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Class Actions and Group Litigation in Switzerland

*Samuel P. Baumgartner**

I. INTRODUCTION

Class actions have gone global. Once limited to the United States in terms of both scholarly interest and practical effects, class action litigation has captured the attention of foreign academics and law reformers.¹ Indeed, some foreign jurisdictions have already adopted representative litigation devices inspired by Federal Rule of Civil Procedure 23.² Conversely, Americans have begun to take an interest in the group litigation landscape abroad, including the reasons why some countries reject American-style class actions outright.³ Foreign parties are no longer a rarity in U.S. class litigation. In addition to being named as defendants, foreigners increasingly form a significant part of the group of absent class members.⁴ Moreover, the emergence of the human rights class action has led to the large-scale involvement of foreigners in public law litigation.⁵ U.S. courts have thus

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¹ See, e.g., RACHAEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS* (2004); Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 269–70 (1993); Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311 (2003); Roberth Nordh, *Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms, and a Forthcoming Proposal*, 11 DUKE J. COMP. & INT'L L. 381 (2001).

² See *infra* text accompanying notes 35–40.

³ See, e.g., Linda S. Mullenix, *Lessons From Abroad, Complexity and Convergence*, 46 VILL. L. REV. 1 (2001); Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 DUKE J. COMP. & INT'L L. 157 (2001).

⁴ See, e.g., Ilana T. Buschkin, Note, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the U.S. Federal Court*, 90 CORNELL L. REV. 1563 (2005).

⁵ See, e.g., Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH. L. REV. 1152 (2004) (reviewing MICHAEL J. BAZYLER, *HOLOCAUST*

begun to consider some novel issues, including whether due process requires foreigners to be treated as an opt-in rather than an opt-out class;⁶ whether a judgment or settlement in the suit is capable of being enforced or recognized as *res judicata* abroad and thus whether class certification is justified in the first place;⁷ and whether a foreign forum grants comparable access to justice in the form of group litigation and thus represents an adequate alternative forum for purposes of a *forum non conveniens* defense.⁸

In short, litigants and courts have recognized that global class actions may present distinct issues and require approaches different from purely domestic cases. As I have argued elsewhere, decisions on this score require great care because:

The law applicable to transnational litigation affects the behavior of transnational actors, that is, groups and individuals who are both subject to the laws of more than one sovereign and have access to more than one sovereign to have their interests counted, and who in turn may affect the international as well as domestic law of transnational litigation both abroad and at home in the future. If

JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (2003)); STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2003)); Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643 (2004); Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI. LEGAL F. 279 (2003). See, e.g., Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991) (discussing public law litigation involving foreign parties and actions abroad).

⁶ See, e.g., *Kern v. Siemens Corp.*, 393 F.3d 120 (2d Cir. 2004) (holding that an opt-in class for foreign class members is neither permissible under Federal Rules of Civil Procedure nor required by the due process clause); Debra Lyn Bassett, *U.S. Class Actions Go Global, Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41 (2003) (arguing that due process requires opt-in class for foreign class members).

⁷ See, e.g., *In re Daimler-Chrysler AG Sec. Litig.*, 216 F.R.D. 291, 300–01 (D. Del. 2003) (refusing to include foreigners in the certified class); *Ansari v. N.Y. Univ.*, 179 F.R.D. 112, 116–17 (S.D.N.Y. 1998) (holding that, together with lack of proof to meet numerosity requirement, foreigners in the plaintiff class and attendant possibility of non-recognition of judgment render certification impermissible). But see, e.g., *In re Lloyd's Am. Trust Fund Litig.*, No. 96 CIV. 1262 (RWS) 1998 WL 50211 at *15 (S.D.N.Y. Feb. 6, 1998) (surmising that given the *res situs* in New York, a foreign court would still use the Southern District's judgment as "guidance," thus rendering certification possible); *In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 48–54 (S.D. Cal. 1975) (rejecting defendant's argument that certification should be impermissible due to the large number of foreign plaintiffs in the proposed class against whom a U.S. judgment would have no *res judicata* effect in their respective home countries). See also *Currie v. McDonalds Rests. of Can., Ltd.*, [2005] 74 O.R. (3d) 321, 321–22 (Can.) (holding that settlement of Illinois class action does not have *res judicata* effects in Ontario and thus does not prevent class members from bringing a class action in Ontario).

⁸ See, e.g., *Aguinda v. Texaco*, 142 F. Supp. 2d 534 (2d Cir. 2001) (holding that absence of class action device does not ordinarily render a foreign forum inadequate for *forum non conveniens* purposes).

those in charge of making and applying the law of transnational litigation want to be in control of their efforts, they need to be aware of this interplay between lawmaking and transnational actors and of how particular procedural choices may influence it in the long run.⁹

Knowledge about the relevant foreign procedure, institutions, and jurisprudential values thus becomes crucial for decision-making in this area.¹⁰ Only with that information will courts and lawmakers in the United States be able to get a sense of what possible reactions a particular approach or decision is likely to cause abroad and thus whether that approach is likely to further the chosen process values in the United States in the long run. Moreover, such information may benefit those who engage in the rare but growing American sport of gaining comparative perspective in procedural lawmaking.¹¹

In what follows, I hope to contribute to that information with a look at group litigation devices in Switzerland. To begin with, Switzerland is one of the many countries that do not currently have an American-style class action.¹² Suggestions to examine the possibility of introducing such a procedural vehicle have met with considerable opposition.¹³ Some of the reasons for that opposition are grounded in reactions to litigation in the United States.¹⁴ More broadly, however, there seems to be a general unease with civil litigation involving more than the traditional plaintiff and defendant and an occasional individual joined out of an urgent need, such as to extend *res judicata* effect to a co-heir or business partner. Below, I intend to explore the most important reasons for that reluctance. I will do so first by analyzing the proposals to introduce an American-style class

⁹ Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1305–06 (2004) [hereinafter Baumgartner, *Transnational Litigation*] (footnote omitted).

¹⁰ See *id.* at 1385–90.

¹¹ See, e.g., Richard L. Marcus, *Putting American Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709 (2005) (reviewing ALI/UNIDROIT, *PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE* (2006)); NEIL ANDREWS, *ENGLISH CIVIL PROCEDURE* (2003); CARL F. GOODMAN, *JUSTICE AND CIVIL PROCEDURE IN JAPAN* (2004); KUO-CHANG HUANG, *INTRODUCING DISCOVERY INTO CIVIL LAW* (2003); PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* (2004); ADRIAN ZUCKERMAN, *CIVIL PROCEDURE* (2003)); Mullenix, *supra* note 3; Rowe *supra* note 3. But see John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 545 (1995) (“My report is short and sad: The study of comparative procedure has little following in academia, and virtually no audience in the courts or in legal policy circles.”).

¹² See, e.g., Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT'L L. 369, 369 (2001). Technically, this changed in 2004 with the introduction of a class-action-like device with a very limited area of application. See *infra* text accompanying notes 241–43.

¹³ See *infra* text accompanying notes 42–53.

¹⁴ See *infra* text accompanying notes 80–97.

action and their rejection. I will then take a closer look at the group litigation devices that already exist in Swiss procedure. They include devices to let similarly situated individuals sue together (joinder of parties), to have an organization sue for its members with similar rights (*Verbandsklage* and *Verbandsbeschwerde*), and to allow a court to consolidate claims arising out of the same controversy. Moreover, certain shareholder litigation results in judgments that are binding on all or an extended group of shareholders. As my analysis below demonstrates, however, even these devices have been interpreted narrowly by the courts and used with little aggressiveness by litigants.

At the same time, however, these existing devices do not seem to satisfy all of the litigants' needs in practice. In several cases, litigants have begun to use test cases. Other plaintiffs have simply created ad-hoc associations for the purpose of gaining leverage in pursuing their claims in shareholder litigation. Moreover, in partial response to these practical needs, there has been a proliferation of statutes introducing or extending circumscribed group action rights in specific subject areas during the last decade. At the same time, political opposition has arisen against group action rights in administrative proceedings involving environmental protection claims.

The result is a patchwork of interlocking state and federal law that is complicated by the traditional civil law separation between civil and administrative tribunals and the respective procedural rules of those tribunals. However, few in Switzerland have undertaken the task of examining in depth whether this patchwork of group litigation devices suffices to meet the procedural values underlying the current system or, indeed, what exactly those values are and whether they are adequate for twenty-first century Swiss society.¹⁵ This is unfortunate since Switzerland is currently in the process of drafting the first federal civil procedure code in its history, a unique opportunity, it would seem, to reexamine the premises of the existing procedural system.

¹⁵ As I have stated elsewhere:

Despite prominent attempts to relegate 'adjective law' to the status of a 'handmaid of justice,' students of procedure have long since realized, and empirical studies have confirmed, that no matter what its features, procedural law affects the rights and the behavior of groups and individuals—including those involved in the administration of justice. It is therefore important that those in charge of applying and devising procedural rules continuously reflect upon the values that those rules serve or ought to serve. Equally important, procedural lawmakers must regularly assess the effectiveness of our approaches to civil litigation in furthering the chosen process values.

Baumgartner, *Transnational Litigation*, *supra* note 9, at 1298–1300 (footnotes omitted).

In Part II of this Article, I will sketch the respective lawmaking powers of the Swiss federal and state governments. In Part III, I will then explicate the various group litigation devices available and explore the reasons for the reluctance to expand on those devices in the current effort to draft a Federal Code of Civil Procedure, including by introducing an American-style class action. Moreover, due to the absence of empirical data on the use of existing group litigation devices in Switzerland today, I have undertaken to get at least a preliminary sense of the usage rates and the kinds of cases involved in such litigation by sifting through the published decisions of the Swiss Supreme Court. The results of that research are included in Part III.

II. THE SETTING

Switzerland is a parliamentary democracy¹⁶ with a federal form of government. Governmental power is shared by the federal government and the twenty-six cantons (or states). Private law has been a matter of federal legislative power at least since a constitutional amendment extended that power to all areas of private law in 1898.¹⁷ Civil procedure and the organization of the courts, however, remained the province of state law.¹⁸ Only in 2000, with the adoption of a new federal constitution and its immediate amendment, did the federal government receive the power to legislate in the area of civil procedure as well as in private law.¹⁹ Since that change, the Swiss government has been working on a new Federal Code of

¹⁶ One could quibble with this characterization to the extent that the executive, the Federal Council, does not entirely serve at the pleasure of the legislature. Although elected by the legislature, “[t]he members of the council are elected individually for a fixed term of four years, and according to the Constitution, the legislature cannot stage a vote of no confidence during that period.” JÜRGEN STEINER, *AMICABLE AGREEMENT VERSUS MAJORITY RULE: CONFLICT RESOLUTION IN SWITZERLAND* 43 (Asger Braendgaard & Barbara Braendgaard trans., rev. & enlarged ed., Univ. of N.C. Press, 1974) (1970).

¹⁷ Bundesverfassung der Schweizerischen Eidgenossenschaft [aBV], [aCst] [Constitution of 1874] May 29, 1874, AS 1 (1875) as amended on Nov. 13, 1898, art. 64 (II) (Switz.). I say “at least” because subsection (I) of that Article already provided for federal power in various areas of private law, including the law of obligations and intellectual property. However, the Constitution of 1848, on which the 1874 Constitution is based, left all legislation in private law to the states.

¹⁸ *Id.* art. 64(III). There is one important exception: The procedure for enforcing money judgments and uncontested monetary claims, including bankruptcy law, is a matter of federal law. *Id.* art. 64(I).

¹⁹ BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT [BV] [Constitution] Apr. 18, 1999, SR 101, as amended on Mar. 12, 2000, art. 122 (Switz.). In an unusual arrangement, the amendment is not to enter into force until so decided by the federal legislature. This is planned to happen together with the entering into force of the new civil procedure code. See Bundesbeschluss über die Reform der Justiz of Oct. 8, 1999, ch. III, AS 2002, 3148; Fridolin M.R. Walther, *Die Schweiz und das europäische Zivilprozessrecht—quo vadis?*, 124 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT [ZSR] II 301, 307 n.31 (2005).

Civil Procedure that is intended to displace the existing cantonal codes.²⁰ As one would expect, the effort has required a significant amount of labor. Moreover, the first draft of the Committee of Experts appointed by the executive has resulted in the criticism of numerous proposed provisions.²¹ Although the official proposal of the Federal Council to Parliament has just been released,²² the project is likely to take a few more years of legislative debate, followed by a brief grace period, during which the cantons can adapt their laws to the new Federal Code.²³ It is therefore likely that the promulgation of this new Federal Code will continue at all deliberate speed.

In the meantime, any analysis of Swiss procedural law must take into account the current system of twenty-six different state procedural codes, each with its own interpretations by the relevant state courts. Fortunately for the analyzing scholar—and to the frustration of some cantons—federal lawmakers have increasingly included procedural provisions in substantive statutes.²⁴ The Federal Supreme Court, the only federal court in the country,²⁵ has followed suit by displacing state procedural law step by step with federal common law in areas as important as personal jurisdiction and *res judicata*, so as to assure the enforcement of substantive federal law.²⁶

²⁰ In fact, then-Minister of Justice Koller impaneled the Committee of Experts that produced the first draft in 2003 on April 26, 1999, almost a full year before the new federal power over civil procedure was approved by popular referendum. *See* Schweizerische Zivilprozessordnung [ZPO], Bericht zum Vorentwurf der Expertentkommission, June 2003, 6 (Switz.), available at http://www.bj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/zivilprozess.Par.0006.File.tmp/vn-ber-d.pdf [hereinafter Begleitbericht].

²¹ The reactions to the project that were directed to the Justice Department are collected in a 956-page document called Zusammenstellung der Vernehmlassungen, Vorentwurf für ein Bundesgesetz über die ZPO (2004), available at http://www.bj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/zivilprozess.Par.0004.File.tmp/ve-ber.pdf [hereinafter Vernehmlassungsbericht].

²² Botschaft zur schweizerischen Zivilprozessordnung, June 28, 2006, BBl 7221 (2006) (Switz.), available at http://www.bj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/zivilprozess.Par.0010.File.tmp/20060628-bot-ZPO-d.pdf [hereinafter Botschaft].

²³ *See* Bundesgesetz über die Bereinigung und Aktualisierung der Totalrevision der Bundesrechtspflege June 23, 2006, BBl 2006, 5799 (subject to possible popular referendum, *see infra* note 63); Walther, *supra* note 19, at 311.

²⁴ *See, e.g.,* OSCAR VOGEL ET AL., GRUNDRISSE DES ZIVILPROZESSRECHTS UND DES INTERNATIONALEN ZIVILPROZESSRECHTS IN DER SCHWEIZ 62–67 (8th ed. 2006); Hans Peter Walter, *Bundesprivatrecht und kantonales Zivilprozessrecht, Tendenzen der Rechtsprechung*, 1995 BASLER JURISTISCHE MITTEILUNGEN 281 (1995).

²⁵ Since the creation of a lower federal criminal court in Bellinzona by federal legislation in 2002 and that court's beginning of operations in April 2004, this is technically no longer true in the area of criminal law. *See* Bundesgesetz über das Bundesstrafgericht Oct. 4, 2002, SR 173.71 (Switz.). Similarly, the federal legislature created a new lower federal administrative court, which has yet to begin work, in 2005. *See* Bundesgesetz über das Bundesverwaltungsgericht June 17, 2005, AS 2005, 4093.

²⁶ *See, e.g.,* VOGEL ET AL., *supra* note 24, at 68–71; STEPHEN BERTI, ZUM EINFLUSS UNGESCHRIEBENEN BUNDESRECHTS AUF DEN KANTONALEN ZIVILPROZESS IM LICHT DER

Group actions represent one area in which both federal statutes and federal common law have proliferated. The drawback of this situation is that it is not always entirely clear how far federal law reaches and thus precisely which rules of state law it displaces.

A somewhat different distribution of power between the federal and state governments exists in the area of administrative procedure. As in other civil law countries, a sharp separation exists in Switzerland between private and public law and, more importantly, between judges adjudicating, and scholars studying, civil litigation on the one hand and administrative cases on the other.²⁷ Yet, any consideration of group actions, in which plaintiffs tend to represent a stronger public interest than in individual civil claims,²⁸ should involve discussion of administrative procedure as well as civil litigation.²⁹ This is particularly true since entire classes of claims that proceed in civil court in the United States, where there are no specialized administrative courts in the civil law sense,³⁰ would be considered public-law cases and thus litigated in administrative courts in Switzerland and other civil law countries.³¹ Much of the U.S. civil rights litigation, for

RECHTSPRECHUNG DES SCHWEIZERISCHEN BUNDESGERICHTS (1989).

²⁷ See, e.g., RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 300–01 (5th ed. 1988). To clarify to U.S. readers: administrative litigation in Switzerland almost exclusively involves cases in which a public agency applies law and/or administrative rules to an individual situation. As part of that litigation, the plaintiff can argue that an administrative rule violates constitutional or statutory law (or federal law in a state administrative case). Administrative rulemaking itself, however, is not generally subject to judicial review. Cf. Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1289–96 (1994), much of whose description of German administrative procedure is fairly accurate for that of Switzerland as well. See, e.g., FRITZ GYGI, *BUNDESVERWALTUNGSRECHTSPFLEGE* 227–28 (2d ed. 1983). However, administrative rules themselves may be the subject of a constitutional appeal to the Federal Supreme Court to the extent they directly impact individuals and if those individuals may not be reasonably expected to wait for an appealable decision applying the regulation by the agency in question. See, e.g., WALTER KÄLIN, *DAS VERFAHREN DER STAATSRÉCHTLICHEN BESCHWERDE* 142–44 (2d ed. 1994).

