.").

scanning and indexing books.[295] Thus, future conduct raising the same legal issues—scanning, indexing, and snippet display—would properly be within the scope of a revised settlement.

Events following the settlement's rejection illustrate how little parity of preclusion interferes with normal class-action litigation. In December 2011, the author plaintiffs moved for class certification.[296] Even though the court had previously held in rejecting the settlement that "the class plaintiffs ha[d] not adequately represented the interests of at least certain class members[,]"[297] it granted class certification, holding that a subset of those lead plaintiffs would be "adequate representatives of the class."[298] There is no contradiction. The Authors Guild's handpicked plaintiffs are adequate representatives to vindicate class members' existing rights. They are not adequate representatives to negotiate a forward-looking publishing deal through a settlement. No one is.

A ruling in a closely related case in October 2012 also underscores the point that scanning and indexing were genuinely at stake but that full-text sales were not. The Authors Guild also sued Google's library partners in a case with the caption of *Authors Guild, Inc. v. HathiTrust*.[299] Four of the libraries had announced an Orphan Works Project, which would have created a process to flag certain books as being orphans, and then made digital copies of those books available to library patrons.[300] After authors noticed serious problems with the libraries' processes—the initial list of "orphans" included Walter Lippman's *The Communist World and Ours*[301]—but before any of the books were actually made available, the libraries

295. *See* Defendant Google Inc.'s Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment or in the Alternative Summary Adjudication, Authors Guild, Inc. v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 05 CV 8136-DC), ECF No. 1032.

296. *See* Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, Authors Guild v. Google, Inc., 282 F.R.D. 384 (S.D.N.Y. 2012), *appeal docketed*, No. 12-3200 (2nd Cir. Aug. 14, 2012) (Nos. 05 Civ. 8136 (DC), 10 Civ. 2977 (DC)), ECF No. 990.

297. *Authors Guild*, 770 F. Supp. 2d. at 679.

298. *Authors Guild*, 282 F.R.D. at 394. *But see* Order of Aug. 14, 2012, *Authors Guild*, __ F.3d __ (No. 12-2402) (granting Google permission to appeal class certification).

299. Authors Guild, Inc. v. HathiTrust, No. 11 CV 6351(HB), 2012 WL 4808939, at *1–3 (S.D.N.Y. Oct. 10, 2012).

300. *Id.* at *2.

301. *Orphan Row: Now It's Your Turn*, AUTHORS GUILD (Sept. 14, 2011), http://blog.authorsguild.org/2011/09/14/orphan-row-now-its-your-turn-2/; *Found One! We Re-Unite an Author with an "Orphaned Work,"* AUTHORS GUILD (Sept. 14, 2011), http://blog.authorsguild.org/2011/09/14/found-one-we-re-unite-an-author-with-an-%E2%80%9Corphaned-work-%E2%80%9D/.

suspended the Orphan Works Project.[302] The Authors Guild and other authors' groups sued the libraries over the Orphan Works Project and also over their use of digital copies given to them by Google to create a search engine.[303] The court held that the search engine was a fair use[304] but refused to pass on the Orphan Works Project, which it held was unripe for adjudication.[305] In other words, as a result of the *HathiTrust* litigation, the plaintiffs have lost the right to object to the libraries' use of scans to provide a search engine, but not the right to object if the libraries in the future start making full books available.[306] This distinction is essentially the same one the *Authors Guild* court made in the context of a settlement; both courts got it right.

B. In re Literary Works in Electronic Databases Copyright Litigation

The *Literary Works* opinion grew out of a cluster of lawsuits informally known as the "freelancers" suits. Where the Google Books suit is about databases of books; the freelancers suits were about databases of articles. In the 1970s and 1980s, periodicals began licensing their articles to electronic databases.[307] While the details varied substantially, most of the databases treated the article as the fundamental unit: users searched for and read individual articles, rather than reading through an issue from one page to the next.[308] In

302. *U-M Library Statement on the Orphan Works Project*, MLIBRARY (Sept. 16, 2011), http://www.lib.umich.edu/news/u-m-library-statement-orphan-works-project.

303. *HathiTrust*, 2012 WL 4808939, at *3.

304. *Id.* at *10–14.

305. *Id.* at *7–8.

