

2008

# Event Jurisdiction and Protective Coordination: Lessons from the September 11th Litigation

Robin Effron

*Brooklyn Law School*, [robin.effron@brooklaw.edu](mailto:robin.effron@brooklaw.edu)

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Jurisdiction Commons](#), and the [Other Law Commons](#)

---

## Recommended Citation

81 S. Cal. L. Rev. 199 (2007-2008)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

## ARTICLES

# EVENT JURISDICTION AND PROTECTIVE COORDINATION: LESSONS FROM THE SEPTEMBER 11TH LITIGATION

ROBIN J. EFFRON\*

### ABSTRACT

*Shortly after the tragic events of September 11, 2001, Congress passed the Air Transportation Safety and System Stabilization Act ("ATSSSA"). The September 11th Victim Compensation Fund ("VCF") was the centerpiece of the statute and provided a source of no-fault compensation to the tragedy's victims and victims' families. The ATSSSA also permitted victims to pursue traditional litigation instead.*

*The ATSSSA contains three "jurisdictional" features that have shaped the path of the litigation. The Act created a federal cause of action "for damages arising out of" the terrorist-related aircraft crashes and gave the Southern District of New York original and exclusive jurisdiction over all actions "resulting from or relating to the terrorist-related aircraft crashes." Finally, it implemented a liability cap by limiting recovery in all actions to the defendants' available liability insurance. These jurisdictional*

---

\* Bigelow Fellow and Lecturer in Law, University of Chicago. From October 3, 2004, through September 30, 2005, the author worked for the Honorable Alvin K. Hellerstein as the law clerk assigned to the September 11th cases consolidated before his court. All opinions expressed are solely those of the author and do not reflect Judge Hellerstein's position on any aspect of the litigation. Thanks to Douglas Baird, Adam Samaha, Jamelle Sharpe, Dave Fagundes, Daniel Abebe, Jonathan Masur, Jonathan Mitchell, Shyam Balganes, Lee Fennell, Noah Zatz, Steve Friedell, Mary Coombs, and Allan Stein for helpful comments.

*aspects of the “traditional” litigation option under the ATSSSA contain unusual and practically unprecedented elements, yet they have received almost no scholarly attention. This Article attempts to fill that gap by telling the story of the course of the September 11th litigation, tracking the challenges and issues that have arisen as a result of the ATSSSA’s coordination mandate, and exploring the relationship between federalization of forum and aggregation of claims.*

*The jurisdictional puzzles seen in the September 11th litigation call for two new labels. “Event jurisdiction” refers to Congress’s choice to give the federal courts subject matter jurisdiction over cases relating to an event of perceived national importance, rather than locating subject matter jurisdiction over a certain class of cases or type of claim. The second phenomenon deserves the label “protective coordination” because, like protective jurisdiction, it evinces a congressional desire to protect certain real or perceived federal interests by manipulating the shape and direction of certain classes of lawsuits. This Article concludes by suggesting how Congress might better evaluate postdisaster litigation legislation in the future.*

## I. INTRODUCTION

On September 11, 2001, terrorists hijacked four airplanes, crashing two of them into the World Trade Center (“WTC”) towers in New York City, and one into the Pentagon outside of Washington, D.C. Passengers on the fourth plane managed to wrest control from the terrorists and crash the plane into the ground in Shanksville, Pennsylvania before the terrorists could use it to harm another civilian target. In all, 2973 people lost their lives on the planes and on the ground,<sup>1</sup> and many more were injured. Property damage was estimated in the billions of dollars.<sup>2</sup> In the immediate aftermath the nation stood transfixed at the scale of the catastrophe before them. Television channels aired news twenty-four hours a day for over a week after the incident, documenting the frantic rescue and recovery missions, and straining to understand how and why this tragedy had occurred. By September 29, 2001, the rescue missions were officially declared at an end, and the long term cleanup began. The pile of debris at the WTC site in lower Manhattan continued to smolder for over three months, and it was nearly one year before workers had finished clearing the debris.

---

1. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 311 (2004).

2. *Id.*

Shortly after the tragic events of September 11, 2001, Congress passed the Air Transportation Safety and System Stabilization Act (“ATSSSA”).<sup>3</sup> The September 11th Victim Compensation Fund (“VCF”) was the centerpiece of the statute and provided a source of no-fault compensation to the tragedy’s victims and victims’ families. The ATSSSA also allowed victims to elect to pursue traditional litigation instead. Congress intended for the ATSSSA to serve a dual purpose: for the victims of the attacks, the statute would ensure an option for a speedy strict liability recovery; for the potential defendants, particularly the airline industry, the statute would shield them from crushing liability and possible insolvency and industry-wide collapse.