²⁸ See, e.g., Reinhard Greger, *Verbandsklage und Prozessrechtsdogmatik—Neuere Entwicklungen in einer schwierigen Beziehung*, 113 ZEITSCHRIFT FÜR ZIVILPROZESS [ZZP] 399, 399 (2000).

²⁹ See, e.g., *id.* at 412.

³⁰ Cf. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 852 (1985) (noting that in Germany, administrative law courts as well as other specialized courts “siphon off business that Americans would expect to see in the ordinary courts”).

³¹ See, e.g., Samuel P. Baumgartner, *Class Actions in der Schweiz?*, in AUF DEM WEG ZU EINEM EINHEITLICHEN VERFAHREN 111, 119–20 (Benjamin Schindler & Regula Schlauri eds., 2001) [hereinafter Baumgartner, *Class Actions*]. In the United States, the term “public law litigation” has been well known at least since the late Professor Chayes drew attention to it in 1976. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). The difference to Switzerland is that such litigation for the most part is not

example, would fall into this category. For these reasons, it is important to point out that the federal government has had the power to regulate administrative procedure and the organization of the administrative judiciary to adjudicate cases involving federal administrative law for quite some time.³² Naturally, as far as state administrative law is concerned, state procedural law prevails.³³ Thus, in Switzerland, the separation between public and private law is not only important for purposes of identifying the competent court (civil or administrative), but it also determines the extent of federal power vis-à-vis the states.

III. EXISTING GROUP ACTION DEVICES AND PLANNED REFORMS

A. Class Actions

For decades, class action litigation was exclusively a phenomenon of the United States. Although there have increasingly been suggestions to introduce class actions—at least in limited circumstances—in many other countries, few of those countries have yet acted on them.³⁴ Among those that have, most are squarely in the common law tradition (Australia,³⁵ England,³⁶ and several Canadian provinces other than Quebec³⁷), and a few (Quebec³⁸ and Sweden³⁹) have a close connection to common law

conducted in distinct public law courts in the United States. Moreover, at least Professor Chayes cast his net wider by including in his definition of public law litigation suits brought by private individuals against other private groups and individuals. *See id.* at 1284.

³² *See* Constitution of 1874, May 29, 1874, AS 1 (1875), as amended on Oct. 25, 1914, art. 103 (Switz.); Constitution of 1874, May 29, 1874, AS 1 (1875), as amended on Feb. 20, 1938, art. 114 (Switz.).

³³ To complicate matters, the implementation of a considerable number of substantive federal administrative statutes has been delegated to the cantons. In such instances, adjudication has long been by cantonal authorities and administrative courts, but usually with an opportunity for judicial review by a federal administrative tribunal. *See, e.g.,* GYGI, *supra* note 27, at 25–27. The planned reorganization of the federal judiciary is unlikely to change this general approach. For details see, e.g., Christoph Auer, *Auswirkungen der Reorganisation der Bundesrechtspflege auf die Kantone*, 107 SCHWEIZERISCHES ZENTRALBLATT FÜR STAATS—UND VERWALTUNGSRECHT [ZBL] 121 (2006).

³⁴ *See, e.g.,* Rowe, *supra* note 3, at 158–59.

³⁵ Federal Court of Australia Amendment Act, 1991, no. 181, § 3; Supreme Court Rules, 1999, am. 11 Vict., c. 1 (Austl.). *See also* S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 289 (2001).

³⁶ CPR 19.6 (1998) (U.K.).

³⁷ British Columbia Class Proceedings Act, S.B.C., ch. 21 (1995); Ontario Class Proceedings Act, S.O., ch. 6 (1992); Saskatchewan Class Proceedings Act, S.S., ch. C-12-01 (2002). For commentary, see, e.g., MICHAEL EIZENGA ET AL., CLASS ACTIONS LAW AND PRACTICE (1999); WARD K. BRANCH, CLASS ACTIONS IN CANADA (1996).

³⁸ Quebec Code of Civil Procedure, R.S.Q., ch. C 25, §§ 99–1052 (1978).

³⁹ Group Proceedings Act (Svensk författningssamling [SFS] 2002:599) (Swed.).

procedure, with Brazil as the big exception.⁴⁰ Among the remaining countries, some have seen class action proposals move to a rather advanced stage in the legislative process,⁴¹ while in others, such proposals have never quite taken off. Switzerland belongs to the latter category. A number of Swiss academics have argued that the country could learn from U.S. class action practice to adopt more adequate procedural rules for mass tort cases.⁴² Moreover, thirty Members of Parliament requested in 1998 that the Federal Council, the Swiss executive, consider the adoption of class actions for labor, landlord-tenant, and consumer law disputes.⁴³ Neither of these proposals went very far, however.

In 1988, a large volume of water contaminated with agricultural chemicals was washed from a Sandoz plant in Schweizerhalle near Basel into the Rhine River, severely contaminating the river water downstream—the “Schweizerhalle accident.” In the wake of that accident, the Justice Department appointed a group of experts to study a possible reform of federal tort law.⁴⁴ The group was given the specific task, among others, to

⁴⁰ See, e.g., Gidi, *supra* note 1, at 312–13.

⁴¹ See, e.g., Guillaume Cerutti & Marc Guillaume *Rapport sur l'action de groupe*, Dec. 16, 2005, available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/054004458/0000.pdf> (France). However, the French proposal has been watered down considerably in the legislative process. See, e.g., Marc Rees, *France: La loi sur l'action de groupe avance . . . doucement*, PCInpact.com, at <http://akosh.pcinpact.com/actu/news/32625-action-collective-gratuite.htm>.

⁴² See, e.g., ISABELLE ROMY, *LITIGES DE MASSE* 235–20 (1997); Emil W. Stark & Stefan Knecht, *Einführung einer Zwangsgemeinschaft für Geschädigte bei Massenschäden?*, 97 ZSR II 51 (1978); Pierre Tercier, *L'indemnisation des préjudices causés par des catastrophes en droit suisse*, 109 ZSR II 497 (1990).

⁴³ Motion 98.3401, Jutzet Erwin, *Einführung der Sammelklage im Arbeits-, Miet- und Konsumentenrecht*; Baumgartner, *Class Actions*, *supra* note 31, at 112. Unlike in the United States, most bills in Switzerland—as in many other civil law countries—are drafted by the executive. While legislators have few staffers, if any, available to them, the executive, in particular the Justice Department, employs a significant number of capable lawyers, many of them with academic ambitions or already in academia, whose main job is legislative drafting. For larger projects, putting together the first draft is usually a task assigned to an ad-hoc committee of experts, composed of leading academics and practicing lawyers in the area of concern. See Bundesgesetz über die Bundesversammlung Dec.13, 2002, SR 171.10, art. 141 (Switz.); Regierungs- und Verwaltungsorganisationsgesetz Mar. 21, 1997, SR 172.010, art. 7 (Switz.); Walter Buser, *Das Vorverfahren der Gesetzgebung*, 85 SCHWEIZERISCHES ZENTRALBLATT FÜR STAATS- UND VERWALTUNGSRECHT 145 (1984).

⁴⁴ See Pierre Widmer & Pierre Wesner, *Revision und Vereinheitlichung des Haftpflichtrechts*, Erläuternder Bericht 15–17 (1999), available at <http://www.bj.admin.ch/etc/medialib/data/wirtschaft/gesetzgebung/haftpflfch.Par.0002.File.tmp/vn-ber-d.pdf>. The water was used to fight a fire that had broken out after an explosion at the plant. That explosion brought back memories of the deadly explosion of a chemical plant in Bhopal, India, in 1984 and made many Swiss fear that in a future accident of this kind, the effect might be much worse.

evaluate the necessity of distinct procedural rules for mass tort cases.⁴⁵ In its final report, the group suggested the introduction of various possible forms of group litigation in mass tort cases and recommended drafting a separate law on catastrophe litigation, such as Schweizerhalle, which it distinguished from mass torts.⁴⁶ The first tort reform draft of 1999, however, failed to follow up on any of these proposals, and, as part of rather severe budgetary measures, the Federal Council decided in 2003 to drop the entire tort reform project from its legislative agenda.⁴⁷

The proposal to consider the introduction of class actions for labor, landlord-tenant, and consumer disputes⁴⁸ was passed on to the committee of experts drafting the new Federal Code of Civil Procedure.⁴⁹ Without much research, however, the committee decided to refrain from introducing a U.S.-style class-action into its draft code, noting that such a device is foreign to Swiss traditions.⁵⁰ This decision has largely been greeted with satisfaction by lawyers, academics, and political groups.⁵¹ The subsequent draft submitted by the executive to parliament thus remains firmly opposed to the introduction of a class action device.⁵² Hence, it is unlikely that the American-style class action will make an appearance in Swiss law, including in the new Federal Code of Civil Procedure, any time soon.⁵³

Why this reluctance? As in many other jurisdictions that have contemplated the adoption of a class-action device,⁵⁴ proponents of such a device in Switzerland face considerable doctrinal, jurisprudential, cultural, and economic objections. Among them are a traditional focus on the individual nature of a claim;⁵⁵ limitation of judicial power vis-à-vis the

⁴⁵ See *id.* at 17.

⁴⁶ Bericht der Studienkommission für die Gesamtrevision des Haftpflichtrechts 190–95 (1991) (copy on file with the author).

⁴⁷ See Bundesamt für Justiz, Haftpflichtrecht: Was ist bisher geschehen?, <http://www.bj.admin.ch/bj/de/home/themen/wirtschaft/gesetzgebung/haftpflicht.html> (last visited Nov. 18, 2006). On the role of the executive in the legislative process, see discussion *supra* note 43.

⁴⁸ See *supra* text accompanying note 43.

⁴⁹ Motion 98.3401, Jutzet Erwin, Stellungnahme des Bundesrates (on file with author).

⁵⁰ See Begleitbericht, *supra* note 20, at 15, 45–46.

⁵¹ See Vernehmlassungsbericht, *supra* note 21, at 96–98. The only critical voice directed against that decision came from the University of Geneva. See *id.*

⁵² Botschaft, *supra* note 22, at 7224.

⁵³ But see *infra* text accompanying notes 241–43.

⁵⁴ See, e.g., Rowe, *supra* note 3, at 159–60.

⁵⁵ Cappalli & Consolo, *supra* note 1, at 269–70; Greger, *supra* note 28, at 399; see also *infra* text accompanying notes 129–40. While civil procedure is conceptually limited to individual claims, enforcing the public interest is primarily considered a matter of the criminal process. See, e.g., Cappalli & Consolo, *supra* note 1, at 269–70. Thus, the victims of alleged criminal behavior, as private attorneys general, are allowed in several Swiss cantons, as well as in some other civil law jurisdictions, to force a criminal prosecution

legislature,⁵⁶ thus disallowing the large-scale judicial discretion necessary to manage complex litigation;⁵⁷ strong emphasis on the litigants' right to be heard, which would need to be slighted in complex cases;⁵⁸ different respective roles of judges and attorneys;⁵⁹ lack of American-style fee structures and entrepreneurial lawyering;⁶⁰ and the many practical changes that would be necessary to introduce a class action device. Moreover, there is a clear preference for legislation rather than litigation to deal with new social problems, including mass torts.⁶¹ This preference is perhaps more realistic in a country in which legislators still spend most of their time legislating (rather than running for re-election) and are not usually afraid of taking a clearly defined position on the issues of the day.⁶² Moreover, the

where the public prosecutor fails to bring one and to appeal an acquittal, among other things. See, e.g., Felix Bommer, *Warum sollen sich Verletzte am Strafverfahren beteiligen dürfen?*, 121 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 172 (2003); Beth van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 145–46 (2001).

⁵⁶ The main concern is to cabin judicial power in countries in which the judiciary has historically been part of governmental repression rather than representing a bulwark against it. See, e.g., SAMUEL P. BAUMGARTNER, *THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS: TRANSATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION* 85–86 (2003) [hereinafter BAUMGARTNER, HAGUE CONVENTION]; see also *infra* text accompanying notes 129–40.

⁵⁷ See, e.g., Douglas L. Parker, *Standing to Litigate “Abstract Social Interests” in the United States and Italy: Reexamining “Injury in Fact”*, 33 COLUM. J. TRANSNAT'L L. 259, 300–06 (1995).

⁵⁸ See, e.g., Cappalli & Consolo, *supra* note 1, at 219.

⁵⁹ See, e.g., David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745, 752–55 (1986).

⁶⁰ See, e.g., Harald Koch, *Non-Class Group Litigation under E.U. and German Law*, 11 DUKE J. COMP. & INT'L L. 355, 365 (2001); Harald Koch, *Die Verbandsklage in Europa*, 113 ZZP 413, 426–27 (2000).

⁶¹ See, e.g., Burkhard Heß, *Entschädigung für NS-Zwangsarbeit vor US-amerikanischen und deutschen Zivilgerichten*, 44 DIE AKTIENGESELLSCHAFT [AG] 145, 152 (1999); Walter, *supra* note 12, at 376.

⁶² The federal legislation attempting to tackle new social problems is considerable. Its proliferation is particularly notable in the area of consumer protection. To take one example, frequent reports of travel arrangements turning sour without the customers of the organizers receiving adequate compensation from either the organizer or their travel agency led the Swiss Parliament to adopt the Federal Act on Organized Travel. See Bundesgesetz über die Pauschalreisen, June 18, 1993, SR 944.3 (Switz.). Among many other provisions, the Act contains stiff liability provisions. See *id.* arts. 14–16. Further, travel organizers and travel agents must keep a guaranty fund large enough to guarantee the payment of any damages to any and all customers. See *id.* art. 18. However, such provisions are not foolproof as the recent bankruptcy of a Zurich area travel organizer showed: The organizer had bilked the guaranty fund in order to stay afloat. The ombudsman of the travel industry then got the insured's travel insurance to offer customers of the bankrupt a 27% cash payment plus 13% in travel coupons of prepaid travel money in exchange for an undertaking not to sue. See, e.g., Doris Huber, *Jann Konkurs: Das ASTAG Angebot gilt bis 31. 8. 05*,

legislative process is considered to derive particular legitimacy from the presence of direct-democratic mechanisms, such as the referendum⁶³ and the initiative.⁶⁴ Finally, given these and other differences, the question of how much of a need there really is for class actions cannot easily be answered in the same fashion as in the United States.⁶⁵

The report of the committee of experts mentions some of these issues. It points out that, in the Swiss procedural tradition, the right to conduct a proceeding is closely connected to one's claimed substantive right.⁶⁶ And the committee displays considerable unease with the prospect of judicial supervision of the litigants' attorneys.⁶⁷ The report also alludes to the problem that class litigation may result in a level of complexity that is difficult, if not impossible, to manage.⁶⁸ What is missing in the report, however, is any serious analysis of these issues. Instead, the committee simply concludes that the traditional procedural vehicles, including suits by associations, "are by far sufficient."⁶⁹ This is unfortunate. Not only do

<http://www.beobachter.ch/artikelfree.asp?Session=BFF1C49B-700A-473F-832344EF011E515&AssetID=8829>.

⁶³ Every piece of federal legislation is subject to a popular referendum when requested by a certain number (currently roughly one percent) of the voting-age population or by the governments of eight cantons within three months of passage by the legislature. If enough such signatures are gathered, the legislation is adopted when a simple majority of those voting approve. Constitution of the Swiss Confederation of Apr. 18, 1999, arts. 141(1), 142(2).

⁶⁴ The constitutional vehicle of the initiative permits a certain number of voters, currently roughly two percent of the voting-age population, to propose a constitutional amendment, which must be put to a popular vote. The amendment is adopted when a simple majority of those voting plus a simple majority of those voting in the majority of cantons approve. *Id.* arts. 138–39, 142(2). The Swiss people thus have the opportunity both to vote down legislation passed by their parliament and to take action when their parliament has failed to do so. Obviously, gathering the relevant number of signatures among voters, particularly within the three-month window set for the referendum, is not easy. This is where trade associations, NGOs, and small political parties can exercise some leverage.

⁶⁵ See, e.g., Samuel P. Baumgartner, *Debates over Group Litigation in Comparative Perspective*, 2 INT'L L. F. 254, 255–57 (2000) [hereinafter Baumgartner, *Group Litigation*] (conference review essay).

⁶⁶ See Begleitbericht, *supra* note 20, at 15.

⁶⁷ See *id.* at 46.

⁶⁸ See *id.*

A critical question for research is whether [the] potential [of the judicial system] is or can be exploited to produce a party structure that is adequately representative in light of the consequences of public law litigation without introducing so much complexity that the procedure falls of its own weight.

Chayes, *supra* note 31, at 1312.

⁶⁹ See Begleitbericht, *supra* note 20, at 45–46.

good arguments exist to address most of these concerns,⁷⁰ but there is also the powerful argument that, as we have moved from an individualistic to an industrial society, civil procedure needs to provide class proceedings as well as individual litigation for the effective and efficient enforcement of laws and individual rights.⁷¹ To be sure, good arguments can be made against the introduction of a class action device in Switzerland or at least for its limitation to certain issue areas.⁷² But given the importance of the new Swiss procedural code for the enforcement of substantive law and individual rights, access to justice, efficiency, equality, and fairness—the process values usually stated at the beginning of civil procedure textbooks in Switzerland⁷³—one would have expected more careful analysis.