306. Two qualifications should be noted. First, the court did allow the libraries to make full-text books available to the print-disabled, but this part of the holding was confined to the print-disabled, as there was no suggestion that the libraries had made the books available to anyone else. *Id.* at *15. Second, as of this writing, the case has been appealed to the Second Circuit. Notice of Appeal, Authors Guild, Inc. v. HathiTrust, No. 1:11-cv-06351-HB (2d Cir. Nov. 8, 2012).

307. *See generally* MICHAEL A. BANKS, ON THE WAY TO THE WEB 63–73 (2008) (discussing 1980s movement toward full-text online availability and royalties issues); CHARLES P. BOURNE & TRUDI BELLARDO HAHN, A HISTORY OF ONLINE INFORMATION SERVICES, 1963-1976, at 366–68 (2003) (discussing 1970s development of online databases and licensing issues). Debates over copyright issues followed the creation of these databases even before they offered full-text downloads. *See* Kristin R. Eschenfelder, Anuj C. Desai, & Greg Downey, *The Pre-Internet Downloading Controversy: The Evolution of Use Rights for Digital Intellectual and Cultural Works*, 27 INFO. SOC'Y 69, 74–75 (2011).

308. *See* Tasini v. N.Y. Times Co., 972 F. Supp. 804, 808–09 (S.D.N.Y. 1997) [hereinafter *Tasini I*], *rev'd*, 206 F.3d 161 (2d Cir. 2000) [hereinafter *Tasini II*], *aff'd*, 533 U.S. 483 (2001) [hereinafter *Tasini III*].

the early 1990s, freelancers and the periodicals began to spar over whether their contracts (many of which were oral) allowed such licensing.[309]

In the first round of litigation, six freelance authors led by Jonathan Tasini sued the *New York Times*, *Newsday*, and *Sports Illustrated* for licensing their articles to various databases.[310] In 2001, the Supreme Court agreed 7–2 with the freelancers, opening the floodgates.[311] Three different groups of freelancers filed putative class actions against various electronic databases,[312] which were consolidated in the Southern District of New York.[313] While the freelancers had a strong case post-*Tasini*, it was not completely open-and-shut, in part because different publishers had used different contract forms. After three years of mediation, the parties announced a proposed settlement in March 2005.[314]

The basic structure of the settlement was comparatively simple. Like the Google Books settlement, it contained both a release for past infringements and one for future infringements.[315] Looking back, the databases and the publishers would have been forgiven for their past uses of class members' articles.[316] Looking forward, the databases would have been allowed to continue including class members' articles under their licenses from the publishers.[317] In return, the

309. *See, e.g.*, *Tasini I*, at 807 (describing contracts entered into by defendants); Deirdre Carmody, *Writers Fight for Electronic Rights*, N.Y. TIMES, Nov. 7, 1994, at B20 (reporting on copyrights dispute).

310. *See Tasini I*, 972 F. Supp. at 807.

311. *See Tasini III*, 533 U.S. at 506.

312. Posner v. Gale Group, Inc., No. 00-cv-07376 (S.D.N.Y. filed Sept. 28, 2000); Laney v. Dow Jones & Co., No. 00-cv-00769 (D. Del. filed Aug. 22, 2000); Authors Guild v. Dialog Corp., No. 00-cv-06049 (S.D.N.Y. filed Aug. 15, 2000). The alert reader will have noted that these filing dates predate the Supreme Court's decision in *Tasini III*. The suits were filed following the Second Circuit's decision in favor of the freelancers in *Tasini II*, but were stayed pending the Supreme Court's decision. *See In re* Literary Works in Elec. Databases Copyright Litig., 2001 Copyright L. Dec. (CCH) 33406, 33408 (S.D.N.Y. 2001).

313. *See In re* Literary Works in Elec. Databases Copyright Litig., 2001 Copyright L. Dec. (CCH) 33147, 33148 (J.P.M.L. 2000). One of the many ironies of these cases is that the National Writers Union and American Society of Journalists and Authors were co-plaintiffs with the Authors Guild in the consolidated freelancers suit and objectors to the Authors Guild-led Google Books settlement. *See id.*

314. *See* Settlement Agreement Dated March 31, 2005, *In re* Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242 (2nd Cir. 2011) (Nos. 05–5943–cv(L), 06–0223), *reprinted in* Joint Appendix at 107, Reed Elsevier Inc. v. Muchnick, 130 S. Ct. 1237 (2010) (No. 08-103), 2009 WL 1423539, at *107.