Combined with a cap on liability for the airlines (and later other industries and government actors), the ATSSSA and its unique compensation fund were both hailed and scorned as an unprecedented model of tort victim compensation.<sup>4</sup> The fund, however, is only one half of the compensation story. The jurisdictional aspects of the “traditional” litigation option under the ATSSSA contain unusual and practically unprecedented elements, yet they have received almost no scholarly attention. This Article attempts to fill that gap.

The ATSSSA contains three jurisdictional features that have shaped the path of the litigation. The Act created a federal cause of action “for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001.”<sup>5</sup> Section 408(b)(3) gave the United States District Court for the Southern District of New York (“SDNY”) “original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.”<sup>6</sup> Finally, it implemented a liability cap by limiting recovery in all actions to the defendants’ available liability insurance.<sup>7</sup>

This Article tells the story of the course of the September 11th litigation, and tracks the challenges and issues that have arisen as a result of the ATSSSA coordination mandate. The unexpected twists and turns that the litigation has taken suggest two new labels for jurisdictional concepts,

---

3. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001), reprinted in 49 U.S.C. § 40101 note (Supp. III 2003) [hereinafter ATSSSA].

4. See *infra* note 8.

5. ATSSSA § 408(b)(1).

6. *Id.* § 408(b)(3).

7. *Id.* § 408(a).

“event jurisdiction” and “protective coordination.”

Congress’s choice to vest jurisdiction in a particular federal district court is an act of significant consequence. It manifests a desire by Congress to control the scope, organization, and direction of complex litigation, decisions normally reserved for other judicial actors such as the parties, the trial judge, state court actors, the Judicial Conference of the United States, and the Judicial Panel on Multidistrict Litigation (“JPML”).

The jurisdictional puzzles seen in the September 11th litigation call for two new labels. “Event jurisdiction” refers to Congress’s choice to give the federal courts subject matter jurisdiction over an “event” of perceived national importance, rather than locating subject matter jurisdiction over a certain class of cases or type of claim. The second phenomenon deserves the label “protective coordination” because, like protective jurisdiction, it evinces a congressional wish to protect certain real or perceived federal interests by manipulating the shape and direction of certain classes of lawsuits. These venue and federalization provisions of the ATSSSA are not accidental aspects of the statutory scheme; they are phenomena deserving of analysis and criticism.

Part II tells the story of the complex and often unexpected dimensions of the September 11th litigation. It shows that aside from doctrinal problems, federalization of claims arising out of an event and congressional specifications of venue present serious pragmatic concerns. Part III of this Article discusses the basis for federal jurisdiction in these cases, and identifies Congress’s grant of jurisdiction in the ATSSSA as a form of “event jurisdiction.” It then questions whether such event jurisdiction is a valid basis for federal jurisdiction over state law claims, and concludes that most of the serious concerns arise as a result of protective coordination. Part IV provides a brief overview of the legal doctrines of venue, consolidation and coordination, and introduces the concept of protective coordination. It then observes that protective coordination may insert an additional layer of complexity into the already troubling constitutional problems of protective jurisdiction. Part V suggests how Congress might better draft legislation such as the ATSSSA in the future by offering a brief case study comparing the post-September 11th litigation with the post-Katrina litigation.

This inquiry thus has both a broad and narrow aim. The broad goal is to use the September 11th litigation as a case study for examining some undertheorized aspects of the role of federalism in jurisdiction and venue. The more specific goal is to provide a comprehensive picture of the

September 11th litigation that has been proceeding *outside* of the VCF and to answer the question, just how successful has the ATSSSA been at creating a centralized and streamlined litigation process for these claims? If, as I argue, the enterprise has not been entirely successful, then where did Congress go wrong?