Apparently, there are other reasons for such cavalier treatment. First, as the report of the committee mentions, its members wanted to avoid, as much as possible, importing any new procedural devices from abroad.⁷⁴ In the committee's view, merging twenty-six different state procedural codes into one consistent Federal Code was difficult enough.⁷⁵ Given that some have fought for this new Federal Code for decades,⁷⁶ however, one would have expected a more visionary approach, including some in-depth (international) comparative analysis.⁷⁷ This is particularly true because the

⁷⁰ See, e.g., Baumgartner, *Class Actions*, *supra* note 31, at 119–28; Gidi, *supra* note 1, at 321–23, 344–54, 363–72; Per Henrik Lindblom, *Group Actions: A Study of the Anglo-American Class Action Suit From a Swedish Perspective*, in *GROUP ACTIONS AND CONSUMER PROTECTION 7* (Thierry Bourgoignie ed., 1992); *infra* text accompanying notes 141–52.

⁷¹ See, e.g., Cappalli & Consolo, *supra* note 1, at 219–21; Rowe, *supra* note 3, at 157–58.

⁷² See, e.g., Baumgartner, *Class Actions*, *supra* note 31, at 122–28.

⁷³ See, e.g., WALTHER J. HABSCHIED, *SCHWEIZERISCHES ZIVILPROZESS- UND GERICHTSORGANISATIONSGESETZ* 1–3 (2d ed. 1990); MAX KUMMER, *GRUNDRISSE DES ZIVILPROZESSRECHTS* 3–7, 13–14 (4th ed. 1984); VOGEL, ET AL., *supra* note 24, at 36–40. See generally, ROBERT COVER & OWEN FISS, *THE STRUCTURE OF PROCEDURE* (1979) (offering a valuable collection of readings on process values in the United States). Oddly, the commentary accompanying the latest proposal of the new federal code discusses the tension among these process values without taking a position on how best to resolve them. Instead it simply concludes with the catchy slogan: “The new Code of Civil Procedure: Familiar, Innovative, and Ready for the Future” (*vertraut, innovativ und zukunftsgerichtet*). Botschaft, *supra* note 22, at 7233.

⁷⁴ See Begleitbericht, *supra* note 20, at 15.

⁷⁵ *Id.*

⁷⁶ See generally THOMAS SUTTER-SOMM, *AUF DEM WEG ZUR RECHTSEINHEIT IM SCHWEIZERISCHEN ZIVILPROZESSRECHT* (1998) (expounding efforts to unify civil procedure in Switzerland since 1872).

⁷⁷ Apparently the Swiss Executive recognized this and has abandoned this rhetoric. Now the draft claims to be at the cutting edge of international developments by introducing enforceable notary documents from the Romanist and Latin countries and by putting a stronger emphasis on mediation. Botschaft, *supra* note 22, at 7223–24. That change in rhetoric has not, however, been accompanied by better comparative analysis with regard to group and class action litigation. The “comparative” analysis in the latest draft is even shorter and relies primarily on an article in the *Financial Times*, describing the perceived

European Community, whose member states surround Switzerland, has been on a course of harmonizing various aspects of procedure, including to some extent in the area of group litigation.⁷⁸ In the committee's defense, one does need to point out that avoiding anything controversial is a tried-and-true approach within the Swiss political system of consensus democracy.⁷⁹

Second, the committee report mentions the perceived danger that "baseless claims would be filed for the sole reason of forcing the defendant into a settlement."⁸⁰ In Switzerland and elsewhere in Europe, this is an often-heard complaint about U.S. class action proceedings, indeed about U.S. litigation in general.⁸¹ It reveals a deeper reason for opposing the adoption of class actions in Switzerland and elsewhere: outright rejection of U.S.-style litigation.⁸² At the heart of this rejection, as the committee's concern about strike suits shows, is a deep unease with the way in which the jury trial,⁸³ a procedure steeped in equity,⁸⁴ anti-formalism,⁸⁵

pathologies of American class action litigation, to prove the lack of need for the device. Botschaft, *supra* note 22, at 7290.

⁷⁸ See, e.g., Baumgartner, *Class Actions*, *supra* note 31, at 112–13; Burkhard Heß, *Neue Rechtsetzungsakte und Rechtsetzungsmethoden im europäischen Justizraum*, 124 ZSR II, 183 (2005).

⁷⁹ See, e.g., AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 31–41 (1999); STEINER, *supra* note 16. Lijphart uses ten elements to distinguish a consensus democracy from a majoritarian democracy: executive power-sharing in broad coalition cabinets; executive-legislative balance of power; multiparty system; proportional representation; interest group corporatism; federal and decentralized government; strong bicameralism; constitutional rigidity; judicial review; and central bank independence. Switzerland meets all of these except the requirement of judicial review: the Supreme Court may not review the constitutionality of federal legislation.

⁸⁰ Begleitbericht, *supra* note 20, at 46.

⁸¹ See, e.g., Burkhard Heß, *Die Anerkennung eines Class Action Settlement in Deutschland*, 55 JURISTENZEITUNG 373, 374 (2000); Heinrich Honsell, *Amerikanische Rechtskultur*, in DER EINFLUSS DES EUROPÄISCHEN RECHTS AUF DIE SCHWEIZ 39, 48 (Peter Forstmoser et al. eds., 1999); Regina Kiener & Raphael Lanz, *Amerikanisierung des Schweizerischen Rechts–und ihre Grenzen*, 119 ZSR 155, 155 (2000).

⁸² See, e.g., Rowe, *supra* note 3, at 159 (noting that "[t]he perceived extremes to which Americans have taken things . . . can turn off those in whose traditions such practices are anathema.").

⁸³ See, e.g., Felix Dasser, *Punitive Damages: Vom "fremden Fötzel" zum "Miteidgenoss"?*, 96 SCHWEIZERISCHE JURISTENZEITUNG [SJZ] 101, 102–03 (2000) (speaking of the aleatoric character of U.S. jury decisions).

⁸⁴ I am referring here to "the enormous flexibility and latitude of U.S. procedure—including its ability to create new remedies, judicial discretion, liberal pleading, the availability of the class-action device, and the ability of the parties to join every conceivable claim" as well as to discovery. Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases*, 80 WASH. U. L.Q. 835, 841 (2002) [hereinafter Baumgartner, *Human Rights*]. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

entrepreneurial lawyering,⁸⁶ the prospect of punitive damages,⁸⁷ and the tendency toward the lawsuit as a business deal that these features support,⁸⁸ results in a litigation system in the United States in which power (including judicial power), money (who has it and who does not), and tactics seem to be more important in the outcome of litigation than a finding of who is right and who is wrong.⁸⁹ This unease was underscored in the 1980s and early 1990s, when what the Germans call the “judicial conflict” with the United States resulted in extensive depictions in German law journals of the U.S. litigation system as arbitrary and unfair—interestingly, unfair primarily to defendants, but that should not be surprising given the reports’ provenance in the U.S. tort reform movement.⁹⁰ This German scholarship seems to have influenced the thinking of Swiss scholars, especially in German-speaking Switzerland.⁹¹ The perception that U.S. courts were exercising their country’s hegemonic power in dealing with foreign parties and foreign sovereignty concerns further supported the unease.⁹²

In the late 1990s, objection to U.S.-style class actions was further intensified in Switzerland by the Holocaust Assets Litigation, in which several classes of Holocaust survivors sued the major Swiss banks for conversion of their families’ bank accounts during and after World War II and for other misdeeds.⁹³ Although the cases presented a number of difficult legal and factual questions, from the procedural (personal jurisdiction, forum non conveniens, proof of title) to the substantive (applicable law, statute of limitations, preemption by treaty), they were settled, after eighteen months, for \$1.25 billion without a single legal ruling by the trial judge.⁹⁴ This seemed to confirm that power is more important

⁸⁵ See, e.g., Baumgartner, *Human Rights*, *supra* note 84, at 843. See generally NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 32-299 (1995) (expounding American anti-formalism).

⁸⁶ See, e.g., Cappalli & Consolo, *supra* note 1, at 220; Heß, *supra* note 61, at 145.

⁸⁷ See, e.g., Honsell, *supra* note 81, at 45-48.

⁸⁸ See, e.g., Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199 (2000); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001).

⁸⁹ See, e.g., Baumgartner, *Human Rights*, *supra* note 84, at 843-46; Heß, *supra* note 61, at 145, 149-50.

⁹⁰ See Baumgartner, *Transnational Litigation*, *supra* note 9, at 1340-41.

⁹¹ See, e.g., Honsell, *supra* note 81, at 45-52 (presenting a very one-sided narrative of U.S. tort law and procedure).

⁹² See, e.g., Baumgartner, *Transnational Litigation*, *supra* note 9, at 1352-53.

⁹³ See generally, Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795 (2002) (an account of that litigation by one of its protagonists).

⁹⁴ See, e.g., *id.* at 805-12 (describing filing, settlement negotiations, and settlement in that litigation).

than the merits in resolving class actions in the United States.⁹⁵ For the Swiss public and those involved in procedural reform, it did not matter that the most important power play in that dispute took place outside of the courtroom by various U.S. government officials,⁹⁶ the chairman of the Senate Banking Committee,⁹⁷ and the legislatures of New York and California.⁹⁸ Together with the unease about the U.S. litigation system described above, this power play reinforced the impression “that what matters for the outcome is not the rule of law, but the relative power of the litigants and of the governments that they are able to mobilize.”⁹⁹ The resulting suspicion of American procedure and American law seems to suffice for most Swiss reformers today to dismiss the viability of the class action out of hand when they could take the device and its application in the United States as the basis for a deeper reflection on process values in Switzerland and how well those values are served by the existing system.

B. Association Suits (*Verbandsklagen*)

1. General Requirements and Standing to Sue

Just because there is no class action device does not mean, however, that there is no procedural vehicle to allow for group litigation in Switzerland. As in the United States, less far-reaching devices already exist. Probably the best known such device is the association suit (*Verbandsklage* in German). As in Germany,¹⁰⁰ the Swiss legislature first introduced the *Verbandsklage* in the area of unfair competition, granting associations that are authorized by their bylaws to pursue the economic

⁹⁵ See, e.g., Baumgartner, *Human Rights*, *supra* note 84, at 847 (noting that “when the \$1.25 billion settlement became public, a great number of editorialists, members of Parliament, and other protagonists of public opinion berated the Swiss banks for selling out to the ‘blackmail’ from overseas.”). That the defendants did not even raise some of these issues, from what I understand partly to avoid extensive discovery and the testing of the trial judge’s patience, only supported this perception.

⁹⁶ See, e.g., STUART EIZENSTAT, *IMPERFECT JUSTICE, LOOTED ASSETS, SLAVE LABOR AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2003) (providing account of government and other negotiations by probably the most important protagonists of the U.S. government in this saga); Neuborne, *supra* note 93, at 797 (describing diplomacy as the second leg of the litigation).

⁹⁷ See, e.g., *Profanierung des Holocaust im Wahlkampf. Kritik an den populistischen Strategien Senator D’Amatos*, NZZ, Oct. 29, 1998.

⁹⁸ See, e.g., David Cay Johnston, *New York Officials to Impose Sanctions on Swiss Banks Sept. 1*, N.Y. TIMES, July 3, 1998, at A3; David Cay Johnston, *Two States Outline Sanctions on Swiss Banks in Holocaust Case*, N.Y. TIMES, July 2, 1998, at A5. See generally, EIZENSTAT, *supra* note 96, at 339–56 (demonstrating the importance of all these levels of government involvement for the outcome of the Holocaust litigation).

⁹⁹ Baumgartner, *Human Rights*, *supra* note 84, at 845.

¹⁰⁰ See Gesetz zur Bekämpfung des unlauteren Wettbewerbs, May 27, 1896, § 1 (F.R.G.).

interests of their members to bring claims of violations of the Unfair Competition Act on behalf of those members.¹⁰¹ However, associations are limited to claiming declaratory relief and injunctions to stop the alleged violations.¹⁰²

While the Unfair Competition Act was being drafted, the Federal Supreme Court recognized a similar right of trade associations to seek a judgment declaring a registered patent invalid if that is in the economic interest of the association's members.¹⁰³ A few years later, in a 1947 case, the Court extended the area of application of that decision as a matter of federal common law. In that case, the Court allowed the Swiss Association of Barbershop Employees to challenge a provision in the bylaws of the Basel Association of Barber Masters to refrain from hiring a barber who had worked with an Association member within 500 meters of the new employment site for six months.¹⁰⁴ Although every barber in the city of Basel was potentially affected and thus had standing to sue, the Court reasoned, few would do so as long as they stayed with the same employer.¹⁰⁵ That was so, the Court said, because of the financial risk of litigation and because of the danger for the claimant to be singled out and never to be hired by a Basel barber again.¹⁰⁶ It thus held that an association can bring suit on behalf of its members if:

[1] the association's claim pursues an interest of all those among whose numbers the association recruits its members;

[2] the association is authorized, by its bylaws, to pursue the economic interests of its members; and

[3] all of the association's members would themselves have standing to sue (i.e. they are the holders of the claimed right).¹⁰⁷

The Court held that this right of the association to sue arises out of Article 28 of the Swiss Civil Code, which allows everyone "whose person is being harmed unlawfully" to sue "anyone who participates in the harmful act."¹⁰⁸ As a result, the common law *Verbandsklage* is limited to claims of

¹⁰¹ See Bundesgesetz über den unlauteren Wettbewerb Sept. 30, 1943, art. 2(3) (Switz.), superseded by Bundesgesetz gegen den unlauteren Wettbewerb Dec. 19, 1986, SR 241, art. 10(2)(b) (Switz.) [hereinafter Unfair Competition Act].

¹⁰² *Id.*

¹⁰³ Bundesgericht [BGer] [Federal Court] Feb. 27, 1940, 66 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 62 (Switz.).

¹⁰⁴ Federal Court May 20, 1947, 73 BGE II 65 (Switz.).

¹⁰⁵ *Id.* at 72.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 69–72.

¹⁰⁸ Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907, SR 210, art. 28

harm to one's person. At first, it looked like there was a further limitation to the area of labor law since the Court based its decision in doctrinal terms on the strong representative role that substantive federal labor law had assigned to labor associations (both unions and trade associations) in disposing over its members' personal rights.¹⁰⁹ But later decisions made clear that such is not the case.¹¹⁰

The limitation of the association suit to claims of harm to one's person is not as narrow an area of application as it may at first seem. Article 28 protects against any unlawful¹¹¹ interference with the integrity of one's personhood, from physical and psychological harm to one's body to limitations on one's freedom to do what one wants—including the freedom to exploit one's abilities economically—to interference with one's privacy¹¹² and defamatory statements and other slights of one's honor.¹¹³ Nevertheless, it is a limitation that is significant, excluding association suits in both contract cases and the majority of negligent tort actions, namely those in which the alleged negligent act was not per se unlawful.¹¹⁴

Thirteen years later, the Court had an opportunity to revisit the association suit in another labor dispute.¹¹⁵ This time, a Geneva trade association had entered into a labor contract with a national trade union on the conditions of employment of electricians.¹¹⁶ Among the contract's provisions was a requirement that the fund of the Geneva trade association

(Switz.).

¹⁰⁹ Federal Court 73 BGE II 65, at 70.

¹¹⁰ Federal Court Sept. 27, 1977, 103 BGE II 294, 302 (Switz.) ("That these decisions concerned labor matters does not change their fundamental importance.").

¹¹¹ Civil Code, Dec. 10, 1907, SR 210, art 28(1) ("The infringement is unlawful if it is not justified by the consent of the harmed, by a prevailing public or private interest, or by statute.").

¹¹² See generally, James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004) (analyzing the very different views on, and legal protections of, privacy in Europe and the United States, respectively).

¹¹³ See, e.g., HEINZ HAUSHEER & REGINA AEBI-MÜLLER, DAS PERSONENRECHT DES SCHWEIZERISCHEN ZIVILGESETZBUCHES 12.70 (2005). See generally, Whitman, *supra* note 112, at 1180–88 (exploring the historical and philosophical development of the law of protecting the person in the German Civil Code, much of which influenced art. 28 of the Swiss Civil Code).

¹¹⁴ See, e.g., THOMAS RÖTHLISBERGER, ZIVILRECHTLICHE PRODUKTBEOBACHTUNGS-, WARN- UND RÜCKRUFPLICHTEN DER HERSTELLER 187 (2003) (noting that association suits will hardly ever be permissible in product liability cases for lack of violation of the personal rights of all members of an association).

¹¹⁵ Federal Court Jan. 19, 1960, 86 BGE II 18 (Switz.).

¹¹⁶ In Switzerland, as in many other continental European countries, labor contracts are negotiated and entered into between unions and trade associations, the latter negotiating in the name of all member employers, rather than between unions and individual companies as is usually the case in the United States. See, e.g., MANFRED REHBINDER, SCHWEIZERISCHES ARBEITSRECHT 143–48 (9th ed. 1988).

pay employed electricians 100% of their salary during national holidays, when the electrical shops would be closed.¹¹⁷ A local Geneva trade union approached the Geneva trade association with a request for a contract with the same conditions.¹¹⁸ The trade association refused, having been told by the national trade union that it would otherwise withdraw from its contract. In the meantime, the local trade union paid its members the holiday salary that they were not receiving due to the strong-arming of the national union.¹¹⁹ The local union then sued both the national union and the Geneva trade association, seeking a repayment of the holiday salaries.¹²⁰ The plaintiff's primary argument was that it was suing in the name of its members, whose holiday pay it had merely advanced. The Supreme Court, however, held that the plaintiff did not have standing. The Court held that while the three requirements set up by the Court in its 1947 decision were met, associations were limited to claiming declaratory relief and an order to cease violating the defendants' Article 28 rights. Claims for damages, however, would have to be brought by the individual members of the association.¹²¹

This is so, the Court reasoned, because the right to bring a claim for damages is a personal right of the creditor, which only he can assert in court.¹²² Allowing an association to claim that right in court, possibly against the creditor's will, would violate his right to dispose of his personal claims.¹²³ That, the Court opined, would amount to a transfer of the creditor's right against his will.¹²⁴ Moreover, the Court continued, the association in a *Verbandsklage* always pursues a right that is distinct from the rights of its individual members, one that is grounded in the common interest of the members and others equally situated.¹²⁵ Thus, to the extent that an association pursues such a common interest—such as the interest of all Geneva electricians to have both the labor and management defendant stop interfering with their right to contract—it can do so without interfering

¹¹⁷ Federal Court 86 BGE II 18, at 19–20.