315. *See id.* § 1.n, at *113–15.

316. *See id*. (past uses); *id.* § 5.b at *127–28 (future uses).

317. As in the Google Books settlement, freelancer class members who remained in the class could choose to deny permission for future uses of their works. If they did so, however, their compensation would be reduced by thirty five percent. *Id.* § 5.a, at *127.

publishers and databases would have created a settlement fund of between $10 million and $18 million to be paid to copyright owners.[318] Owners of articles that had been registered with the Copyright Office would receive one-time payments of $150 or $1500 or more;[319] owners of unregistered works would receive payments starting at $5.[320] Following a detour through the Supreme Court on an unrelated jurisdictional issue,[321] the Second Circuit rejected the settlement for inadequate representation.[322]

On the way to this holding, however, the court also dealt with the future-conduct issue. The objectors had invoked the identical factual

Unlike the Google Books settlement's toggleable right to Exclude, however, this back-end opt-out right was a one-time option.

318. *See id.* § 3.a, at *116 (minimum); *id.* § 3.f, at *119 (maximum).

319. *See id.* § 4.a–.b, at *122–23.

320. *See id.* § 4.c, at *123. Older (i.e. pre-1995) works were subject to discounts from these payments, *see id.* § 4.d, at *123–24, and individual payments were to be scaled down if the total claims exceeded $18 million, *see id.* § 4.f, at *124–25. No copyright owner's payment, however, could be reduced beneath $5. *See id.* § 4.j, at 126.

321. Despite objections from some class members, the district court approved the settlement in an unreported, completely pro forma order. Order for Final Approval of Settlement and Final Judgment, *In re* Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242 (2d Cir. 2011) (Nos. 05–5943–cv(L), 06–0223), *reprinted in* Joint Appendix at 107, Reed Elsevier Inc. v. Muchnick, 130 S. Ct. 1237 (2010) (No. 08-103), 2009 WL 1423539, at *152. The objectors appealed, but instead of addressing their arguments on the merits, the Second Circuit sua sponte ordered briefing on whether the district court had jurisdiction to approve the settlement at all. *See In re* Literary Works in Elec. Databases Copyright Litig., 509 F.3d 116, 120 (2d Cir. 2007) *rev'd sub nom Reed Elsevier, Inc.*, 130 S. Ct. 1237. The Second Circuit's theory was that since the Copyright Act requires registration of United States works with the Copyright Office as a precondition to file suit for infringement, the class members whose works were unregistered were never properly before the district court. *See* 17 U.S.C. § 411(a) (2006). After briefing, the Second Circuit indeed ruled that the requirement was jurisdictional, and so vacated the settlement. *See In re* Literary Works in Elec. Databases Copyright Litig., 509 F.3d 116, 128 (2nd. Cir. 2007), *rev'd sub nom Reed Elsevier, Inc.*, 130 S. Ct. 1237. The Supreme Court granted certiorari. *See* Reed Elsevier, Inc. v. Muchnick, 129 S. Ct. 1523 (2009). Since the plaintiffs, defendants, and objectors below all argued for jurisdiction (they disagreed only over the settlement's substantive terms), the Supreme Court also appointed an amicus curiae to defend the Second Circuit's opinion. *See Reed Elsevier, Inc.*, 130 S. Ct. at 1240. After argument, the Court reversed the Second Circuit 8–0; Justice Sotomayor, who had been the district judge in *Tasini I*, *supra* note 308, recused herself. *See Reed Elsevier, Inc.*, 130 S. Ct. at 1240. While the Court declined to decide whether a federal court would be obliged to grant a defendant's motion to dismiss an infringement case involving an unregistered copyright, *id.* at 1249, it held that the registration requirement was not a limit on the court's subject-matter jurisdiction. *Id.* at 1241. Thus, the Court remanded for consideration of the settlement's merits, leading to the *Literary Works* opinion we are here concerned with. *Id.* at 1241. For an approving discussion of *Reed Elsevier*, see Howard M. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings"*, 105 NW. U. L. REV. 947, 961 (2011).

