

A Bridge Too Far?  
The Google Books Settlement and  
the Limits of Class-Action Law

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# In this talk

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- ❖ How we got here
- ❖ Where the settlement would take us
- ❖ Whether we should go there



# Resources

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- ❖ Our site on the settlement: <http://thepublicindex.org>
- ❖ My blog (frequently GBS-related): <http://laboratorium.net>

# Simplified history

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- ❖ 2004–05: scanning, indexing, and snippets, with opt-out
  - ❖ Background: orphan works problem
- ❖ 2005: class-action lawsuit subject to fair-use defense
- ❖ 2006–08: settlement negotiated
- ❖ 2008–10: settlement debated



# Essential terms

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- ❖ Scanning, indexing, and snippets continue
- ❖ Consumer Purchase, Institutional Subscription, etc.
- ❖ Google pays \$125 million up front and 63% thereafter
- ❖ Book Rights Registry (including Unclaimed Works Fiduciary)
- ❖ Temporal and geographic limits; internal opt-outs

# Some salient objections

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- ❖ Information policy: privacy, pricing, censorship, etc.
- ❖ Copyright limits, domestic and international
- ❖ Orphan works subject to *de facto* exclusivity
- ❖ Antitrust concerns, in various flavors
- ❖ Curable (in theory) class-action mistakes: notice, etc.



# The settlement is forward-looking

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- ❖ It clearly differs from a “typical” cash-payment settlement.
- ❖ And yet are there class-action precedents to meet every objection?
  - ❖ All settlements are in a sense “commercial transactions.”
  - ❖ A settlement can award what a court can’t (e.g. quotas).
  - ❖ Some toxic tort settlements include releases of “future claims.”
  - ❖ Structured settlements (e.g. medical monitoring) pay out over time.



# Forward-looking settlement = release of future-conduct claims

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- ❖ The Google Books settlement would *release class members' claims based on the defendant's future conduct*.
- ❖ This point distinguishes most of the class-action precedents:
  - ❖ Releases *by the class* raise issues that promises *to the class* don't.
  - ❖ Future-conduct claims ≠ “future claims” based in past conduct.
  - ❖ Structured settlements pay out over time for a one-time release.
- ❖ To be precise, it's the release of claims based on conduct *unlike anything the defendant has already done* that's truly distinctive.



# Future-conduct releases matter

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- ❖ The Google Books settlement itself is a big deal, but what about ...
- ❖ ... a pre-*Deepwater Horizon* settlement for any future BP oil spills?
- ❖ ... a settlement to build a skyscraper on class members' land?
- ❖ ... an insurer-patient settlement on future health coverage rules?

# Why are forward-looking settlements so worrisome?

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- ❖ Informational problems for class members and judges
- ❖ Settlement design problems, especially moral hazard
- ❖ Threats to class members' autonomy and property rights
- ❖ Aggregation of rights means concentration of power
- ❖ Separation of powers at risk



# Ends, means, and the end

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- ❖ Substantively, there are strong arguments in favor of the settlement.
  - ❖ And pragmatically, don't hold your breath waiting for Congress.
- ❖ But procedurally, forward-looking settlements are Pandora's box.
  - ❖ Perhaps *this* settlement can be distinguished from the general case.
  - ❖ The safer course: declare forward-looking settlements off-limits.

# Questions and conversation

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# A few thoughts about legality

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- ❖ The specific Article III case-or-controversy issue is *ripeness*.
- ❖ There are at least two Due Process issues:
  - ❖ *Hansberry*: what representation, if any, is adequate for orphans?
  - ❖ Personal jurisdiction: the assumptions behind *Shutts* may fail!
- ❖ The “identical factual predicate” test draws on adequacy of representation, substantive fairness, and preclusion concerns.