¹¹⁸ *Id.* at 20.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 21–27 (The plaintiff nevertheless won in the Supreme Court on its alternative theory that it had given its members the holiday pay in *negotiorum gestio*, which it could claim as *its own right* against the defendants.). See generally, John P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 HARV. L. REV. 817 (1961); Duncan Sheehan, *Negotiorum Gestio: A Civilian Concept in the Common Law?*, 55 INT'L & COMP. L.Q. 253 (2006) (explaining *negotiorum gestio*).

¹²² Federal Court 86 BGE II 18, at 22.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

with the individual rights of its members.¹²⁶ But to the extent it intends to advance the rights of individual electricians to receive damages, it is precluded from doing so.¹²⁷ Moreover, the Court said that not all of the Geneva electricians had such a claim to make, because some of them were represented by the national trade union and thus already were parties to the contract that gives them holiday compensation.¹²⁸

To understand the Court's reasoning, it is important to remember the strong foundation of 19th Century German Pandectism,¹²⁹ which to some extent has influenced Swiss civil law,¹³⁰ in Kantian concepts of free will¹³¹ as well as Pandectism's concern with cabining judicial power.¹³² In this view, legal rights allow each individual to exercise his free will and thus "fully to realize his potential as an individual: to give full expression to his

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Pandectism was the jurisprudential school that, beginning in the 1840s, continued Friedrich Carl von Savigny's work of painstakingly organizing Roman law, mainly Justinian's Digest, scientifically penetrating it so as to achieve a highly formalist hierarchical system, within which every legal concept has a clearly defined meaning. The effort was carried by a variety of underlying purposes, among them a positivist-inspired endeavor to prove law a science independent of the other social sciences and an attempt to constrain judges in applying the law by a conceptual edifice that would impose one correct interpretation of the law to be deduced by knowledge of the precise meaning of the concepts used by the legislature. See, e.g., FRANZ WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT* 430–68 (2d ed. 1967); Gerhard Dilcher, *Der rechtswissenschaftliche Positivismus*, 61 *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE* 497 (1975). While Pandectism's strict formalism was unable to survive later criticism, it has nonetheless left a lasting mark on the method of making and applying law in Germany and in other civil law countries. It has had a particularly strong influence on the law of procedure in the German-speaking countries of continental Europe. See, e.g., FRIDOLIN M.R. WALTHER, *DIE AUSLEGUNG DES SCHWEIZERISCHEN ZIVILPROZESSRECHTS, INSBESONDERE DES BUNDESGESETZES ÜBER DEN GERICHTSSTAND IN ZIVILSACHEN (GERICHTSSTANDSGESETZ)* 79 (2002); Peter Gottwald, *Argumentation im Zivilprozeßrecht*, 93 *ZZP* 1, 4–8 (1980).

¹³⁰ I say "to some extent" because most cantons and localities in Switzerland resisted German-style full reception of Roman law. See, e.g., EUGEN HUBER, *SYSTEM UND GESCHICHTE DES SCHWEIZERISCHEN PRIVATRECHTS*, IV 114–21 (1893). Similarly, the drafters of the cantonal civil codes and, later, of the Swiss Civil Code, attempted to stay clear of some of Pandectism's conceptualist language in favor of a style that was easier for the then-numerous lay judges to understand. Yet, the German Historical School and Pandectism clearly influenced the drafters of the Civil Code and Code of Obligations as well as later scholarly and judicial interpretations of those codes. See, e.g., WIEACKER, *supra* note 129, at 443; Ingeborg Schwenzer, *Rezeption deutschen Rechtsdenkens im schweizerischen Obligationenrecht, in SCHULDRECHT, RECHTSVERGLEICHUNG UND RECHTSVEREINHEITLICHUNG AN DER SCHWELLE ZUM 21. JAHRHUNDERT* 80 (Ingeborg Schwenzer ed., 1999).

¹³¹ See, e.g., William B. Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 *U. PA. L. REV.* 1889, 1997–2004, 2074 (1995).

¹³² See discussion *supra* note 129.

peculiar capacities and powers.”¹³³ The exercise of those legal rights must be in the control of the individual and can be limited only by the legislature.¹³⁴ Conversely, no individual can be forced to exercise his rights or to exercise them at a particular time.¹³⁵ The procedural equivalent to this concept is what in German is called *Dispositionsmaxime* (roughly “principle of free disposition”):¹³⁶ every individual claiming a particular right must have full control of the decision whether, when, and to what extent¹³⁷ to claim that right in court and if so, whether to prosecute the claim all the way to trial, agree to a settlement, or abandon prosecution altogether.¹³⁸ This principle fits nicely with the classical liberal concepts underlying the procedural codes of German-speaking Europe: the judge should exercise his power—state power—only to the extent that the parties so request.¹³⁹ All this should be easy to understand, although it may be difficult to believe for those who have been subjected to careless talk about the “inquisitorial” nature of civil litigation in civil law countries and the resulting assumption of an all-powerful judge.¹⁴⁰

¹³³ Whitman, *supra* note 112, at 1181. The Pandectists thus defined a right as *Willensherrschaft*, see, e.g., ANDREAS VON TUHR, *DER ALLGEMEINE TEIL DES DEUTSCHEN BÜRGERLICHEN RECHTS* I 56–58 (1910), thus assigning “the individual will an area in which it can control independently of any other will.” FRIEDRICH CARL VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* I 333 (1840). See generally, Ewald, *supra* note 131, at 2065–74 (explaining the philosophical history of this concept of right and the formal equality it was to serve in a hitherto aristocratic German society).

¹³⁴ See generally, WIEACKER, *supra* note 129, at 465 (explaining the significance of the French Revolution’s postulates on this concern about limiting the power of judges in German-speaking Europe).

¹³⁵ In fact, as von Tuhr points out, assigning individuals the right to exercise their will means giving them the power to exercise or not to exercise that will any time they wish. See VON TUHR, *supra* note 133, at 57.

¹³⁶ See, e.g., KUMMER, *supra* note 73, at 80–81.

¹³⁷ Thus, *ne eat iudex ultra petita partium* (the judge may not award more or something different than asked for by the parties). *Id.* at 81.

¹³⁸ *Id.*

¹³⁹ See, e.g., Carl Baudenbacher, *Der Zivilprozeß als Mittel der Wirtschafts- und Sozialpolitik*, 102 ZSR 161, 162–66 (1983); Gerber, *supra* note 59, at 769. Cf. ADOLF WACH, *VORTRÄGE ÜBER DIE REICHS-CIVILPROCESSORDNUNG* 2 (1896) (referring to the “lack of interest of the state and its organ, the judge, in the litigation”). This includes imposing the limitation that only evidence that is likely to be of probative value may be gathered so as to protect individuals, including the parties, from unnecessary intrusion into their constitutionally protected privacy by the state (via the judge). See, e.g., BAUMGARTNER, *HAGUE CONVENTION*, *supra* note 56, at 84–85; Gerber, *supra* note 59, at 763 (“Mere speculation of a party that a witness may say something relevant to the litigation process is not enough to trigger the use of state power.”).

¹⁴⁰ “Whoever first characterized the continental European system as ‘inquisitorial’ did a profound disservice to constructive legal thought.” Hearings Before the Commission on Revision of the Federal Court Appellate System, second phase, vol. I, at 205 (1974) (statement of J. Friendly). A logical corollary to the *Dispositionsmaxime* flowing from this

Of course, Pandectist concepts were not the only ones to influence the Swiss Civil Code and its interpretation. Germanic communitarian institutions and ideas also found their way into the Code,¹⁴¹ as did a somewhat more relaxed attitude toward judicial lawmaking. In particular, Article 1(2) of the Code provides that if the Code provides no rule for a particular question of law, “the judge shall . . . decide according to the rule that he would promulgate were he a legislator.”¹⁴² Moreover, Rudolph von Jhering’s ideas about law as legal protection of social interests (and later about law as a means to achieve social ends) have influenced the Code’s interpretation to some extent,¹⁴³ although they have not nearly had the impact that the Legal Realists, who borrowed some of Jhering’s ideas,¹⁴⁴ had in the United States.¹⁴⁵ Finally, the classical liberal concept of civil procedure was challenged in the late 19th Century by the Austrian proceduralist Franz Klein, who argued in favor of a more “social” procedure, and proved influential in early 20th Century changes to procedural codes in Switzerland and Germany, as well as Austria.¹⁴⁶ Chief

ideational background is the *Verhandlungsmaxime*, which holds that the development of the facts is the responsibility of the parties. Accordingly, only facts alleged by the parties may be made the basis of the court’s judgment; only facts actually in dispute may become the subject of evidence-gathering; and only evidence proffered by the parties may be gathered by the court, while proffered evidence must be so gathered unless the judge considers the proffering party’s allegation proven. See, e.g., KUMMER, *supra* note 73, at 76–77; Gerber, *supra* note 59, at 754. That, together with the limitations of judicial power discussed above, leaves little of the inquisitorial procedure with which German and other jurisdictions had experimented in the 18th and earlier centuries. Cf. *id.* at 768 (“The German system is also based on the adversarial principle.”).

¹⁴¹ See, e.g., WIEACKER, *supra* note 129, at 403–16 (exploring the influence of Germanic institutions in Germany and Switzerland).

¹⁴² Article 1 of the Civil Code provides in full:

The *Gesetz* (legislated law) applies to all questions of law on which it contains a provision according to its plain language or by interpretation.

If no provision can be gleaned from the *Gesetz*, the judge shall decide according to customary law and, where there is no customary law, according to the rule that he would promulgate were he a legislator.

In doing so, he shall follow well-tried (*bewährte*) scholarship and practice.

¹⁴³ See, e.g., WIEACKER, *supra* note 129, at 450–53 (portraying Jhering and his development from a Pandectist to a rebel against Pandectism in the mid- to late 19th century). As Wieacker points out, Jhering first saw a right as the power of the will (*Willensmacht*), as the Pandectists (see *supra* note 133), but a power bestowed to achieve protected social interests and later in life went further to see law simply as a means of exercising power and satisfying interests. WIEACKER, *supra* note 129, at 451.

¹⁴⁴ See, e.g., Ewald, *supra* note 131, at 2083.

¹⁴⁵ See, e.g., Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50 (W. Edmundson & M. Golding eds., 2005).

¹⁴⁶ See, e.g., Baudenbacher, *supra* note 139, at 167–72; Satter, *Das Werk Franz Klein’s*

among those changes in Switzerland is the federal requirement of judicial supervision of settlements in specific cases of public interest, mainly those involving the interest of the child and of the weaker spouse in divorce proceedings, and a judicial duty to probe whether the parties really intend what they declared in their answer and complaint.¹⁴⁷

On this basis, then, it is understandable that the Swiss Supreme Court had no problem utilizing its judicial power pursuant to Article 1(2) of the Civil Code to extend the *Verbandsklage* to claims of violations of Article 28 of the Code, finding that Article 28 provided no clear answer as to who should have the right to sue;¹⁴⁸ using policy arguments to back up its decision;¹⁴⁹ and recognizing an interest of the group as distinct from the interest of individual members of the association to have the group's rights enforced by the association.¹⁵⁰ Thirteen years later, however, the Court retreated to the Pandectist concept of personal rights to limit the available relief.

There is, of course, a difference in these conceptual terms between an association's claim for declaratory relief and its claim for damages: a declaratory judgment in favor or against the association would have conceptually affected the rights of the individual barber employees no less or no more than a declaration in favor of one of them alone would have affected the rights of the others. A judgment for damages on behalf of all members, however, would have adjudicated the individual members' alleged right to damages once and for all.¹⁵¹ Yet, it seems odd that the Supreme Court retreated from its relatively bold use of Article 1(2) and from its policy argument that association members would not have the means or the economic power to sue individually, an argument that would support an association suit for damages as well. Moreover, the slight weakening of the *Dispositionsmaxime* in more recent procedural reforms¹⁵² makes one wonder how conceptually unthinkable it really is to transfer the rights of individual members to sue to an association (or a class representative for that matter). Apparently the extension of group rights had gone far enough as a matter of policy, including the Kantian-liberal ideals underlying Swiss civil law and procedure. Perhaps, the Court was simply trying to align the outcome with the declared policy of the legislature in the Unfair Competition Act.¹⁵³ Moreover, there are other

und sein Einfluss auf die neueren Prozessgesetze, 60 ZJP 272 (1937).

¹⁴⁷ See, e.g., KUMMER, *supra* note 73, at 81; Gerber, *supra* note 59, at 754–55.

¹⁴⁸ See Federal Court May 20, 1947, 73 BGE II 68–69 (Switz.).

¹⁴⁹ See *supra* notes 105–06 and accompanying text.

¹⁵⁰ See Federal Court 73 BGE II at 71.

¹⁵¹ See *supra* notes 122–24 and accompanying text.

¹⁵² See *supra* text accompanying notes 146–47.

¹⁵³ Cf. Federal Court Jan. 19, 1960, 86 BGE II 23 (Switz.) (referring approvingly to

reasons against allowing the association to claim damages on behalf of its members, such as the fact that each member's claim for damages may be different and a fear of over-deterrence. Accordingly, the Court's limitation of association suits to declaratory relief and orders to stop violating the defendants' Article 28 rights has been well received and was quickly adopted by the federal legislature when extending the *Verbandsklage* to other substantive areas.¹⁵⁴

With this limitation on available remedies, the *Verbandsklage* has itself been fairly well received by the federal legislature. As a result, the *Verbandsklage* is available today in a number of substantive areas in addition to violations of Article 28 of the Civil Code and unfair competition as discussed above. In the areas of trademark and unfair competition law, consumer organizations "of national or regional importance" are given the right to sue to enforce the relevant statutes to the extent they affect consumer interests in addition to allowing associations to sue in favor of the economic interests of their members;¹⁵⁵ the Federal Act on the Equal Treatment of Men and Women allows organizations that have as their declared aim the achievement of gender equality or the representation of employee interests to bring claims alleging gender discrimination;¹⁵⁶ and the Federal Act on the Codetermination Rights of Employees gives trade associations and unions the right to enforce the Act's obligations on behalf of individual companies and employees in court.¹⁵⁷ As discussed above, however, the *Verbandsklage* in all these instances is limited to declaratory relief and orders to stop unlawful behavior. Moreover, damages and other injunctive relief can be pursued only by individuals, possibly with the

Article 2(3) of the Unfair Competition Act and its limits on available relief in association suits as well as to policy arguments made in the legislative process in support of those limits).

¹⁵⁴ See, e.g., FRANK ET AL. KOMMENTAR ZUR ZÜRCHERISCHEN ZPO 150–51 (3d ed. 1997); VOGEL ET AL., *supra* note 24, at 207.

¹⁵⁵ Bundesgesetz über den Schutz von Marken und Herkunftsangaben Aug. 28, 1992, SR 232.11, art. 56 (Switz.); Bundesgesetz gegen den unlauteren Wettbewerb [Unfair Competition Act] Dec. 19, 1986, SR 241, art. 10(2)(b) (Switz.). To the extent that these statutes enable consumer organizations to sue, they do so without requiring their members to have standing individually, indeed without requiring some injury in fact, as modern American standing doctrine does. Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that environmental organization lacked standing to file a suit challenging a federal regulation interpreting the Endangered Species Act's interagency consultation requirement because the organization was asserting "only a generally available grievance about government").

¹⁵⁶ Bundesgesetz über die Gleichstellung von Frau und Mann, Mar. 24, 1995, SR 151.1, art. 7 (Switz.) [hereinafter Gleichstellungsgesetz]. Pursuant to this statute, the association can sue in its own name, but is required to cooperate closely with the employees involved in the alleged discrimination. *Id.*

¹⁵⁷ Bundesgesetz über die Information und Mitsprache der Arbeitnehmerinnen und Arbeitnehmer in den Betrieben Dec. 17, 1993, SR 822.14, art. 15(2) (Switz.).

practical advantage¹⁵⁸ of a finding of unlawfulness in a preceding association suit.¹⁵⁹

2. *Res Judicata Effect*

Despite being part of federal civil procedure for some sixty years, the *Verbandsklage* has largely been neglected by Swiss proceduralists. In books and courses on civil procedure, the subject is usually treated as a brief add-on to discussions on standing and the ability to sue.¹⁶⁰ Similarly, all of the published court decisions deal with the question of whether the requirements have been met to proceed with a *Verbandsklage* in the first place. As a result, the precise res judicata effects of a judgment in an association suit are somewhat unclear.