322. *See In re* Literary Works in Elec. Databases Copyright Litig., 654 F.3d at 257–58. Thus the court of appeals accepted the objectors' original argument, albeit six years later.

predicate doctrine, arguing that "future infringements are distinct harms giving rise to independent claims of relief, with factual predicates that are different from authors' past infringement claims."[323] The court, however, looked to the complaint:

> Objectors' first argument fails to recognize that the consolidated complaint seeks injunctive relief for future uses, and therefore contemplates these alleged future injuries. Put another way, a trial of this case would determine whether it is permissible for publishers to continue to sell and license the works. Accordingly, regardless of whether future infringements would be considered independent injuries, the Settlement's release of claims regarding future infringements is not improper.[324]

This was the correct result, and for almost the correct reason. The *Literary Works* settlement was consistent with the parity-of-preclusion test because the publishers had already, for years, been licensing the articles to the databases. If the publishers had won on their theory of the case—that the freelancers had granted implied licenses for database uses—then issue preclusion would have barred the freelancers from objecting to those uses in the future, even if they constituted separate acts of reproduction leading to separate infringements. Thus, the settlement permitted publishers to do no more than they could have won at trial. The court correctly focused on what would have been "determin[ed]" by a "trial of this case,"[325] as the parity of preclusion demands. The only thing that is slightly off here is the emphasis on the complaint at all. What matters are the underlying facts about the defendant's past conduct; the complaint is of course not conclusive as to the facts it alleges.[326]

The contrast between *Authors Guild* and *Literary Works* nicely illustrates the workings of the parity-of-preclusion test. In *Authors Guild*, Google had never sold complete copies of the plaintiffs' books, and it was not about to. In *Literary Works*, however, the publishers had been licensing, and the databases had been displaying, the articles for years. They had plausible arguments that doing so was legal, and one court even agreed with them. The same future conduct that was a major break from the defendant's past conduct in *Authors Guild* was

323. *Id.* at 248.
324. *Id.* (internal citation omitted).
325. *Id.*
326. *See supra* Part IV.A.

a continuation of the defendant's past conduct in *Literary Works*. The former was an improper settlement; the latter was proper.

C. Williams v. General Electric Capital Auto Lease

Williams v. General Electric Capital Auto Lease, Inc.[327] involved dueling class actions over early termination fees (ETFs) in auto leases issued by the defendant, GECAL.[328] The first class action, the "*Williams*" suit, settled: the class included individuals who entered into a lease assigned to GECAL between January 1, 1987 and July 21, 1995, and settled "all claims which might have been asserted in the Actions . . . arising out of disclosures made on or in connection with vehicle leases assigned to GECAL, out of the reasonableness or validity of the charges and other terms contained in such leases, and out of the collection or attempted collection of charges imposed under such lease forms."[329] The court approved the *Williams* settlement in December 1995, and entered a final judgment in January 1996.[330]

The second class action, the "*Dooner*" suit, was filed in July 1996.[331] When GECAL asked the district court in the *Williams* case to enforce an anti-suit injunction against the *Dooner* plaintiffs,[332] they argued that the injunction did not apply to them because none of them had terminated their leases as of the July 21, 1995 cut-off date.[333] Thus, they claimed, their claims against GECAL were not ripe as of the *Williams* settlement, and they were therefore not subject to its releases.[334]

On appeal, the Seventh Circuit upheld the trial court's injunction against the *Dooner* suit[335] in a carefully reasoned but ultimately misguided opinion. It started by noting that the *Williams* complaint raised two kinds of claims: failure to disclose the ETFs in the leases, and charging unreasonable ETFs.[336] The former were ripe immediately, but there was a substantial question as to whether the

327. 159 F.3d 266 (7th Cir. 1998).
328. *Id.* at 268.
329. *Id.* at 271.
330. *See* Williams v. Gen. Elec. Capital Auto Lease, No. 94-C-7410, 1995 WL 765266, at *11 (N.D. Ill. Dec. 26, 1995) [hereinafter *Williams I*], *aff'd*, 159 F.3d 266 (7th Cir. 1998) [hereinafter *Williams II*].
331. *See Williams II*, 159 F.3d at 271 (describing the Dooner suit).
332. *See id.* at 272.
333. *See id.*
334. *See id.*
335. *Id.* at 275.
336. *See id.* at 273.

latter were ripe before a customer actually terminated the lease and was charged an unreasonable ETF.[337] Thus, the *Dooner* plaintiffs were unquestionably members of the *Williams* class and unquestionably had ripe disclosure claims against GECAL that the *Williams* settlement could release.[338]

The court should have stopped there. The settlement released only "all claims which might have been asserted" in the *Williams* action.[339] If the *Dooner* plaintiffs' unreasonable-ETF claims were truly unripe as of July 21, 1995, then the *Williams* settlement *by its own terms* did not purport to release them. It is not even necessary to invoke parity of preclusion.