## II. THE SEPTEMBER 11TH LITIGATION EXPERIENCE

A careful examination of the progress of the September 11th litigation contributes to an understanding of the utility and advisability of coordination of cases by federal statute. Over the past six years, scholars and practitioners have debated the effectiveness and prudence of the VCF, the statute's central liability innovation.<sup>8</sup> Some commentators also opined that the ATSSSA's jurisdictional mandate—that all cases arising out of the September 11th terrorist attacks would be brought in federal court—combined with the statute's directive that underlying state tort law would provide the rules of decision, implicates the issue of so-called “protective jurisdiction,” complete with its own set of potential problems.<sup>9</sup> This jurisdictional aspect of the ATSSSA vests jurisdiction not simply in the federal courts, but in the SDNY. Scholars and practitioners alike have ignored this aspect of the statute, perhaps because it appears so ordinary. In

---

8. For evaluation, praise, and criticism of the VCF, see generally Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135 (2005); Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1 (2006); Richard P. Campbell, *Implementing the 9/11 Victim Compensation Fund: Two Steps Forward, One Step Back*, 69 DEF. COUNS. J. 409 (2002); Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51 (2003); Wendy Floering, *The September 11th Victim Compensation Fund of 2001: A Better Alternative to Litigation?*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 195 (2002); Tracy Hresko, *Restoration and Relief: Procedural Justice and the September 11th Victim Compensation Fund*, 42 GONZ. L. REV. 95 (2006); Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315 (2004); Jessica Ramirez, *The Victims Compensation Fund: A Model for Future Mass Casualty Situations*, 29 TRANSP. L.J. 283 (2002); George Rutherglen, *Distributing Justice: The September 11th Victim Compensation Fund and the Legacy of the Dalkon Shield Claimants Trust*, 12 VA. J. SOC. POL'Y & L. 673 (2005); Joe Ward, *The September 11th Victim Compensation Fund: The Answer to Victim Relief?*, 4 PEPP. DISP. RESOL. L.J. 161 (2003); James C. Harris, Comment, *Why the September 11th Victim Compensation Fund Proves the Case for a New Zealand-style Comprehensive Social Insurance Plan in the United States*, 100 NW. U. L. REV. 1367 (2006); Erin G. Holt, Note, *The September 11 Victim Compensation Fund: Legislative Justice Sui Generis*, 59 N.Y.U. ANN. SURV. AM. L. 513 (2004); Jonathan D. Melber, Note, *An Act of Discretion: Rebutting Cantor Fitzgerald's Critique of the Victim Compensation Fund*, 78 N.Y.U. L. REV. 749 (2003).

9. See, e.g., Eric J. Segall, *Article III as a Grant of Power: Protective Jurisdiction, Federalism and the Federal Courts*, 54 FLA. L. REV. 361, 361–66 (2002) (questioning Congress's power under Articles I and III to redirect state cases into federal court and still apply state law).

fact, this sort of provision is quite revolutionary in statutory drafting.

What follows is an account of the progress of the September 11th claims litigated under the ATSSSA.<sup>10</sup> The September 11th litigation is a lesson in the unexpected. It began as one relatively coherent group of claims, *In re September 11 Litigation*, but soon became three fairly distinct groups of cases designated by four different master calendar numbers.<sup>11</sup> “September 11th Litigation” quickly became the umbrella term for a two-part disaster litigation, a two-part mass tort litigation, and an insurance battle. This narrative is used in Part III to demonstrate the incoherence of “event jurisdiction,” and in Part IV to caution against future use of “protective coordination.”

#### A. THE INITIAL ASSIGNMENT TO JUDGE HELLERSTEIN AND THE FIRST MOTION TO CONSOLIDATE SEPARATE CASES

By the middle of 2002, SDNY Judge Alvin K. Hellerstein had accepted twelve cases filed pursuant to the ATSSSA. The defendants at the time included the airlines, airport security companies, and other aviation related entities, World Trade Center Properties and its various subsidiaries, the Port Authority of New York and New Jersey (“PANYNJ”), and other property owners and operators on the WTC site. Shortly thereafter, the court granted a motion by the Transportation Security Administration (“TSA”) to intervene in the cases, as well as to consolidate the cases pursuant to Federal Rule of Civil Procedure 42(a).<sup>12</sup> On November 1, 2002, Judge Hellerstein formalized this consolidation by assigning a master docket number and a caption to the pending actions.<sup>13</sup> The assigned caption, *In re September 11 Litigation*, suggests what the parties and the judge believed at that time—that the litigation would be described and handled as one large group before a single judge, with only a few exceptions.<sup>14</sup>

---

10. A chart summarizing the field of the September 11th Litigation appears as Figure 1 in Part II.E.

11. See United States District Court, Southern District of New York, September 11th Litigation Cases, at <http://www1.nysd.uscourts.gov/cases.php?form=sept11> (last visited Jan. 2, 2008).