In the decision in which it extended the device to the law of personality in 1947,¹⁶¹ the Swiss Supreme Court briefly addressed the defendant's argument that letting the association of barber employees proceed with a *Verbandsklage* would disadvantage it because a judgment in the defendant's favor would not bar members of the plaintiff association to bring individual lawsuits on the same claim later.¹⁶² The Court did not indicate disagreement with the argument's assumption that a judgment in an association suit, whether in favor of the plaintiff or the defendant, would have no binding effect between the defendant and individual members of the association. Instead it reasoned that a judgment in favor of the plaintiff, declaring the Basel barbers' by-law provision against hiring employees from colleagues within 500 meters illegal, would result in the ineffectiveness of that provision and thus make it unnecessary for other barber employees to sue individually.¹⁶³ Conversely, the Court reasoned, in case of a judgment in favor of the defendant, individual barber employees would hardly want to take the risk of trying alone what their association was unsuccessful with as a group.¹⁶⁴

The assumption, then, is that the judgment in a *Verbandsklage* has res judicata effect between the suing association and the defendant, but not between the defendant and individual members of the association. This seems to be supported by the Supreme Court's insistence that the association is pursuing a public interest distinct from the individual interests

¹⁵⁸ As I note below, the judgment in the association suit does not have res judicata effect between the defendant and the individual members of the association. See *infra* text accompanying notes 160–66.

¹⁵⁹ See, e.g., FRANK ET AL., *supra* note 154, at 151.

¹⁶⁰ See, e.g., *id.* at 150–51; VOGEL ET AL., *supra* note 24, at 207.

¹⁶¹ See *supra* text accompanying notes 104–09.

¹⁶² Federal Court May 20, 1947, 73 BGE II 72–73 (Switz.).

¹⁶³ *Id.* at 73.

¹⁶⁴ *Id.*

of its members.¹⁶⁵ However, it could be viewed as conceptually inconsistent with the notion of a few authors that the association acts on behalf of its members.¹⁶⁶ But because neither those authors, nor the courts, as far as I know, have addressed the issue of *res judicata* head on, the assumption underlying the Supreme Court's 1947 case is probably the rule in Switzerland. As the Court also points out in that decision, however, the judgment in a *Verbandsklage* is likely to have binding effects between defendant and individual members (and between defendant and other associations) *as a practical matter* because neither may want to risk new litigation on the same claim, most likely with the same outcome.

3. Practical Importance

If the *res judicata* effects of the *Verbandsklage* remain somewhat unclear, assessing the device's practical importance comes close to a guessing game. The *Verbandsklage* remains under-researched. Statistical data on its use are largely unavailable. Because the judicial statistics of the cantons do not distinguish group claims from other litigation,¹⁶⁷ one interested in learning more about the practical relevance of the device would have to engage in costly empirical research in twenty-six cantons. Short of that, I will rely here on published opinions, largely those of the Swiss Federal Supreme Court. This is rather risky business, not least because some cantons rarely publish judicial opinions.¹⁶⁸ At the same time, however, review by the Swiss Supreme Court is a matter of right rather than by certiorari,¹⁶⁹ and the Court claims to publish all decisions of substantial

¹⁶⁵ See *supra* text accompanying note 125.

¹⁶⁶ See, e.g., KUMMER, *supra* note 73, at 67.

¹⁶⁷ See, e.g., Supreme Court of the State of Bern, Switzerland, Verwaltungsbericht des Obergerichts des Kantons Bern für 2003, Jan. 15, 2004, available at http://www.jgk.be.ch/site/og_statistiken_og_03_d.pdf.

¹⁶⁸ Cf. Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 604 (2004).

Both my own empirical work and that of many others have long ago persuaded me that the picture of a legal landscape that emerges from published opinions, at whatever court level, is very probably distorted. . . . The distortion is likely to be particularly serious when published appellate decisions are used as a basis for inference about experience at first instance, and when, therefore an appeal bias is added to the publication bias.

Id.; Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 116 (2001) ("Today, a scholar who studies only published opinions from the United States Courts of Appeal does so at his or her peril.").

¹⁶⁹ There are a number of requirements for a case to be appealable to the Supreme Court.

importance, both of which should impose some discipline on the opinions published by it.¹⁷⁰

In the Supreme Court, I have found nine opinions involving association suits between 1947 and 2006 (including the two discussed above),¹⁷¹ four of them handed down between 1995 and 2000 and none, not even downloadable unpublished opinions,¹⁷² since. In all of these cases, the standing of the association to sue was at issue, and the Supreme Court, with the exception of the damages claim discussed above,¹⁷³ decided in favor of the plaintiff association. In addition to the two cases discussed above,¹⁷⁴ there were four more, for a total of six, in the area of labor law, three of them handed down between 1995 and 1999. In one of these cases, the association sued for the removal by the defendant corporation of surveillance cameras installed to supervise its employees.¹⁷⁵ The other three involved attacks on labor contracts and the right of employees to be consulted before a mass layoff.¹⁷⁶ Of the remaining three cases, two involved the Unfair Competition Act,¹⁷⁷ and one antitrust law,¹⁷⁸ in which area the *Verbandsklage* was subsequently confirmed, then abolished, by the

Simplifying just a little bit, any case with a value in controversy of 8,000 Swiss Francs, or more (\$6,400), can be appealed, although there are cases where there is no minimum value in controversy. Bundesgesetz über die Organisation der Bundesrechtspflege Dec. 16, 1943, SR 173.110, arts. 44–47 (Switz.). For the most part, however, the Court can only—but fully—review the application of federal law by the cantonal courts, which includes, as one may remember, substantive private law as well as constitutional law. See *supra* text accompanying note 17; *id.* arts. 43–67. As of January 1, 2007, the requisite value in controversy will rise to sFr. 15,000 (\$12,000) in labor matters and 30,000 Swiss Francs (\$24,000), in all other cases. Below that value, a case may newly be appealed to the Supreme Court in cases involving an important question of federal law, among other exceptions. See Bundesgesetz über das Bundesgericht June 17, 2005, AS 2005, 4045, art. 74 (Switz.).

¹⁷⁰ Moreover, the Court has made roughly three quarters of its unpublished opinions available on the Internet since 2000, allowing for somewhat of a check on what the Court “publishes” and what it does not. See <http://relevancy.bger.ch/php/aza/http/index.php?lang=de>.

¹⁷¹ See *supra* text accompanying notes 104–54.

¹⁷² See *supra* note 170.

¹⁷³ See *supra* text accompanying notes 115–28. As noted in note 121, however, the plaintiff association still won that case because the Supreme Court decided it represented its own claim based on *negotiorum gestio*.

¹⁷⁴ See *supra* text accompanying notes 104–54.

¹⁷⁵ Federal Court Nov. 8, 1998, 114 BGE II 345 (Switz.).

¹⁷⁶ Federal Court Jan. 11, 1999, 125 BGE III 82 (Switz.); Federal Court Apr. 21, 1997, 123 BGE III 176 (Switz.); and Federal Court Apr. 27, 1995, 121 BGE III 168 (Switz.).

¹⁷⁷ Federal Court May 2, 2000, 126 BGE III 239 (Switz.) (adjudicating a suit by a trade association to protect an internet domain name); Federal Court June 13, 1967, 93 BGE II 135 (Switz.) (involving a claim that professional titles used by certain architects and engineers amounted to unfair competition).

¹⁷⁸ Federal Court Sept. 27, 1977, 103 BGE II 294 (Switz.) (involving a claim of illegal vertical restraints in the market of distributing motion pictures).

federal legislature.¹⁷⁹

No matter what one's preferred procedural values, it is difficult to assess whether these numbers show that the system works as it should without further empirical studies. The relative spike in labor-related association suits between 1995 and 1999 may have originated in one of the most severe downturns of the post-World War II economy in Switzerland. One may further speculate from the relatively small number of association suits and from the fact that all of them have been decided in favor of the plaintiff associations since 1960 that associations and their lawyers have not exactly attempted to utilize the *Verbandsklage* aggressively. Along the same lines, advocates of gender equality have complained that the *Verbandsklage* has yet to be used to enforce federal comparable-worth legislation passed in 1995,¹⁸⁰ despite survey data showing large swaths of income inequality in private industry and government jobs alike.¹⁸¹ Some have speculated that this may be due to the relatively limited financial power of gender-equality NGOs compared to the unions and trade associations that have successfully brought association suits in the labor and

¹⁷⁹ FRANK ET AL., *supra* note 154, at 151.

¹⁸⁰ Cf. *supra* note 156 and accompanying text.

¹⁸¹ See, e.g., Florence Aubry Girardin, *Egalité salariale et décisions judiciaires: questions pratiques de point de vue de la justice*, 14 AKTUELLE JURISTISCHE PRAXIS [AJP] 1062, 1062 (2005); Margrith Bigler-Eggenberger, *Art. 4 Abs. 2/8 Abs. 3 BV—Eine Erfolgsgeschichte?*, 106 SCHWEIZERISCHES ZENTRALBLATT FÜR STAATS- UND VERWALTUNGSRECHT, 57, 76 (2005); Sabine Steiger-Sackmann, *5 Jahre Gleichstellungsgesetz—5 Jahre Lohngleichheit?*, 10 AJP 1263, 1267 (2001). Whether the absence of association suits means that women have been deprived of a procedure to enforce their federal right to salaries of comparable worth is, however, a different question. A search engine of women's organizations compiling all lawsuits by women under the new federal legislation in German-speaking Switzerland lists 157 comparative-worth cases filed since 1995 as of July 31, 2006. See Der Gleichstellungsbüros in der Deutschschweiz, <http://www.gleichstellungsgesetz.ch> (last visited Jan. 23, 2007). This includes a number of association suits in administrative court. See *infra* text accompanying notes 187–92. Thirty-six of these cases resulted in a judgment for plaintiff and thirty-one in a judgment for defendant; fifty-five cases were settled either during formal court proceedings or, more frequently, during the free consultation hearings before the consultation agencies that may informally hear the case prior to a formal court filing according to the 1995 legislation; nine cases remain to be decided, and in twenty-six the outcome is unknown. In the latter category, the case descriptions occasionally indicate that the plaintiff decided not to pursue her claim beyond the consultation stage. Yet, for most of these cases there is no such indication. Thus, I decided to code them separately rather than as cases won by defendants. Finally, sixty-five of the cases listed involved private suits and ninety-two involved administrative or public law proceedings. At the very least, this demonstrates that quite a few women have been able and willing to pursue their rights in court—although a disproportionate number of them are or were in government jobs (see *infra* notes 187–91)—and that the success rate of those suing has been considerable. However, whether current procedural mechanisms prevented others with valuable claims from suing and whether, indeed, those mechanisms are to blame for the inadequate enforcement of federal law in this area cannot be answered without further empirical study.

unfair competition areas.¹⁸² It is indeed true that the plaintiff association risks footing the bill of a lost case in a country in which the loser must pay the winner's attorney's fees and in which contingent fees are unethical.¹⁸³ Given that the Swiss litigation systems are relatively lean and based more on law than on equity,¹⁸⁴ this is not as daunting a proposition as it would be in the United States.¹⁸⁵ Yet, the potential costs are still considerable—particularly in comparable-worth cases, where the outcome is highly fact-dependent and where opinions vary greatly as to what amounts to discrimination.¹⁸⁶

It is also interesting that although there have been no association suits against private companies asserting violation of the comparable-worth principle,¹⁸⁷ there has been some group litigation initiated by associations against state and city governments in the administrative courts.¹⁸⁸ Is this because the state for institutional reasons is expected to be less likely to retaliate against litigating employees than a private firm? Is it because the basic hiring criteria and salary information for comparable government jobs are publicly available, thus compensating for the lack of American-style

¹⁸² See, e.g., Steiger-Sackmann, *supra* note 181, at 1267.

¹⁸³ At least, federal legislation mandates that no court costs may be assessed in such cases. Bundesgesetz über die Gleichstellung von Frau und Mann Mar. 24, 1995, SR 151.1, art. 12(2) (Switz.).

¹⁸⁴ See *supra* note 84 and accompanying text; Samuel P. Baumgartner, *Related Actions*, 3 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL 203, 210 [hereinafter Baumgartner, *Related Actions*] (pointing to an underlying “procedural philosophy that views a civil proceeding more as an efficient adjudication of the plaintiff’s claim than as an equitable resolution of a dispute” as a result of which there is a “more limited party and claims structure” in Switzerland and other civil law countries than there is in the United States). One may add the more limited nature of evidence-gathering as another reason for lower litigation costs. See *supra* notes 139–40 and *infra* text accompanying notes 263–65.

¹⁸⁵ Cf. Baumgartner, *Group Litigation*, *supra* note 65, at 256 (“[T]o what extent would class actions level the playing field in countries in which comparatively low costs of litigation, fee shifting, and legal aid operate to make the system available to enforce relatively low monetary claims and in which the quality of the attorney is not as important to guide the client through a process based on law as it is in one steeped in equity?”).

¹⁸⁶ See, e.g., Federal Court Oct. 5, 1999, 125 BGE II 530 (Switz.) (discussing at great length the factors relevant to the decision whether a 25% salary differential between kindergarten teachers, almost exclusively female in Switzerland, and grade school teachers, among whom men are better represented, is justified); Bigler-Eggenberger, *supra* note 181, at 78–79.

¹⁸⁷ There have, however, been individual suits by women against private employers, three of which made it to the Supreme Court. See Federal Court Dec. 22, 2003, 130 BGE III 145 (Switz.) (upholding a 200,000 Swiss Franc (roughly \$165,000) judgment for back pay); Federal Court Jan. 19, 2001, 127 BGE III 207 (Switz.) (remanding for further evidentiary hearings); Federal Court Sept. 14, 1999, 125 BGE III 368 (Switz.) (denying relief).

¹⁸⁸ See, e.g., Federal Court Oct. 5, 1999, 125 BGE II 530 (Switz.) (deciding an association suit by kindergarten teachers in Zurich); Federal Court Dec. 18, 1998, 125 BGE I 71 (Switz.) (deciding an association suit by nurses at state hospitals in Bern).

discovery?¹⁸⁹ Does it have to do with the fact that cases against the government are litigated in administrative court, where the procedure is somewhat more “inquisitorial”¹⁹⁰ and the government is subject to charges that cannot be leveled against a private employer, such as that its actions are not covered by legislation?¹⁹¹ Or are judges and attorneys in administrative litigation, where more complex party structures have always been a feature, simply more comfortable with multiparty litigation than are judges and attorneys in civil litigation? My own tabulation of mostly individual comparable-worth suits filed in the last ten years indicates that the latter hypothesis has less explanatory power than those previously mentioned, for the same picture emerges in individual litigation: among 157 such cases filed in German-speaking Switzerland, 92 (including a few association suits) were filed in the administrative courts, while 65 (none of them association suits) were filed in the civil courts.¹⁹² Thus, despite the fact that roughly ninety percent of the Swiss population works for private employers,¹⁹³ the cases filed against federal and state governments outnumbered the private cases by 3:2. Without larger empirical studies, however, it is impossible to do more than speculate on why that is so and thus on the effectiveness of the *Verbandsklage* in this and other areas.

4. Law Reform Proposals

Despite this lack of empirical information, the law reformers appear to know precisely what is needed in the proposed Federal Code of Civil Procedure. They are confident that there currently is no need for a class action device in Switzerland.¹⁹⁴ At the same time, they originally proposed

¹⁸⁹ See, e.g., Jeanne Ramseyer & Corina Müller, *Bewährt aber noch zu wenig bekannt: Überblick über die Resultate der Evaluation des Gleichstellungsgesetzes*, 15 AJP 1331, 1333 (2006) (presenting survey evidence according to which the finding of information often presents a problem when a potential plaintiff suspects wage discrimination). But see Federal Court Jan. 19, 2001, 127 BGE III at 210–11 (Switz.) (indicating that plaintiff was able to have the (private) corporate defendant compelled to divulge its confidential salary policy, among other pertinent evidence, in cantonal proceedings).

¹⁹⁰ In particular, the court may order the release of evidence not proffered by the parties. See, e.g., GYGI, *supra* note 27, at 208–10. Cf. *supra* note 140. At least in theory, however, the latter is true in private labor litigation as well. See Code of Obligations, art. 343(4); Bundesgesetz über die Gleichstellung von Frau und Mann Mar. 24, 1995 SR 151.1, art. 12(2) (Switz.).

¹⁹¹ See, e.g., Federal Court Sept. 29, 1995, 121 BGE I 230 (Switz.) (holding that legislation in the Canton of Zug requiring doctors at state hospitals to turn in a part of their profits gained from private practice at the hospital to the state was sufficient for the relevant state agency to charge such doctors 35% of such profits because the legislation itself set a numerical limit of 40%).

¹⁹² See *supra* note 181.

¹⁹³ See BUNDESAMT FÜR STATISTIK, TASCHENSTATISTIK DER SCHWEIZ 12 (2006).

¹⁹⁴ See *supra* note 69 and accompanying text.

to extend the *Verbandsklage* to all substantive areas,¹⁹⁵ thus abolishing the limitation to Article 28 of the Civil Code and to substance-specific federal statutes.¹⁹⁶ This decision was heavily criticized, primarily by conservatives and business interests.¹⁹⁷ The latest draft thus returns to a stated attempt to codify the federal common law developed by the Swiss Supreme Court as described above.¹⁹⁸ However, the draft lists the requirements for the standing of the association somewhat more leniently:

- The association must have national or regional importance and
- it must, by its bylaws, be authorized to represent the interests of certain groups of people.¹⁹⁹

However, distinct provisions in substance-specific federal statutes would remain controlling.²⁰⁰ In defense of the drafters, I need to point out that empirical research has not thus far played much of a role in procedural law reform in Switzerland. However, while this helps explain the lack of concern for such research in the current reform, it does not make the quality of law reform decisions based on anecdotal evidence any better.