Instead, the Seventh Circuit justified the injunction on the basis of the identical factual predicate doctrine. It reasoned that the factual predicate was "the leases and the potential for an early termination penalty," so that "even if the [unreasonable ETF] claims were not ripe, they were closely enough related to the disclosure claims that everything could be resolved in the settlement."[340] This argument illustrates the dangers of taking the identical factual predicate doctrine at face value. The problem is that to the extent the unreasonable-ETF claims were unripe, it was because they involved future conduct: GECAL's contingent attempts to impose fees when a consumer actually terminated her auto lease. Thus, the Seventh Circuit approved a future-conduct release without entirely realizing it.

It is hard at this distance to say whether this was harmless or prejudicial error. One possibility is that "the computation of the early termination payments might be ministerial at any given point in time."[341] If so, then parity of preclusion would have allowed the *Williams* releases to cover the unreasonable-ETF claims: the essential legal issues could all have been squarely presented as of July 21, 1995. But it is also possible that GECAL retained sufficient discretion under the leases to charge either reasonable or unreasonable ETFs. If so, then litigation over the *leases* could not establish the propriety of the *fees*; neither claim preclusion nor issue preclusion would apply to the unreasonable-ETF claims.

Indeed, on this view, the *Williams* settlement gives a nice illustration of moral hazard in future-conduct releases. Class

337. *See id.*
338. *See id.*
339. *Id.* at 271.
340. *Id.* at 274.
341. *Id.*

members received $50 or $100 certificates.[342] But, as one of the objectors pointed out, the ETFs could be $1,000 or more,[343] and GECAL did not make any promises about the ETFs it would charge customers who terminated their leases after the settlement deadline.[344] The settlement freed GECAL to max out the ETFs it collected without fear of the legal consequences. After all, the settlement order enjoined leaseholders from suing over the "collection or attempted collection of charges imposed under such lease forms."[345] A $100 coupon for a legally risk-free $1,000 ETF is a good trade from GECAL's perspective, but perhaps less so from class members' perspective. This is not to say that the Seventh Circuit was necessarily wrong to enforce the settlement—only that it did not provide a convincing response to the future-conduct issue it identified.

D. Uhl v. Thoroughbred Technology & Telecommunications, Inc.

In *Uhl v. Thoroughbred Technology and Telecommunications, Inc.*,[346] a telecommunications company known colloquially as T-Cubed announced plans to lay fiber-optic cables along Norfolk Southern Railway rights of way.[347] 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.[348] In a settlement filed the same day, the class agreed, in effect, to grant T-Cubed the necessary easements in exchange for cash compensation.[349]

An objector claimed that the case was nonjusticiable because the class members had only "future claims."[350] The Seventh Circuit disagreed and upheld the settlement, explaining that the plaintiffs' slander of title claims were already ripe, so that:

342. *See id*. at 271.
343. *See id.*
344. *See Williams I*, 1995 WL 765266, at *8.
345. *Id.* at *2.
346. 309 F.3d 978 (7th Cir. 2002).
347. *See id.* at 978.
348. *Id.* at 980.
349. *See id.* at 982. The actual settlement called for all of the landowners to become shareholders of a new company, Class Corridor. *See id.* The landowners would grant easements to Class Corridor, which in turn would grant an easement to T-Cubed and become an ongoing participant in the cable-laying, owning fiber of its own and receiving ongoing royalties. *See id*. These details are not directly relevant to the future-conduct analysis.
350. *Id.* at 984.

> 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.[351]

This time the result was arguably consistent with the parity-of-preclusion test. 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.

Of course, this conclusion is debatable to the extent that it depends on the factual finding that T-Cubed had real and immediate plans to lay cable. There is more than a whiff of collusion about *Uhl* and other railroad-corridor settlement class actions.[352] Close scrutiny of the settlement's commercial terms—which the court appears to have engaged in—was entirely appropriate.