12. *Mariani v. United Air Lines, Inc.*, No. 01 Civ. 11620 (AKH), 2002 WL 1685382, at \*1 (S.D.N.Y. July 24, 2002) (ordering “all actions for wrongful death, personal injury, and property damage or business loss currently pending or hereinafter filed pursuant to the Act against any airline and/or airline security company . . . are hereby consolidated for purposes of pretrial proceedings . . .”).

13. *In re Sept. 11 Litig.*, No. 21 MC 97 (AKH) (S.D.N.Y. Nov. 1, 2002) (order consolidating actions and establishing a master docket).

14. Two groups of cases were excluded from Judge Hellerstein’s docket from the outset of the litigation. The first included cases against alleged promoters, financiers, sponsors and supporters of the September 11th terrorist attacks, and were excluded because they were explicitly excluded from claims

The cases filed within the first months after September 11th matched these expectations. Most claims involved allegations of personal injury, wrongful death, or property damage suffered during the September 11th attacks themselves. Judge Hellerstein worked with the litigants during these initial months to coordinate the proceedings pending before SDNY with the VCF proceedings, and to organize how any remaining litigation would proceed.

### 1. The Victim Compensation Fund

Congress created the VCF under the ATSSSA as an alternative to litigation, intending for it to provide a swift and reliable source of compensation for victims while simultaneously shielding the airline industry from potentially crippling lawsuits.<sup>15</sup> The fund only covered personal injury and wrongful death cases, and did not apply to instances of property damage or business loss. Ultimately, the VCF processed over 7400 cases and awarded a median of \$855,919.50 per victim in compensation (with a median award of \$1.6 million for deceased victims).<sup>16</sup>

Although the Special Master's compensation determinations were "final and not subject to judicial review,"<sup>17</sup> Judge Hellerstein adjudicated disputes related to the administration of the VCF. In a series of rulings, he sustained the regulations for the VCF promulgated by the Department of Justice and the compensation formula devised by Special Master Kenneth

---

under the ATSSSA. *See* ATSSSA, Pub. L. No. 107-42, § 408(c), 115 Stat. 230 (2001), *reprinted in* 49 U.S.C. § 40101 note (Supp. III 2003). These cases were originally filed in a few different districts, and themselves became multidistrict litigation in the SDNY, consolidated before Judge Casey. *See In re Terrorist Attacks on Sept. 11, 2001*, 295 F. Supp. 2d 1377, 1379 (J.P.M.L. 2003). The second included cases against and among the insurers of property damaged at ground zero. *See, e.g., Can. Life Assurance Co. v. Converium Rückversicherung (Deutschland) AG*, 210 F. Supp. 2d 322, 329–30 (S.D.N.Y. 2002) (holding that no federal jurisdiction exists under the ATSSSA for a dispute between a reinsurer and retrocessionaire concerning losses arising out of the terrorist-related crashes of September 11th). The exceptions to this rule were the liability insurance provider cases, which remained before Judge Hellerstein. ATSSSA § 405(c)(3)(B)(i) (suits to recover "collateral source obligations" are excluded from the ATSSSA jurisdiction). *See infra* notes 82–85 and accompanying text for discussion of these cases.

15. The creation and administration of the VCF was a unique and controversial remedy by Congress, and has received extensive scholarly commentary. *See* sources cited *supra* note 8.

16. KENNETH R. FEINBERG ET AL., U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, 109–11, *available at* [http://www.usdoj.gov/final\\_report.pdf](http://www.usdoj.gov/final_report.pdf) (last visited Jan. 2, 2008). Around \$7 billion was paid to claimants, including 2880 claimants whose family members died in the crashes or building collapses and 2680 persons who suffered physical injury at the Pentagon and WTC site. *Id.* at 110.

17. ATSSSA § 405(b)(3).



Feinberg against a number of challenges on administrative law grounds,<sup>18</sup> interpreted the meaning of a waiver of a right to sue under the ATSSSA,<sup>19</sup> and determined when a claim was deemed “filed” with the Special Master.<sup>20</sup> These holdings reflected September 11th litigation as Congress probably imagined it: the district court was spared the task of adjudging or reviewing awards to individual plaintiffs, but played an important background role in settling disputes over the interpretation of the statute and structure of the fund’s administration.