C. Association Suits in Administrative Procedure (*Verbandsbeschwerde*)

The *Verbandsbeschwerde* is the counterpart to the *Verbandsklage* in Swiss administrative procedure. It allows an association to challenge a decision in which an administrative agency applies law to a specific case, first within the agency, then before an administrative tribunal, including the Federal Supreme Court.²⁰¹ The requirements are the same as for the *Verbandsklage*, although the prerequisites for association suits involving state administrative law before state administrative tribunals follow state rules that may vary slightly.²⁰² However, one significant difference between civil and administrative procedure affecting the admissibility of the

¹⁹⁵ See Schweizerische Zivilprozessordnung, Vorentwurf der Expertenkommission, art. 79(1), June 2003, available at http://www.bj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/zivilprozess.Par.0001.File.tmp/entw-zpo-d.pdf.

¹⁹⁶ See *supra* text accompanying notes 108–13, 155–59.

¹⁹⁷ See Vernehmlassungsbericht, *supra* note 21, at 7, 230–37.

¹⁹⁸ See Botschaft, *supra* note 22, at 7288–89.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Current procedural statutes distinguish between an administrative appeal and a constitutional appeal to the Federal Supreme Court, depending on whether the appellant claims a violation of federal (statutory) administrative law or federal constitutional law. The *Verbandsbeschwerde* has been available in both. See, e.g., Federal Court Feb. 11, 1972, 98 BGE 1b 63 (Switz.); Federal Court Feb. 3, 1967, 93 BGE I 125 (Switz.).

²⁰² See, e.g., 93 BGE I 128.

Verbandsbeschwerde relates to standing. In civil proceedings, only the person who claims to be the owner of the allegedly infringed right has standing to sue.²⁰³ In administrative procedure, however, courts and statutes have followed Jhering's views of law as the protection of legitimate interests.²⁰⁴ Thus, on the federal level, anybody with a legitimate interest can challenge a governmental decision first in intergovernmental proceedings and then in administrative court.²⁰⁵ The interest is legitimate if the plaintiff has a personal interest in the decision that is stronger than that of most anybody else.²⁰⁶ In deciding whether a particular interest is legitimate, the courts have taken a pragmatic approach. Thus, home owners are routinely allowed to challenge construction permits granted to neighbors on the grounds that they violate zoning laws or environmental statutes.²⁰⁷ Equally, competitors are considered to have standing to challenge the decision to license new entrants.²⁰⁸ On the other hand, those who live too far away to be suffering any direct negative effects of a planned project are not considered to have standing to challenge a building permit.²⁰⁹ By virtue of this more open-ended standing requirement in administrative procedure, the requirement that the individual members of the association have standing to sue may be easier to meet for the *Verbandsbeschwerde* than it is for the *Verbandsklage*.²¹⁰

It is perhaps partly for this reason that the *Verbandsbeschwerde*, as opposed to the *Verbandsklage*, has been used extensively in practice. In the last fifteen years alone, the Federal Supreme Court has published over fifty decisions involving administrative association suits. In terms of substance, they run the gamut, including trade and consumer organizations challenging the decision of the Federal Food and Drug Administration to allow Monsanto to sell food ingredients made from genetically modified soybeans,²¹¹ to local unions and trade associations complaining about a decision of the Transportation Department to allow retailers in Swiss train

²⁰³ See, e.g., KUMMER, *supra* note 73, at 66.

²⁰⁴ See *supra* text accompanying notes 143–45.

²⁰⁵ Bundesgesetz über das Verwaltungsverfahren Dec. 20, 1968, SR 172.021, art. 48(a) (Switz.); Bundesgesetz über die Organisation der Bundesrechtspflege Dec. 16, 1943, SR 173.110, art. 103(a) (Switz.).

²⁰⁶ See, e.g., GYGI, *supra* note 27, at 158.

²⁰⁷ See, e.g., Federal Court Oct. 15, 1986, 112 BGE Ib 409 (Switz.); Federal Court Oct. 27, 1978, 104 BGE Ib 245 (Switz.).

²⁰⁸ See, e.g., Federal Court May 2, 1975, 101 BGE Ib 87 (Switz.).

²⁰⁹ See, e.g., Federal Court Apr. 30, 1985, 111 BGE Ib 290 (Switz.) (plaintiff living one kilometer away from planned interstate highway has no standing to challenge the decision to build it); Federal Court Dec. 19, 1978, 104 BGE Ib 381 (Switz.) (individuals who do not live near a farmhouse planned to be demolished may not sue with a claim that the demolition violates federal legislation protecting historical buildings).

²¹⁰ But see *supra* note 155.

²¹¹ See Federal Court Sept. 10, 1997, 123 BGE II 376 (Switz.).

stations to remain open irrespective of cantonal closing-time regulations,²¹² and attacks by environmental groups against construction permits allowing the building of roads, stadiums, military training facilities, and other large projects.²¹³ Indeed, the latter have been frequent enough to allow the Zurich Liberal Democrats to collect a sufficient number of signatures to force a popular vote on their constitutional proposal to limit association suits by environmental organizations.²¹⁴ As indicated above, *Verbandsbeschwerden* also include appeals by gender equality organizations of salary decisions of state and city governments²¹⁵ and many others.²¹⁶

Why this extensive use of the *Verbandsbeschwerde* as opposed to the *Verbandsklage*? Part of the explanation may lie in the more lenient standing requirements in administrative procedure. Moreover, governmental decisions have a tendency to affect more individuals than decisions of private persons. And such decisions must be made in the public interest. Thus, the difference may have to do with the fact that an entire host of constitutional provisions (such as the equal treatment clause) and administrative statutes (such as environmental legislation) are primarily or exclusively directed at governmental agencies making decisions on whether to grant a particular permit.²¹⁷ Short of those possible explanations, it would help to have some empirical information on whether there are procedural reasons why the association suit is utilized frequently

²¹² See Federal Court Sept. 30, 1993, 119 BGE Ib 374 (Switz.).

²¹³ See, e.g., Federal Court Dec. 3, 2004, 131 BGE II 81 (Switz.) (soccer stadium); Federal Court Apr. 8, 2003, 129 BGE II 331 (Switz.) (local airport); Federal Court Dec. 28, 1998, 125 BGE II 50 (Switz.) (military training facility); Federal Court Aug. 19, 1998, 124 BGE II 460 (Switz.) (interstate highway); Federal Court Apr. 21, 1997, 123 BGE II 337 (Switz.) (commercial building complex); Federal Court June 21, 1995, 121 BGE II 224 (Switz.) (commercial building complex).

²¹⁴ See, e.g., AP/Baz, *Initiative gegen das Verbandsbeschwerderecht gültig*, Basler Zeitung online (visited June 2, 2006). On the ability to force such a popular vote see *supra* note 64.

²¹⁵ See *supra* text accompanying notes 187–88.

²¹⁶ See, e.g., Federal Court Apr. 20, 2005, 131 BGE I 291 (Switz.) (suit by association of home owners against state property tax increase); Federal Court Mar. 9, 2005, 131 BGE I 198 (Switz.) (appeal by a local association of pharmacists of decision of state of Solothurn to allow general practitioners to dispense pharmaceuticals in less restricted fashion than pharmacists); Federal Court Oct. 25, 2004, 130 BGE II 514 (Switz.) (suit by association of television viewers against state-run television station for giving masked opponents of World Economic Forum in Davos airtime without questioning their views or backgrounds); Federal Court July 28, 2004, 130 BGE I 290 (Switz.) (suit by various associations claiming illegal interference by the Zurich government with a popular referendum on the adoption of changes to the Zurich Code of Criminal Procedure by sending voters a one-sided description of what is at stake).

²¹⁷ Cf. *supra* text accompanying note 191.

in administrative and constitutional courts, but not in the civil courts.²¹⁸ If so, it would further help to have empirical knowledge on whether there is a need to adapt civil procedure accordingly or whether the administrative courts take care of most of the need for group litigation in Swiss society.²¹⁹ For that purpose, it is not helpful that civil procedure and administrative procedure are applied by different judges and researched by different scholars.²²⁰ Yet, it is research that needs to be done if one wants to understand whether the current approaches to group litigation in Switzerland are adequate.

D. Shareholder Litigation

A discussion of group litigation in Switzerland would be incomplete without a look at a small but important group of actions whose *res judicata* effects extend beyond the parties. This sort of action (*Gestaltungsklagen*) has been significant primarily in status matters, where a decree on a person's status, such as marital status or paternity, must be effective in relation to everyone else.²²¹ However, the same principle has long been applied to suits by individual shareholders of a corporation against decisions at the corporation's shareholder meetings.²²² Thus, a decree voiding a decision by the shareholders as illegal will nullify that decision not only with regard to the plaintiff but in relation to all remaining shareholders as well.²²³ In this sense, the suing shareholder acts as the representative of the others, although rarely in the interest of all of them. Similarly, although not a *Gestaltungsklage*, a derivative suit, in which a shareholder sues the officers or the members of the board for violating their fiduciary duties, has the effect of a damages judgment that is to be paid to the corporation and thus indirectly favors all shareholders.²²⁴

It is said, however, that this type of shareholder litigation has been too risky to initiate because the Swiss Supreme Court held early on that the amount in controversy is to be determined by the value of the litigation to the corporation rather than on the basis of the value of the shares of stock owned by the plaintiff.²²⁵ This raises the threshold considerably in a legal

²¹⁸ See *supra* text accompanying notes 187–91.

²¹⁹ See, e.g., Baumgartner, *Class Actions*, *supra* note 31, at 126–27.

²²⁰ See *supra* text accompanying note 27.

²²¹ See, e.g., KUMMER, *supra* note 73, at 103–04.

²²² *Id.* at 104.

²²³ See Schweizerische Obligationenrecht [OR] [Code of Obligations], art. 706(5) (“The judgment voiding a decision of the shareholder meeting has effect for and against all shareholders.”). According to subsection 1 of Article 706, the judge is to void such a decision if it violates the law (in practice, primarily provisions protecting certain shareholders) or the corporation's bylaws.

²²⁴ See OR, arts. 754–60.

²²⁵ See, e.g., Andreas Casutt, *Rechtliche Aspekte der Verteilung der Prozesskosten im*

system in which court costs and attorneys fees in litigated cases are determined largely on the basis of the value in controversy.²²⁶ In order to lower the risk for potential plaintiffs, the federal legislature thus tempered the loser-pays rule as part of the corporate law reform of 1992. Since then, the trial court has had to distribute attorney's fees discretionally between plaintiff and defendant if the plaintiff loses the case.²²⁷

Some have argued that this change insufficiently tempers the risks for potential plaintiffs since the fees to be paid can still be significant²²⁸ and, more importantly, since the plaintiff has no idea what the court's discretion will bring at the time of judgment.²²⁹ Again, some empirical insight would be helpful here for purposes of law reform.²³⁰ Apparently, however, there seems to be enough of a problem here that some plaintiff groups have taken action. In 1989, for example, an association of Nestlé shareholders, the purpose of which had been the monitoring of the company's economic and social ethics, changed its bylaws to include as its objective the pursuit of the economic interests of its members.²³¹ This allowed the association to bring a suit against Nestlé, challenging the corporation's shareholder decision to issue 175,000 new shares without allowing existing shareholders the right to preferential purchase of those shares,²³² while distributing the costs of the litigation equally among the association's members.²³³ The association itself owned one share of Nestlé stock.²³⁴ As a result, the association formally represented its own interests as a shareholder rather than those of its members, thus avoiding the problem that neither Swiss law nor the law

Anfechtungs- und Verantwortlichkeitsprozess, in Festschrift für Peter Forstmoser 79 (1993). Again, it would be helpful to know whom precisely this does in fact disadvantage in practice. As far as number of lawsuits, I have been able to find thirty-eight published Article-706 cases by the Supreme Court alone for the period from 1954–2006, most of them involving suits by minority shareholders. Thirty-three of these decisions were decided before the big reform of corporate law of 1992, which was meant to render such suits less financially risky to file. See *infra* text accompanying note 227.

²²⁶ See, e.g., Verordnung über die Anwaltsgebühren June 10, 1987, ON 215.3, § 2 (Canton of Zürich); Dekret über die Anwaltsgebühren Nov. 6, 1973, BSG 168.81, art. 10 (Canton of Bern), available at http://www.sta.be.ch/belex/d/1/168_81.html.

²²⁷ See OR, art. 706a(3) (as amended on Oct. 4, 1991).

²²⁸ See, e.g., Federal Court Oct. 12, 2004, 4P.208/2003 (Switz.) (upholding decision in which the trial court estimated the value in controversy at 10–20 million Swiss Francs (\$8–16 million) and determined the plaintiff's share of the defendant's attorney's fees to be 160,000 Swiss Francs (\$128,000)).

²²⁹ See, e.g., Casutt, *supra* note 225.

²³⁰ See *supra* text accompanying notes 217–20.

²³¹ Federal Court June 25, 1991, 117 BGE II 290, 291 (Switz.).

²³² *Id.*

²³³ Among these costs was an order by the district judge of Vevey requiring the plaintiff to post a sFr.500,000 (\$400,000) bond. See Federal Court Feb. 22, 1990, 116 II 94, 95 (Switz.).

²³⁴ See 117 II at 291.

of the Canton of Vaud provides for association suits in this area.²³⁵ This is a smart way for a group of like-minded shareholders to share the risks and costs of this kind of litigation; I have been told by two Swiss attorneys that the strategy has been used since. It is one way to get around the lack of a true group-litigation device in this area, for which there is obviously a need.

The federal legislature has apparently recognized the problem. In the new Act on Mergers and Acquisitions of 2003,²³⁶ the legislature introduced an additional remedy for aggrieved shareholders in merger and acquisition cases.²³⁷ Rather than bring an action to declare the shareholder decision sanctioning the merger or acquisition void—which the courts have been extremely reluctant to grant²³⁸—minority shareholders can sue for damages for any losses incurred by disadvantageous treatment arising from the transaction.²³⁹ In this litigation, the court costs and the attorney's fees of the plaintiff in case of a loss must be borne by the acquiring corporation, thus removing the plaintiff's risk of having to pay for the defendant's attorney's fees.²⁴⁰

More interestingly, the judgment for damages in such a case is valid in favor of all shareholders equally situated, whether or not they participated in the litigation.²⁴¹ Thus, the suing plaintiff truly acts as a representative of the others. In this sense, this limited action in the area of mergers and acquisitions is in fact a class action.²⁴² Apparently, the legislature felt that, despite what the procedural reformers say today,²⁴³ there is indeed a need for such a device in this particular area of law. More likely, the drafters recognized the need for the device without noticing that what they were

²³⁵ See *supra* text accompanying notes 108–13, 155–59.

²³⁶ Bundesgesetz über Fusion, Spaltung, Umwandlung und Vermögensübertragung Oct. 3, 2003, SR 221.301 (Switz.) [hereinafter *Fusionsgesetz*].

²³⁷ *Id.* art. 105.

²³⁸ See, e.g., PETER BÖCKLI, *SCHWEIZER AKTIENRECHT* 354 (3d ed., 2004).

²³⁹ *Fusionsgesetz*, *supra* note 236, art. 105(1).

²⁴⁰ *Id.*, art. 105(3). But see *id.*, second sentence: “In special circumstances, the court may charge the costs of the proceedings against the plaintiffs.” According to the explanatory report, this provision is primarily intended to target frivolous lawsuits. See *Botschaft zum Bundesgesetz über Fusion, Spaltung, Umwandlung und Vermögensübertragung*, BBl 2000, 4337, 4488.

²⁴¹ *Fusionsgesetz*, *supra* note 236, art. 105(2) (Switz.). Whether a judgment in favor of the defendant has *res judicata* effect against all other shareholders equally situated is not clear to me given the language of the provision (“The judgment has effect for all shareholders” Does this mean only *for* all shareholders, not *against* them?) and the lack of any legislative history on this point. However, this question may have little practical relevance. The action must be brought within two months of the publication of the merger decision. See *id.* art. 105(1). By the time a judgment is entered, that deadline will long have passed for another claimant to bring suit on the basis of the same merger decision.

²⁴² See BÖCKLI, *supra* note 238, at 355.

²⁴³ See *supra* text accompanying note 69.

introducing is in fact a very limited class action.

E. Joinder of Parties and Consolidation by the Court

While the *Verbandsklage*, the *Verbandsbeschwerde* in federal court, and the shareholder suits discussed above are primarily or exclusively controlled by federal law, joinder, intervention, and consolidation devices have largely remained a matter of state law.²⁴⁴ To my knowledge, all state procedural codes provide for the joinder of parties. Usually, they require that the joined parties claim, or are defendants with regard to, the same or similar set of facts or legal rights.²⁴⁵ The most important distinction the codes make here is between mandatory and voluntary joinder.²⁴⁶ Joinder is mandatory where, as a matter of substantive law, a group of individuals holds a right or owes a duty jointly so that only the group can validly dispose of the right or fulfill the duty.²⁴⁷ This concept has its roots in both Roman and Germanic law²⁴⁸ and includes claims by and against the community of heirs regarding the rights on the inheritance that is formed as a matter of law among all heirs of the deceased,²⁴⁹ the owners of community property,²⁵⁰ and claims by a simple association.²⁵¹ The procedural effect of this indivisible property is that these groups must sue or be sued together.²⁵² The claim by or against them is then effectively treated as a single lawsuit resulting in one uniform judgment or settlement for or against all.²⁵³

²⁴⁴ I say “largely” because recent federal legislation on personal jurisdiction provides for jurisdiction in cases of joinder of defendants wherever the court has jurisdiction over one of the defendants. See Bundesgesetz über den Gerichtsstand in Zivilsachen Mar. 24, 2000, SR 272, art. 7(1) (Switz.) Naturally, the provision requires a federal interpretation of what is required for a joinder to lead to the application of Article 7(1). See, e.g., Franz Kellerhals & Andreas Güngerich, *Art. 7, in KOMMENTAR ZUM BUNDESGESETZ ÜBER DEN GERICHTSSTAND IN ZIVILSACHEN* 47, 53–54 (Franz Kellerhals et al. eds., 2001).