E. Alvarado v. Memphis-Shelby County Airport Authority

Another easement case, *Alvarado v. Memphis-Shelby County Airport Authority*,[353] is also illuminating. With FAA approval, the defendant Airport Authority planned to expand operations at the Memphis International Airport.[354] Nearby landowners sued in a class action, claiming inverse condemnation. The settlement required class members to transfer an avigation easement to the Airport Authority in exchange for compensation.[355] 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

351. *Id.*

352. *See, e.g.*, Smith v. Sprint Commc'n Co., 387 F.3d 612, 615 (7th Cir. 2004) (vacating approval of similar settlement for failure of adequate representation). *See generally* Nels Ackerson, *Right-of-Way Rights, Wrongs and Remedies: Status Report, Emerging Issues, and Opportunities*, 8 DRAKE J. AGRIC. L. 177 (2003) (discussing rationale and history of right-of-way class actions); Alison Frankel, *Blood on the Tracks*, AM. LAW., June 2002, at 14 (discussing struggle between two groups of plaintiffs' law firms for control over fiber-optic class actions).

353. Nos. 99–5159 & 99–5162, 2000 WL 1182446 (6th Cir. Aug. 15, 2000).

354. *See id.* at *1.

355. *See id.* at *3.

for it. That is what the tort is for, and the settlement reflected an outcome entirely consistent with litigation.[356]

Thus, when the court approved the settlement, it did so consistently with the parity-of-preclusion test. *Alvarado* even came close to recognizing that the real question is similarity of legal issues. The court wrote, "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."[357] Replace "of the same character" with "raising the same legal issues" and be willing to go behind the face of the complaint to the defendant's actual past conduct, and you have the parity-of-preclusion test.

F. UniSuper Ltd. v. News Corp.

In *UniSuper Ltd. v. News Corp.*,[358] Rupert Murdoch's media corporation, which had been incorporated in Australia, announced plans to reincorporate in Delaware.[359] Australian corporate law prohibits adopting a poison pill without a shareholder vote; Delaware corporate law does not.[360] Multiple institutional investors threatened to vote against the reincorporation, so the News Corporation ("News Corp.") board adopted a policy that it would not adopt or extend a poison pill without a shareholder vote.[361] Following the reincorporation, a hostile acquirer showed up; the board immediately turned around and adopted a poison pill.[362]

The institutional investors sued over the failure to hold a shareholder vote, and got claims for breach of contract and promissory estoppel past a motion to dismiss.[363] While the case went up on appeal, settlement talks began, and the parties filed a proposed settlement in early 2006.[364] Under the settlement, News Corp. would submit its pill for a shareholder vote at its October 2006 meeting. The case was to be certified as a class action, and class members would

356. The parallels to the cases in which courts award permanent damages in lieu of an injunction are, of course, direct. *Cf. supra* Part IV (discussing the similarities between orders denying an injunction but allowing permanent damages and those allowing future conduct releases in exchange for cash compensation).

357. *Alvarado*, 2000 WL 1182446, at *7 (emphasis added).

358. 31 DEL J. CORP. L. 1186, 1202 (Del. Ch. 2005) [hereinafter *UniSuper I*].

359. *Id.* at 1202.

360. *See id.* at 1188.

361. *See id.* at 1190.

362. *See id.* at 1191.

363. *See id.* at 1202.

364. *See* UniSuper Ltd. v. News Corp., 898 A.2d 344, 346 (Del. Ch. 2006).

release News Corp. from any liability for the extension of the pill at the shareholder meeting. Liberty Media, the would-be acquirer, objected.[365]

The court considered the future-conduct release categorically impermissible. Because the October 2006 meeting had not yet happened, it could not be the factual predicate giving rise to the lawsuit:

> 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. . . .[366]

The court then generalized:

> 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. . . . 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.[367]

This cannot be right, at least as stated. This rule would effectively make impossible any settlement that reaches future conduct—even if the propriety of that future conduct is precisely the issue at stake in the lawsuit. The court's description of the proposed settlement made it sound like a resounding win for class members: they wanted a shareholder vote on the poison pill, and News Corp. agreed that it would submit its pill for a vote at the forthcoming October 2006 shareholder meeting.[368] Not only does it seem reasonable to allow News Corp. a release for doing what the class demanded of it, but also the opinion provided no reason to think that submitting the plan for a vote could violate class members' rights in the first place. Thus, the settlement would appear to have been consistent with the parity-of-preclusion test, and the court's distrust of it comes across as unwarranted.