## 2. Organizing the Remaining Litigation

As the deadline for victims to apply to the VCF came to a close, Judge Hellerstein and the litigants intensified the focus on organizing the remaining litigation. The litigants appeared to fall into three broad categories: (1) insurance companies that provided liability insurance for Silverstein Properties and PANYNJ;<sup>21</sup> (2) litigants with claims of wrongful death and personal injury who had elected not to enter the VCF (including a number of personnel involved in the rescue and cleanup effort who had begun to file claims alleging respiratory injury); and (3) property damage plaintiffs. A few miscellaneous cases also remained.<sup>22</sup>

The remaining litigants scored their first major victory on the path to trial in 2003 while the VCF was still open.<sup>23</sup> Judge Hellerstein ruled that the aviation defendants owed a duty of care to the ground victims because the events were within the scope of foreseeable duty.<sup>24</sup>

---

18. *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 301 (S.D.N.Y. 2003), *aff’d in part, dismissed in part*, *Schneider v. Feinberg*, 345 F.3d 135, 149 (2d Cir. 2003).

19. *In re Sept. 11th Litig.*, No. 21 MC 97 (AKH), 2004 WL 1320897, at \*5–7 (S.D.N.Y. June 10, 2004).

20. *In re Sept. 11 Litig.*, No. 21 MC 97 (AKH), 2003 WL 23145579, at \*1 (S.D.N.Y. Dec. 19, 2003).

21. *See infra* note 82 and accompanying text.

22. *See, e.g.*, *Grosshandels-und Lagerei-Berufsgenossenschaft v. World Trade Ctr. Props., LLC*, 435 F.3d 136, 137–38 (2d Cir. 2006) (affirming district court decision that German insurers cannot pursue state law tort claims on behalf of victims who have received VCF benefits).

23. Since participation in the VCF precluded a plaintiff from proceeding with any civil litigation, *see* ATSSSA § 405(c)(3)(B)(i), the court created a “suspense docket” to allow plaintiffs to preserve their right to file a civil action while deciding whether to pursue a claim before the VCF. *In re Sept. 11 Litig.*, No. 21 MC 97 (AKH), 2003 U.S. Dist. LEXIS 14411 (S.D.N.Y. July 22, 2003) (order outlining procedure with respect to suspending actions). The VCF administrators created a similar procedure by which families could submit a preliminary application, without waiving the right to sue. *See* 28 C.F.R. § 104.21(b) (2006).

24. *In re Sept. 11 Litig.*, 280 F. Supp. 2d 279, 292–93, 296 (S.D.N.Y. 2003) (holding that “[t]he Aviation Defendants, and plaintiffs and society generally, could reasonably have expected that the screening methods at [airports used by the Aviation Defendants] were for the protection of people on the ground as well as for those on board the airplanes,” and that “the crash of the airplanes was within

The court denied motions to dismiss ground victims' complaints brought by the PANYNJ and WTC Defendants as well, holding that under New York law, they owed a duty of care to the lessees, occupants, and others on the premises.<sup>25</sup>

Judge Hellerstein rejected the argument that the criminal acts of the terrorists were intervening acts that broke the chain of causation, holding that it was too early to rule that proximate cause could not be found. Citing the absence of a well-developed factual record, the court put this argument on hold, finding proximate cause at least at the level of the plaintiffs' allegations.<sup>26</sup>

With the denial of the motions to dismiss against the aviation defendants, the PANYNJ and the WTC entities, the litigation against a multitude of defendants was set to continue to discovery and, possibly, a trial.<sup>27</sup> The decision also highlighted the ways in which the litigation ahead would be complex. Had legal remedies been limited by a small class of victims on the planes against a small group of defendants, the cases would have resembled an "air and common disaster" litigation.<sup>28</sup> The court's decision, however, recognized that September 11th involved multiple classes of victims that were owed varying duties of care by different types of defendants. At this stage in the litigation, it was enough for Judge Hellerstein to conclude that cases could proceed beyond the Rule 12(b)(6) motion to dismiss,<sup>29</sup> and that development of a factual record was required for any further determinations. The complexity of the duty question foreshadowed the ways in which different classes of plaintiffs would pull the once unitary litigation in different directions.

---

the class of foreseeable hazards resulting from negligently performed security screening").

25. *Id.* at 299–301 ("[T]he parties and society would reasonably expect that the WTC Defendants would have a duty to the occupants of the Twin Towers in designing, constructing, repairing and maintaining the structures, in conforming to appropriate building and fire safety codes, and in creating appropriate evacuation routes and procedures should an emergency occur.").