²⁴⁵ See, e.g., VOGEL ET AL., *supra* note 24, at 146.

²⁴⁶ See, e.g., HABSCHEID, *supra* note 73, at 151.

²⁴⁷ *Id.* at 153.

²⁴⁸ On the influence of Germanic law on the Swiss Civil Codes see Wieacker, *supra* note 141 and accompanying text. In Pandectist thought, this limited number of group rights was not considered an exception to the individualistic nature of rights. The group was simply conceived of as the individual holding the group right. See, e.g., VON TUHR, *supra* note 133, at 78–80.

²⁴⁹ See Schweizerisches Zivilgesetzbuch [ZBG] [Civil Code] Dec. 10, 1907, SR 210, art. 602.

²⁵⁰ See *id.* art. 215.

²⁵¹ See Schweizerisches Obligationenrecht [OR] [Code of Obligations] Mar. 30, 1911, SR 220, art. 544. The “simple association” is an unincorporated association of individuals pursuing a common purpose. OR, art. 530(1).

²⁵² See, e.g., VOGEL ET AL., *supra* note 24, at 143.

²⁵³ See, e.g., KUMMER, *supra* note 73, at 158. This is the result of viewing the group as

In practice, this appears to be quite an important kind of joinder in Switzerland.²⁵⁴ However, all procedural codes also allow for voluntary joinder based on the same (or, in some cantons, a related)²⁵⁵ factual claim or right.²⁵⁶ Thus, it is possible for a plaintiff to sue all those she considers to be jointly and severally liable, for all holders of the same insurance policy to challenge a specific interpretation of a provision in that policy, or for all those harmed by the same alleged tort to sue the defendant together.²⁵⁷

While this may seem like group litigation, however, it is so only to a limited extent. First, it is not representative litigation because only those who sue or are sued actually participate in it. Second, as a result of the individualist precepts underlying the state procedural codes,²⁵⁸ each party is treated individually, thus conducting her own lawsuit. Hence, the judgment may differ as to each individual party; each party may decide to settle or to abandon the suit without prejudice to the others; and each party may decide whether or not to appeal, again without prejudice to the right to appeal of the others.²⁵⁹ Further, in some cantons it is the practice of the courts to keep separate dossiers for every single party.²⁶⁰ Moreover, voluntary joinder is usually limited to cases within the same subject-matter jurisdiction.²⁶¹ At the same time, however, allegations and suggestions of a line of evidence-gathering of one litigant may benefit the others in some jurisdictions.²⁶²

In sum, voluntary joinder may result in some efficiency by having the same court decide similar claims and by consolidating the taking of evidence—which, as one may remember, is much less extensive in a system in which the gathering of evidence is controlled by the judge²⁶³ who is also the finder of fact²⁶⁴ and where lines of inquiry must meet a high standard of

an individual holder of a single right. See discussion *supra* note 248.

²⁵⁴ See *infra* text accompanying notes 272–74.

²⁵⁵ See, e.g., Zivilprozessordnung für den Kanton Bern of July 7, 1918, BSG 271.1, art. 37 [hereinafter BEZPO]; KUMMER, *supra* note 73, at 156.

²⁵⁶ See, e.g., VOGEL ET AL., *supra* note 24, at 146.

²⁵⁷ See, e.g., KUMMER, *supra* note 73, at 156. The latter two examples may go too far in those cantons that limit voluntary joinder to cases in which the plaintiffs' claim must arise out of the *same* rather than merely *related* facts and legal rights. See, e.g., HABSCHIED, *supra* note 73, at 152.

²⁵⁸ See *supra* text accompanying notes 129–40.

²⁵⁹ See, e.g., KUMMER, *supra* note 73, at 157.

²⁶⁰ See, e.g., ROMY, *supra* note 42, at 242; Jean-Marc Schaller, FINANZ-ANALYSTEN-RECHT 180 (2004).

²⁶¹ See, e.g., VOGEL ET AL., *supra* note 24, at 146.

²⁶² See, e.g., KUMMER, *supra* note 73, at 158. But see HABSCHIED, *supra* note 73, at 152 (arguing that allegations and proffers by one party do not affect the others in Zurich).

²⁶³ See, e.g., Gerber, *supra* note 59, at 753–54. But see *supra* notes 139–40 and accompanying text.

²⁶⁴ As I have written elsewhere:

materiality.²⁶⁵ It may also be beneficial for claimants to pursue their cases together for a number of practical reasons, including an attempt to avoid inconsistent judgments regarding the same set of operative facts.²⁶⁶ However, given that voluntary joinder results in many essentially independent lawsuits, the efficiency gains are limited,²⁶⁷ as are other potential benefits and drawbacks of representative litigation, so often discussed today.²⁶⁸

Thus, the American trial judge must be more generous in determining the relevancy of proffered evidence than his German [and Swiss] colleague, who does not need to account for the fact that the attorneys need to persuade a lay jury rather than the judge himself. Furthermore, the separation of what in Germany [and Switzerland] is the process of taking evidence before the court into a phase of gathering the facts (discovery) and into one of presenting it to the jury at trial, a separation that is due to the need for a continuous jury trial, the attorneys must be allowed to discover evidence for an entire case before trial. Thus, issues of relevancy for purposes of discovery on the one hand and for purposes of admissibility at trial on the other do not converge as they do in Germany [and Switzerland].

BAUMGARTNER, HAGUE CONVENTION, *supra* note 56, at 81–82 (footnotes omitted).

²⁶⁵ See *supra* notes 139, 264; Gerber, *supra* note 59, at 762–63.

²⁶⁶ See, e.g., Federal Court Dec. 31, 1998, 125 BGE III 95, 97 (Switz.). Thus, the plaintiff or plaintiffs can use voluntary joinder to avoid one of the drawbacks of the lean litigation package in Swiss procedure. See *supra* note 184 and accompanying text; Baumgartner, *Related Actions*, *supra* note 184, at 210 (noting that “as part of the same philosophy [of viewing a civil proceeding as an efficient adjudication of the plaintiff’s claim rather than equitable resolution of a dispute, the] res judicata effects are more limited than in common law jurisdictions, particularly the United States”).

²⁶⁷ See, e.g., ROMY, *supra* note 42, at 243. The current rules do not necessarily compel this result. In the United States, for example, Professor Burbank observes:

In the materials on party joinder and consolidation, students are repeatedly exposed to the substantive implications of joinder and led to consider the extent to which efficiency concerns cause courts to bend the requirements of procedural rules, to pursue dubious packaging strategies that are supposedly provisional but that in substantive terms may be irremediable, and, alternatively, to pursue dubious substantive strategies that enable packaging.

Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471 (1987) (reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (1985)).

²⁶⁸ See, e.g., DEBORAH HENSLER ET AL., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* (2000); Burbank, *supra* note 267; John H. Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); John H. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Allen Erbsen, *From “Predominance” to “Resolvability”: A New Approach To Regulating Class Actions*, 58 VAND. L. REV. 995 (2005); Charles Silver, *“We’re Scared to Death:” Class Certification & Blackmail*, 78

While there is agreement among the state procedural codes on the basics of joinder, the same is not true with regard to the consolidation of related proceedings by the court. Some states do not provide for such consolidation at all.²⁶⁹ Others allow it in cases in which voluntary joinder would have been permissible.²⁷⁰ Even in those states, however, consolidation is limited to common hearings, including evidentiary hearings, and scheduling.²⁷¹ As with voluntary joinder, the combined lawsuits remain independent with different outcomes possible.

Again, there is no available statistical evidence on the use of joinder and consolidation devices in Switzerland. Similarly, any empirical research on how well these devices work in practice and whether and to what extent they meet the needs of litigants and the judicial system is impossible to find. To get at least some sense of the practical significance of these devices, I again looked at the published decisions of the Swiss Supreme Court in civil litigation during the last fifty years. This research turned up only one case in which a court had consolidated separately filed suits.²⁷² There were, however, forty-nine joinder cases, twenty-seven of which involved mandatory joinder. The remaining twenty-two cases with voluntary joinder, however, almost all hemmed to a very narrow pattern of group litigation, involving only a handful of litigants, usually two or three. Moreover, most of the parties were joined to avoid inconsistent judgments,²⁷³ which is partly a result of the relatively narrow bite of *res judicata* in Switzerland.²⁷⁴ And in a few instances, family members sued together in a case affecting them all.²⁷⁵ Only in three cases did a few

N.Y.U. L. REV. 1357 (2003).

²⁶⁹ The Bernese Code of Civil Procedure, for example, did not contain such a provision until it was so amended in 1995. See BEZPO, *supra* note 255, art. 38(2) (as amended).

²⁷⁰ See, e.g., HABSCHEID, *supra* note 73, at 152.

²⁷¹ *Id.*

²⁷² Federal Court Jan. 9, 1960, 86 BGE II 59 (Switz.) (noting consolidation in lower court of three independently filed suits by tenants against the same landlord).

²⁷³ See, e.g., Federal Court Nov. 13, 2000, 127 BGE I 92 (Switz.) (suit by individual and his partly-owned corporation against bank and trustee for misappropriation of co-owned funds); Federal Court Dec. 1, 1998, 125 BGE III 95 (Switz.) (complaint by Lego and its Swiss distributor against an alleged patent infringer); Federal Court Apr. 2, 1991, 117 BGE II 204 (Switz.) (suit claiming unfair competition against parent and subsidiary); Federal Court June 19, 1981, 107 BGE III 91 (Switz.) (suit by creditors in bankruptcy against alleged debtor); Federal Court July 10, 1979, 105 BGE Ia 193 (Switz.) (bankruptcy trustee suing four members of the board and auditor of failed company for violation of fiduciary duty); Federal Court Dec. 21, 1961, 87 BGE II 355 (Switz.) (suit by heirs challenging bequest).

²⁷⁴ See discussion *supra* note 266.

²⁷⁵ See, e.g., Federal Court Sept. 30, 2005, 131 BGE III 667 (Switz.) (suit by surviving spouse and children of man killed in traffic accident with tramway against city of Geneva and city-owned tramway company); Federal Court Dec. 3, 1984, 110 BGE II 505 (Switz.) (suit by 17-year old and thus minor skier harmed by ski accident, his father, and his health insurance company against operator of air-tram company); Federal Court Nov. 14, 1974, 100

unrelated individuals sue a defendant without primary concern for inconsistent results,²⁷⁶ and in one of them, it appears that the three plaintiffs had chosen their attorney together.²⁷⁷

Thus, it appears that voluntary joinder is used only for very narrow purposes and that consolidation is rare in civil litigation. Again, things look different in administrative cases. There, consolidation is more common, particularly in proceedings involving claims of neighbors and others challenging the same construction permit.²⁷⁸ Joinder of parties, including voluntary joinder, too, appears to be more prevalent in public law cases, yet only occasionally involving larger groups of litigants.²⁷⁹

It would be interesting to know the reasons for the narrow use of voluntary joinder and for the virtual absence of consolidation in civil, but not administrative, cases. It may be that parties and judges feel that these devices introduce too much complexity, and thus too much cost,²⁸⁰ into the litigation to be worth the limited benefits. Perhaps lawyers and judges in civil cases are not sufficiently comfortable with a larger litigation package, or at least it is far from their radar screen.²⁸¹ Or it may be that Swiss legal education with its emphasis on teaching legal doctrine produces few lawyers that are intent on testing the rules for the benefit of their clients.²⁸²

BGE II 453 (Switz.) (claim by couple and their two children against federal military insurance arising out of traffic accident caused by intoxicated driver of military vehicle).

²⁷⁶ Federal Court Apr. 23, 1996, 122 BGE III 229 (Switz.) (three home owners suing Canton of Vaud for allegedly causing nearby river to overflow); Federal Court May 21, 1974, 100 BGE II 134 (Switz.) (heirs of recently deceased owner and two neighbors suing Canton of Obwalden for causing flooding and dirt avalanches onto their respective farmland); Federal Court Jan. 23, 1962, 88 BGE II 54 (Switz.) (suit by union and various trade associations against low-price competitor alleging unfair competition).

²⁷⁷ See 100 BGE II at 134.

²⁷⁸ See, e.g., Federal Court Aug. 13, 1973, 99 BGE Ib 200 (Switz.) (aggregated suits of many individuals and an association against decision to build interstate highway).

²⁷⁹ See, e.g., Federal Court Aug. 14, 2002, 129 BGE III 18 (Switz.) (suit by German and Swiss association of book sellers challenging decision of the federal competition commission finding illegal vertical restraint); Federal Court Nov. 9, 2001, 128 BGE II 90 (Switz.) (suit by a few neighbors and neighboring township against rezoning decision to allow airport to build airport restaurant); Federal Court Nov. 27, 1974, 100 BGE Ib 404 (Switz.) (suit by twelve land owners against state decision to expropriate a strip of their respective land for the building of a power line); Federal Court Dec. 19, 1968, 94 BGE I 525 (Switz.) (suit by forty-seven citizens challenging as biased the question posed to voters in a referendum to change the state constitution).

²⁸⁰ Cf. Burbank, *supra* note 267, at 1466–87 (engaging costs of complex litigation).

²⁸¹ See *supra* text accompanying note 184.

²⁸² Cf. Baumgartner, *Related Actions*, *supra* note 184, at 210 (“Most Swiss attorneys I have spoken to . . . have never thought of testing the domestic stay provision to its full extent simply to serve their client’s interest.”). On the emphasis in continental European law teaching—which, as one may remember, goes back some 900 years—on lecturing, teaching doctrine, and scientific concepts see, for example, Mirjan Damaška, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363,

And again, lawyers and judges in administrative cases may just be more comfortable with multiparty litigation to begin with.²⁸³ It would be useful for the reformers engaged in fashioning a new Federal Code of Civil Procedure to gain some empirical knowledge on this score.

F. Test Cases

One way in which litigants and courts in Switzerland have attempted to achieve efficiency gains and uniformity of results recently is through the use of test cases, also known as “pilot suits” or “model suits.” For that purpose, the defendant agrees with the claimants that a test case brought by one of the claimants will be binding between the defendant and all claimants.²⁸⁴ The first such case in the civil courts occurred in the late 1980s when a considerable number of Swiss vegetable farmers incurred great losses as a result of the nuclear explosion in Chernobyl, after which many Swiss consumers, in the wake of media reports of increased radioactive residue in vegetables, refused to buy leafy greens. The federal government, faced with a large number of claims by the affected farmers under the Nuclear Liability Act,²⁸⁵ entered into a test-case contract with the claimants with regard to the question of government liability.²⁸⁶ After the courts found the federal government to be liable, the latter negotiated settlements with all individual claimants for a total of 8.7 million Swiss francs (\$6.96 million).²⁸⁷

The judgment in the test case does not have *res judicata* effect for or against those claimants not formally parties to the litigation.²⁸⁸ Moreover, some have raised the question whether the contractual obligation to accept the judgment as binding is judicially enforceable.²⁸⁹ This may explain why the use of this device has thus far mostly been limited to a few cases against

1364–70 (1968); John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 869–75 (1975).

²⁸³ See *supra* text accompanying notes 217–20.

²⁸⁴ See, e.g., Philippe Spitz, *Das Kartellzivilrecht und seine Zukunft nach der Revision des Kartellgesetzes* 2003, 2005 SCHWEIZERISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 113, 125 (2005).

²⁸⁵ Kernenergiehaftpflichtgesetz Mar. 18, 1983, SR 732.44. Article 16(1)(d) of that Act provided at the time that the federal government would pay, up to a certain limit, damages for harm occurring in Switzerland as a result of a nuclear accident abroad. The provision has since been amended to require that damages be unobtainable from the foreign operator of the nuclear facility.

²⁸⁶ See Federal Court June 21, 1990, 116 BGE II 480, 482–83 (Switz.).

²⁸⁷ See, e.g., Schweizerische Depeschagentur (sda), dispatch of Dec. 17, 1990.

²⁸⁸ See, e.g., Spitz, *supra* note 284, at 125. In order to avoid the running of the statute of limitations, all claimants may file suit individually, immediately requesting a stay, pending resolution of the pilot litigation. *Id.*

²⁸⁹ See, e.g., SCHALLER, *supra* note 260, at 183.

the federal government.²⁹⁰ Apparently the federal government is sufficiently likely to abide by the agreement in case of a judgment against it for the claimants to accept the risk of trying²⁹¹ (and sufficiently unconcerned about the ability of the other claimants to succeed in the face of an unfavorable judgment). It may also be that the same factors that favor the use of other group litigation devices in the administrative courts are at play here.²⁹²

A look at the case law of the Swiss Supreme Court shows that there have only been five published decisions involving test cases since 1990, three of which concerned a single case.²⁹³ A further decision involved a somewhat related vehicle: the ability of an administrative agency in a case with more than twenty plaintiffs “with the same interest” to order plaintiffs to name a representative pursuant to Article 11a of the federal Administrative Procedure Act,²⁹⁴ in which case there is true representative litigation with the ensuing judgment binding on all parties. The decision involved another instance of a mass claim for damages against the federal government, in this instance by cattle farmers alleging the government had failed to take the necessary measures to prevent the spread of Bovine Spongiform Encephalopathy (mad cow disease) in Switzerland and thus caused the precipitous drop of beef prices suffered by the plaintiffs.²⁹⁵

²⁹⁰ *But see* Federal Court Mar. 19, 1993, 119 BGE Ib 46 (Switz.) (mentioning a suit by employees challenging decision of Zurich pension fund in early 1980s).