Nonetheless, the court may have reached the right result for reasons that do not appear in the opinion itself. It appears from the briefing in the case that the original (non-class) lawsuit focused on the propriety of adopting a poison pill without a shareholder vote, but

365. *Id.* at 346.
366. *Id.* at 347.
367. *Id.* at 348.
368. *Id.*

that the release would have also arguably covered the merits of the poison pill itself.[369] What is more, the class action was framed as a mandatory, non-opt-out class.[370] Thus, the settlement would effectively have deprived Liberty Media of any substantive right to object to the terms of the pill. This was a serious problem with the settlement, and provided more than sufficient reason to reject it. News Corp. was collusively buying off the outside investors who objected to the lack of a shareholder vote in order to steal a march on Liberty Media and strip it of some of its rights as a shareholder. If so, then the court should have explained that this was the real reason the settlement was unacceptable, and grounded its holding elsewhere in class-action and corporate law.

G. Schwartz v. Dallas Cowboys Football Club

In *Schwartz v. Dallas Cowboys Football Club*,[371] the NFL sold satellite TV access to its games, but only as part of an all-inclusive Sunday Ticket bundle for $139 a season.[372] In 1997, a class of 1.8 million Sunday Ticket purchasers sued the NFL and five teams, claiming that the bundling violated the Sherman Act.[373] After the NFL lost a motion to dismiss based on a statutory exemption in the Sports Broadcasting Act, the parties negotiated a proposed settlement.[374]

Under the settlement, the NFL would have paid $7.5 million to class members and offered them 10–15% discounts on NFL merchandise.[375] Going forward, the NFL would have been required to offer individual weeks via satellite at $29.99, along with the season package for $159.[376] In exchange, class members 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.[377]

The court rejected the settlement on multiple grounds, the most significant of which was the scope of the releases. First, the court

369. *See* Liberty Media Corp.'s Objection to the Proposed Settlement at 1, *UniSuper Ltd.*, 898 A.2d 344 (No. 1699–N).
370. *See id.* at 8.
371. 157 F. Supp. 2d 561 (E.D. Pa. 2001).
372. *See id.* at 565.
373. *See id.* at 565–66.
374. *See id.*
375. *See id.* at 566.
376. *See id.*
377. *See id.*

explained that the expansion from satellite broadcasts to other media was problematic:

> The plaintiffs' complaint does not suggest that they have asserted any claims with respect to NFL programming by broadcast, cable television, or the Internet. Nevertheless, under the terms of the Settlement Agreement, the defendants would be released from all claims regarding their programming of NFL football games regardless of the technology involved or the method of distribution of those games (e.g., in a form that bundles those games as does NFL Sunday Ticket or in a form that does not).[378]

This rationale—that cable and Internet bundling were not at issue in the underlying lawsuit, only satellite bundling—is easy to understand in terms of the parity-of-preclusion test. Because of the medium-by-medium structure of telecommunications regulation, those other media presented 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. A win for the NFL at trial would not have been conclusive on the legality of its cable and Internet broadcasts, and so a settlement could not reach them, either. But the parity-of-preclusion test probably would not have blocked a settlement that included a prospective release for claims arising out of the revised satellite offerings the NFL proposed. These practices were directly at issue in the underlying suit, the NFL's proposal was unambiguously more moderate than its past practices, and a victory at trial for the NFL would have let it offer the programs the settlement authorized.

The court also gave a second, broader explanation for its holding:

> 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.[379]

This flat rule against future-conduct releases may sound too sweeping. But recall that *Schwartz* was an antitrust case: and antitrust law carries a strong public policy against private ordering that would displace its rules. Future-conduct releases for antitrust claims are impermissible in settlements, regardless of whether they are class

378. *Id.* at 575–76.

379. *Id.* at 578. It is not entirely clear whether the court itself considered these two holdings to be distinct.

actions or not.[380] Thus, the settlement could not prospectively bless any form of bundling; at most it could resolve claims for past bundling. This second holding is not really about class actions or parity of preclusion; it is a holding about antitrust law.[381]

CONCLUSION

We must plan for the future, but we have a choice as to how. Individuals can make plans for themselves, with promises and waivers. Governments can make plans for society, with laws and regulations.[382] Contract and legislation are the two great and legitimate tools of planning: one private and one public. Contract reflects individual autonomy: it justifies its far-reaching power because the parties themselves have consented to their bargain. Legislation reflects societal agreement: it justifies its far-reaching power because elections keep legislators broadly accountable to the people. Each kind of planning has its proper sphere, each is legitimate within that sphere, and there is a crucial role for both in a free and democratic society.

