

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

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# The Google Books decision

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- Google scans, indexes, and displays snippets from books*
- Settlement would have let Google sell complete books*
- Settlement required release for Google's future conduct*
- Rejected by the court on this basis, among others*

# Future-conduct releases

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- *The Google Books settlement involved future-conduct releases*
- *Such settlements are unusually dangerous*
  - *They require closer scrutiny from courts (a standard)*
  - *Releases limited to claims at stake in the lawsuit (a rule)*
- *The DOJ got it right: the settlement was a "bridge too far"*

# Future conduct vs past conduct

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- Released claims in the Google Books settlement:
  - "(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 . . ."

# Two important distinctions

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- Future conduct, not future claims or future claimants
- "Future claims" in mass tort cases involve past conduct
- Parties with future-conduct claims may have past-conduct claims, as well
- Watch for releases by classes, not by individuals
- Individuals can also act via contract; classes cannot

# More at stake

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- Baseline: 23(b)(3) damages action for defendant's past conduct:*
  - Class can lose its right to compensation, but no more*
- Future-conduct releases can result in fresh harms to the class*
  - Releases give the defendant more scope for action*
- Thus, there is more at stake for the class*

# Dangers of future-conduct releases

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- *Future-conduct releases are harder to design and review*
  - *"It's hard to make predictions, especially about the future."*
  - *Endemic moral-hazard problems for the defendant*
- *Future-conduct releases concentrate power in the defendant*
  - *Possible threats to the class and to third parties*
- *Future-conduct releases require courts to act as legislatures*
  - *Insert standard competence and accountability arguments here*

# Solution 1: closer scrutiny

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- Courts already scrutinize settlements for adequacy
  - As required by Rule 23 and Due Process
  - With more at stake in future-conduct releases, and more opportunities for mischief, closer scrutiny is required
- I discuss details and some specific ideas in the paper, e.g.
  - Ex ante: seek advice from special masters and political branches
  - Ex post: retain jurisdiction and pay fee awards over time

# Solution II: parity of preclusion

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- A class should be able to give up in settlement those and only those claims at stake in the underlying lawsuit*
- The line reflects preclusion doctrine:*
  - Past-conduct claims subject to claim preclusion (broad)*
  - Future-conduct claims subject to issue preclusion (narrow)*
- Rule 23 and Article III limit jurisdiction over unrelated matters*

# The normative case for parity

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- Releases only claims already at stake in the lawsuit
- Grounds releases in specifics of defendant's past conduct
- Defendant's skin in the game limits moral hazard
- Cannot create new power, only confirm existing power
- Ties settlements to existing Article III controversies

# Counterarguments to parity

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- Cases like Vukovich seem to prohibit all future-conduct-releases
  - But even individuals can't prospectively waive the civil rights laws
  - Some bodies of law have a public policy against private ordering
  - But not all! E.g., copyright depends on licensing
- Firefighters and consent-decree cases allow "broader relief than the court could have awarded after a trial"
- These are individual promises ("relief") to the class

# Back to Google Books

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- Past conduct: scanning and searching were plausibly fair use*
- Future conduct: selling whole books en masse is not fair use*
  - I.e. no possibility of preclusion against class members*
- This is exactly the sort of settlement we should be worried about*
- A scanning-and-searching settlement would be another story:*
  - If Google wins at trial, it would be allowed to continue*
  - Scrutinize it closely, but it's potentially permissible*

Questions?