²⁹¹ *See, e.g.,* Walter, *supra* note 12, at 374.

²⁹² *See supra* text accompanying notes 211–18. Technically, the Chernobyl case was litigated in the civil courts as a result of statutory provisions based on an outdated theory that conceived of monetary claims against the government as civil in nature. *See, e.g.,* FRITZ GYGI, VERWALTUNGSRECHT 36–37 (1986). However, it involved an area of law that is today considered a matter of public law and has thus usually been handled by public law experts. *Id.* Accordingly, federal law now provides that damages claims against the federal government must be brought in administrative proceedings. *See* Bundesgesetz über die Verantwortlichkeit des Bundes sowie seiner Behördenmitglieder und Beamten Mar. 14, 1958, SR 170.32, art. 10 (as amended on Oct. 4, 1991) (Switz.).

²⁹³ *See* Federal Court Nov. 22, 2005, 132 BGE II 47 (Switz.) (suit by a private telecommunications company challenging the Federal Telecommunications Agency’s decision to limit the provision of certain telecommunications services, including last-mile access, to recently half-privatized government telecommunications company); Federal Court Nov. 30, 2004, 131 BGE II 13 (Switz.); Federal Court Mar. 13, 2001, 127 BGE II 132 (Switz.); Federal court June 28, 1999, 125 BGE II 385 (Switz.) (suit challenging the salary classification of physical therapists, 75% of whom are women, by Canton of Solothurn as violating federal requirement of comparable worth); Federal Court June 21, 1990, 116 BGE II 480, 482–83 (Switz.) (for discussion *see* text accompanying notes 285–86).

²⁹⁴ Bundesgesetz über das Verwaltungsverfahren Dec. 20, 1968, SR 172.021, art. 11a (as amended on Oct. 4, 1991) (Switz.).

²⁹⁵ Federal Court Jan. 18, 2000, 126 BGE II 63 (Switz.). The decision refers to an unpublished 1992 decision in which the Court dealt with a similar mass claim of cheese makers to fail to take the necessary measures to prevent a listeria outbreak in Vacherin Mont d’Or cheese. *See id.* at 69.

In sum, test cases are relatively new and experience with them is limited—as is the discussion of difficult questions about the effects this approach has on the right of individual claimants to pursue their own litigation strategies,²⁹⁶ on the taking of evidence for the entire class,²⁹⁷ and on settlement,²⁹⁸ among many other effects of representative litigation²⁹⁹ that concern Swiss proceduralists in the class action context.³⁰⁰

G. Jurisdiction in Mass-Tort Litigation

As a remnant of earlier proposals to provide for some sort of class or group litigation in mass tort cases,³⁰¹ the Swiss legislature provided for an exclusive basis of personal jurisdiction for all claims arising out of the same mass tort when federalizing the law of jurisdiction in 2001. Article 27 of the Federal Act on Personal Jurisdiction³⁰² requires that all claims in such cases be brought at the place where the alleged tort was committed or, if that place is unknown, at the domicile of the defendant.

This provision thus attempts to identify a single court with personal jurisdiction, while leaving the remaining questions on how to proceed with mass tort claims for the states. As we now know, the states do not have a class action device,³⁰³ nor would an association suit be available in most mass tort cases.³⁰⁴ Moreover, few cantons allow for the aggregation of individual, but related lawsuits by the court, and those that do may nevertheless require the court to keep individual dossiers.³⁰⁵ Furthermore, it is questionable whether mass tort plaintiffs would ever meet the written³⁰⁶ or unwritten³⁰⁷ joinder requirements of most state codes. What is left, then, is the judicial economy gained by having the same court adjudicate individually all lawsuits arising out of the same set of operational facts. But not even that is guaranteed, since the statute does not order the states to have the same judges sit on those cases.

The provision does, however, create considerable uncertainty both by

²⁹⁶ See, e.g., Steiger-Sackmann, *supra* note 181, at 1267.

²⁹⁷ See, e.g., Spitz, *supra* note 284, at 125.

²⁹⁸ See, e.g., Astrid Stadler, *Referat, in VERHANDLUNGEN DES 62. DEUTSCHEN JURISTENTAGES IN BREMEN 1998*, II/1, 36, 44 (1998) (asserting that pilot litigation cannot be settled).

²⁹⁹ See, e.g., FLORIAN JACOBY, *DER MUSTERPROZESSVERTRAG* (2000).

³⁰⁰ See *supra* text accompanying notes 54–68.

³⁰¹ See *supra* text accompanying notes 44–46.

³⁰² Bundesgesetz über den Gerichtsstand in Zivilsachen [GestG] Mar. 24, 2000, SR 272 (Switz.).

³⁰³ See *supra* text accompanying notes 18–35.

³⁰⁴ See *supra* text accompanying notes 108–13.

³⁰⁵ See *supra* text accompanying notes 268–71; SCHALLER, *supra* note 260, at 180.

³⁰⁶ See *supra* text accompanying notes 255–57.

³⁰⁷ See *supra* text accompanying notes 272–77.

using the new term “mass tort” without defining it and by relying on the place where the tort was committed, which may be notoriously difficult to determine.³⁰⁸ In short, the provision may create more harm than good. Not surprisingly, the proposed Federal Code of Civil Procedure intends to abolish it.³⁰⁹ To my knowledge, the provision has not yet been applied in practice.

IV. CONCLUSION

Switzerland is currently in the process of drafting its first Federal Code of Civil Procedure, an enterprise similar in importance to the promulgation of the Federal Rules of Civil Procedure in the United States in 1938. This is a great opportunity to reflect on the usefulness of existing state procedure codes, indeed to engage the premises underlying those codes and their effectiveness in practice. Reconsideration of existing procedural devices and process values is particularly important in the area of group litigation. For it is in this area that there has always been some tension between existing devices and the individualist concepts underlying the codes.³¹⁰ Moreover, reforms have occurred interstitially and limited to certain subject-matter areas, largely through federal legislation and federal common law.³¹¹ This has resulted in a patchwork of federal and state rules and principles, the effectiveness of which has never been carefully assessed.³¹² Indeed, most group litigation devices have remained relatively marginal in both civil procedure courses and procedural scholarship in Switzerland,³¹³ although not necessarily in practice.³¹⁴

Unfortunately, it is in the area of group litigation that the reformers have decided to forego introspection, opting instead to write the current patchwork of federal and state statutory and common law into the code so as to promote easy adoption in a country controlled by consensus politics.³¹⁵ The work of various scholars in specific areas of substantive law suggests that this may be bad policy.³¹⁶ The same goes for litigants in practice, who

³⁰⁸ See, e.g., THOMAS MÜLLER & MARKUS WIRTH, *GERICHTSSTANDSGESETZ* 692–96, 701–02 (2001).

³⁰⁹ Botschaft, *supra* note 22, at 7269–70.

³¹⁰ See *supra* text accompanying notes 129–54.

³¹¹ See *supra* text accompanying notes 155–59.

³¹² See, e.g., *supra* text accompanying notes 160–65.

³¹³ See *supra* text accompanying notes 160, 167–70.

³¹⁴ See *supra* Parts II.2.c and II.3.

³¹⁵ See *supra* text accompanying notes 48–97, 194–98.

³¹⁶ See, e.g., BRIGITTE KURZEN, *E-HEALTH UND DATENSCHUTZ* 217 (2004) (arguing that representative litigation such as class actions and test cases could improve number of suits to enforce legislation protecting personal information from illegal dissemination); DIETER ZOBL & STEFAN KRAMER, *SCHWEIZERISCHES KAPITALMARKTRECHT* 435 (2004) (noting that because financial harm to individual investors is often low and individual proof of causation

search for avenues to improve access to justice, efficiency, and consistency of result either within existing procedural devices or by creating new ones, such as association suits in shareholder litigation or test cases.³¹⁷

What is interesting from a comparative perspective, however, is that the reluctance of the Swiss law reformers to expand upon existing group litigation, let alone to introduce an American-style class action, is based on more than consensus politics. At the ideational level, Kantian liberal-individualist precepts have led to a strong emphasis of the procedural ideal of enforcing individual substantive rights with dispatch.³¹⁸ The resulting litigation package in the Swiss procedure codes is comparatively slim.³¹⁹ Group litigation inevitably introduces complexity and cost and thus is in tension with this ideal.³²⁰ Representative litigation is even more so because it allows some individuals to enforce other people's rights, whether or not they agree.³²¹ This is further in tension with the classical liberal ideal of limiting governmental intervention because it leads to enforcement action by the government (through litigation) against private individuals where there may not have been any before.³²² Moreover, due to its complexity, representative litigation may require a stronger judicial role than traditional liberal ideals allow.³²³

But things are more complex. Old German communitarian ideals have also influenced substantive Swiss law, and notions of "social civil procedure" have led to a few changes in the procedural codes that give the judge some powers to support the weaker party in litigation.³²⁴ The question is whether this admittedly limited alternative influence has been strong enough to support an expansion of group litigation in the future.³²⁵ More importantly, the same German communal ideals have led to the notion of the social state, which has had a strong influence on public law in Switzerland as well as in Germany.³²⁶ As a result, the public interest is no

potentially costly, securities fraud cases are likely to remain rare in Switzerland); Spitz, *supra* note 284, at 125 (proposing legislative integration of test case litigation in antitrust matters so as to improve clarity on issues of evidence-gathering, costs, and enforcement); Steiger-Sackmann, *supra* note 181, at 1267 (arguing that the availability of test cases and *Verbandsklage* are insufficient to guarantee women access to court so as to effectively enforce their rights under comparable-worth legislation).

³¹⁷ See *supra* text accompanying notes 231–35, 284–92.

³¹⁸ See *supra* text accompanying notes 129–40.

³¹⁹ See *supra* text accompanying notes 184, 274.

³²⁰ See *supra* text accompanying notes 66–68.

³²¹ See *supra* text accompanying notes 134–38.

³²² See *supra* text accompanying note 139.

³²³ See *supra* text accompanying notes 67, 129–40.

³²⁴ See *supra* text accompanying notes 141–47, 190.

³²⁵ See *supra* text accompanying note 145.

³²⁶ On the development of German medieval communal ideals into the notion of the social state (*Sozialstaat*) by Otto von Gierke and other Germanist scholars influenced by

longer enforced in criminal proceedings alone, but (in the form of social, economic, and environmental legislation) in administrative tribunals as well. Hence, the traditional liberal separation between civil procedure as the place where individual rights are enforced and public law procedure where public interests are enforced has remained strongly influential.³²⁷ But the public law side of the equation has expanded drastically from the protection of private property and public health to the promotion of social and environmental causes and market regulation.³²⁸ Moreover, administrative procedure with its more lenient standing requirements has allowed a larger group of potential claimants to sue and thus enforce this newly conceived public interest.³²⁹ The question is whether public law litigation in the administrative courts is sufficient to enforce this public interest.

On an institutional level, a rule-based legal education and the traditional expectations of judges as efficient adjudicators and of attorneys as professionals and officers of the court may make both uncomfortable with complex litigation and efforts to engage in social engineering in the civil process and thus explain the relatively limited use of existing group and joinder devices in practice.³³⁰ Legislators, on the other hand, still take their business seriously,³³¹ although some would certainly argue that the emergence of American-style public relations have made serious inroads on the quality of the legislative discourse. In addition, due to the presence of direct democratic institutions, the legislative process is considered to have particular legitimacy to deal with complex social issues.³³² Conversely, Swiss culture has not yet come “to regard litigation as a fact, however unpleasant, of everyday life.”³³³ As a result, the notion of effecting social

Johann Gottfried Herder’s ideas of national identity in the 19th Century see, for example, Ewald, *supra* note 131, at 2055–61.

³²⁷ See *supra* text accompanying notes 27–33, 187–91, 201–20.

³²⁸ I intentionally list market regulation separately because the Swiss model of a social market economy, written into the federal constitution in 1947 (see Bundesverfassung der Schweizerischen Eidgenossenschaft, [aBV], [Constitution of 1874] May 29, 1874, as amended on July 6, 1947, art. 31 (Switz.)), has resulted in considerably more economic regulation than the American model of a free market economy. The *ordo-liberal* concepts developed by the Freiburg School in Germany, on which this model is based, has been ably presented by Professor Gerber. See David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the “New” Europe*, 42 AM. J. COMP. L. 25 (1994).

³²⁹ See *supra* text accompanying notes 203–10.

³³⁰ See *supra* text accompanying notes 278–83.

³³¹ See *supra* text accompanying notes 61–62.

³³² See *supra* text accompanying notes 63–64.

³³³ Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1476 (1991) (reviewing GARY B. BORN WITH DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* (1989)).

change through the civil litigation system has remained foreign to many in Switzerland.³³⁴

There is also the question of how much of a social need there is for group litigation, especially class action litigation, in a country in which shared values outside of the law guide the behavior of individuals and corporations alike.³³⁵ Similarly, a denser level of social and environmental regulation than in the United States and the ability of individuals to challenge or enforce that regulation in administrative court, including through association suits, may reduce the need for enhanced group litigation devices in Swiss civil procedure.³³⁶ At the same time, however, globalization and the opening of national markets have put pressure on the short-term bottom line of Swiss businesses and, in turn, on the federal legislature to become more business friendly.³³⁷ As a result, there may be more of a need for group litigation to enforce the public interest in the future.

Finally, the rejection of a class action device is partly the result of reactions to litigation practice in the United States and the perceived pathologies thereof. To some extent, this is due to true concern with differences observed in American law and practice, including concern with a litigation system steeped in equity and its recent tendency to result in dispute resolution *simpliciter*.³³⁸ Partly, however, it is the result of the influence of the U.S. tort reform movement during a time when German

³³⁴ See *supra* text accompanying notes 61–65, 281–83.

³³⁵ See, e.g., Marco Verweij, *Why Is the River Rhine Cleaner than the Great Lakes (Despite Looser Regulation)?*, 34 LAW & SOC. REV. 1007 (2000).

³³⁶ See, e.g., Baumgartner, *Class Actions*, *supra* note 31, at 123. On a related note, the proliferation in Switzerland of offices of ombudsmen and women, created by governments, businesses, and trade associations to give consumers an opportunity to be heard, taken seriously, and perhaps receive the relief they desire may have relieved the pressure for litigation-related solutions to consumer problems if the success stories of those institutions are to be believed. See, e.g., Ombudsstelle Kommunikation und Umwelt, Jahresbericht 2003, available at http://www.omk.ch/download/jahresbericht_2003.pdf (dealing with concerns about radiation by wireless telecommunications services); Schweizerischer Versicherungsverband, Ombudsstelle, 2006, <http://www.svv.ch/index.cfm?id=629> (set up by Swiss insurers); Stadt Zürich, Beauftragte für Beschwerdefälle: Ombudsfrau, Bericht 2005, available at http://www.stadt-zuerich.ch/internet/ombudsstelle/home/jahresberichte.ParagraphContainerList.ParagraphContainer0.ParagraphList.0012.File.pdf/Ombudsfrau_Bericht2005.pdf (set up by the City of Zurich); Verband öffentlicher Verkehr, Jahresbericht 2004, Ombudsstelle öffentlicher Verkehr, available at http://www.ombudsstelle.ch/jahresbericht_2004.pdf (set up by the Swiss public transportation system). See also *supra* note 62.

³³⁷ See, e.g., Baumgartner, *Class Actions*, *supra* note 31, at 123.

³³⁸ See *supra* text accompanying notes 83–89. “[T]he alternatives in current fashion represent a logical terminus in the progression from law in the sense that Justice Harlan described it, through equity, to dispute resolution *simpliciter*.” Burbank, *supra* note 267, at 1486.

businesses attempted to receive help from their government against lawsuits pending in the United States, a time during which U.S. courts fashioned an approach to transnational litigation that paid little attention to legitimate foreign sovereignty concerns, thus evoking protective reflexes in Germany and Switzerland.³³⁹

To someone studying the interplay among transnational actors and domestic procedural lawmaking,³⁴⁰ these are interesting causal interrelations; some of the damage may be irremediable. One would hope, however, that the Swiss law reformers can overcome their anti-American instincts in this area sufficiently to engage in informed procedural comparison. In doing so, it should be obvious that a procedural system based on the ideal of enforcing individual rights is unlikely to produce the same complexity, cost, and potential for negotiations outside the shadow of the law³⁴¹ as one steeped in equity when group litigation devices are expanded.³⁴² At the same time, the Swiss reformers need to consider carefully whether their liberal, rights-based procedure along with fee shifting and the lack of contingent fees has something to do with the limited use of existing group litigation devices in civil practice versus their rather extensive use in administrative tribunals and, if so, whether that is desirable.³⁴³ In short, there is plenty of work ahead for the Swiss reformers in the area of group litigation. I hope they will perform their task well.

³³⁹ See *supra* text accompanying notes 91–99; Baumgartner, *Transnational Litigation*, *supra* note 9, at 1317–38.

³⁴⁰ See *supra* text accompanying notes 9–10.

³⁴¹ See, e.g., Subrin, *supra* note 84, at 989 (noting that when civil procedure insufficiently “confine[s] and focus[es] the law so that one may predict results,” bargaining “is in the shadow of a shadow”).

³⁴² It is not correct, however, to say that, in the context of a civil law system, class action proceedings are necessarily expensive and burdensome for the defendant, or that they permit high recoveries and large legal fee awards. These effects are the result of the background American legal system as applied to class action procedure. Gidi, *supra* note 1, at 321.

³⁴³ See *supra* text accompanying notes 187–91, 201–20.