But future-conduct releases are a "monstrous hybrid" between private and public planning, the worst of both worlds.[383] They impose plans on people who have never heard of or consented to them—but they are negotiated by self-interested private parties rather than elected representatives. Courts are planners of last resort: their job is to sort out the consequences of past plans gone awry, not to make new plans.[384] Courts bearing future-conduct releases undermine both

380. *See supra* Part I.B.

381. The court eventually approved a narrower settlement that excluded future claims and media other than satellite TV. *See* Schwartz v. Dallas Cowboys Football Club, Ltd., No. 97–5184, 2001 WL 1689714, at *1 (E.D. Pa. Nov. 21, 2001), *cert. denied*, 132 S. Ct. 1796 (2012); *accord* Grunewald v. Kasperbauer, 235 F.R.D. 599, 607 (E.D. Pa. 2006) (approving settlement that did not "release defendants from claims based on future conduct"); Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 244 (D.N.J. 2005) (approving release of "future claims for conduct that occurred in the past" and noting that settlement did not release claims for "future conduct").

382. *See generally* SCOTT J. SHAPIRO, LEGALITY 155 (2011) (defining law as "social planning").

383. The term is Jane Jacobs's. *See* JANE JACOBS, SYSTEMS OF SURVIVAL: A DIALOGUE ON THE MORAL FOUNDATIONS OF COMMERCE AND POLITICS 75–77 (1992); Timothy B. Lee, *Jane Jacobs and the Problem of Monstrous Hybrids*, DISRUPTIVE ECON. BLOG (Jan. 13, 2012, 9:26 AM), http://www.forbes.com/sites/timothylee/2012/01/13/jane-jacobs-and-the-problem-of-monstrous-hybrids/.

384. *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of* The Legal Process, 107 HARV. L. REV. 2031, 2038 (1994) ("A court in making law is bound to base its action, not on free judgment of relative social advantage, but on a process of

individual autonomy and democratic decision-making. When courts take thought for the morrow, they make it harder for individuals and legislatures to do the same. Bad planners drive out good.

Future-conduct settlements are a valuable part of any judicial toolkit that includes class actions and settlements. But they must be understood—and employed—strictly as a way to resolve disputes without the uncertainty and expense of motion practice and trial. They can legitimately do what a lawsuit could do, no more, and then only under close supervision. Anything further is playing with fire.

In this age of political decay, future-conduct class-action settlements are a sore temptation. The copyright system is broken; perhaps class actions could fix it.[385] So are the health-care system, the financial system, and so much else besides. These unfolding disasters are far beyond the capacity of any one person to salvage, or even escape; Congress is busy demonstrating that the baleful influence of its neglect is rivaled only by the baleful influence of its attention. So why not turn things over to the courts, Mephistopheles asks: why not let future-conduct releases serve as the foundation for a new form of social reform?

This attitude amounts to the belief that "[o]ne branch is broken, so let's break another branch."[386] The solution to a broken, systematically compromised political system is to fix the system.[387] Unbounded future-conduct settlements are an evasion of responsibility, an admission of defeat. The turn to them is a turn away from the rule of law.

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reasoned development of authoritative starting-points." (quoting Henry M. Hart, Jr.) (quotation marks omitted)).

385. *But see* Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. (forthcoming 2012/2013) ("The simple fact is that all societies already possess an institution designed to overcome collective action barriers to common security and the proper allocation of burdens and resources: the state, in its most basic Hobbesian functions. The class action offers an alternative form of collective organization to the state, but a form of collective organization without the elements of popular participation, political consent, and electoral accountability that justify governmental authority in a democracy. That delegation of collective authority to an institution without the democratic pedigree of the state demands some justification . . . .").

386. Norman Oder, *Samuelson Says Google Book Settlement Doesn't Reflect 'Public Trust Responsibilities'*, LIBR. J. (Oct. 13, 2009), http://www.libraryjournal.com /article/CA6701727.html (quoting Pamela Samuelson).

387. *See generally* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011) (describing unchecked "dependence corruption" in Congress).