26. *See id.* at 293 (aviation defendants); *id.* at 302 (WTC entities). Note, however, that the court's holding is with respect to the validity of plaintiffs' pleadings, and calls for future litigation to settle these issues. *Id.*

27. On July 2, 2007, Judge Hellerstein ordered, pursuant to Federal Rule of Civil Procedure 42(b), that some of the 21 MC 97 cases would be bifurcated and proceed to trial on the issue of damages only. *In re Sept. 11 Litig.*, No. 21 MC 97 (AKH) (S.D.N.Y. July 2, 2007) (order scheduling damages trial and pretrial proceedings).

28. The phrase "air and common disaster" is a designation used for administrative purposes by the Judicial Panel for Multidistrict Litigation. John F. Nangle, *From the Horse's Mouth: The Workings of the Judicial Panel on Multidistrict Litigation*, 66 DEF. COUNSEL J. 341, 342 (1999).

29. FED. R. CIV. P. 12(b)(6).

## B. RESPIRATORY DISTRESS CASES—21 MC 100 AND 21 MC 102

The collapse of the towers at Ground Zero led to a major rescue, recovery, and cleanup effort. The City of New York took control of the WTC site immediately after the collapse of the buildings and did not return control of the site to the PANYNJ until July 2002.<sup>30</sup> These postcollapse efforts involved thousands of fire fighters and other rescue personnel coordinated by a number of public and private parties. The acts of heroic rescue workers and selfless volunteers are an enduring memory of the days and months after September 11th.<sup>31</sup> The reality, however, is that the vast majority of those involved in the cleanup effort were employees of government agencies or government contractors and Ground Zero was transformed into a giant workplace. And with a workplace came accidents. As of early 2002, the extent of workplace injury at the WTC site was underappreciated. According to one report, only “35 of the more than 1,500 workers assigned to help clear debris from the World Trade Center site were seriously injured in more than six months of work there,” and federal statistics initially reported that “the job had turned out to be far less dangerous than an average demolition job in the United States.”<sup>32</sup> This was a premature prediction.

Workers injured at the site began to file complaints for violations under New York State Labor Laws in state court.<sup>33</sup> The defendants removed these cases to federal court and the plaintiffs moved for remand. Judge Hellerstein granted the motion to remand in two of these early cases in which plaintiffs alleged injury from falling debris at the WTC site.

The opinions in *Graybill v. City of New York*<sup>34</sup> and *Spagnuolo v. Port Authority of New York and New Jersey*<sup>35</sup> set the outer boundaries for the subject matter jurisdiction of cases brought under or removed pursuant to the ATSSSA.<sup>36</sup> Judge Hellerstein found that the tort concept of “proximate

---

30. *In re WTC Disaster Site*, 414 F.3d 352, 358 (2d Cir. 2005).

31. For a more comprehensive narrative account of the rescue, recovery, and cleanup effort, see THE 9/11 COMMISSION REPORT, *supra* note 1, at 278–323; Jean Macchiaroli Eggen, *Toxic Torts at Ground Zero*, 39 ARIZ. ST. L.J. 383 (2007) (describing the nature of environmental hazards at the WTC site).

32. Eric Lipton, *Injuries Few Among Crews at Towers Site*, N.Y. TIMES, Apr. 12, 2002, at B1.

33. See NY LAB. LAW §§ 240–42 (2007). New York Labor Law provides the commissioner with the power to impose liability for construction, repair and demolition work and has been said to establish strict liability. For a description of the relevant New York labor law and how it might apply to WTC site workers' claims, see George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?*, 112 PENN. ST. L. REV. 175 (2007).

34. *Graybill v. City of New York*, 247 F. Supp. 2d 345, 347–52 (S.D.N.Y. 2002).

35. *Spagnuolo v. Port Auth. of N.Y. & N.J.*, 245 F. Supp. 2d 521, 522–23 (S.D.N.Y. 2002).

36. See *Graybill*, 247 F. Supp. 2d at 346 (“Congress did not intend to oust state court jurisdiction

causation provides a useful framework for limiting the scope”<sup>37</sup> of jurisdiction and that it was insufficient merely to allege that “the accident took place on the WTC site.”<sup>38</sup> This is a rare instance in which the substantive tort principle of proximate cause was used (if only by analogy) to make a jurisdictional determination in the context of September 11th litigation.<sup>39</sup> As will be seen later, when event jurisdiction is an organizing principle of federalizing claims, the district judge will need to “front-end” proximate cause analysis or make proximate cause-like determinations in order to rule on jurisdiction.

### 1. The First Grouping—Claims of Respiratory Injury by On-Site Workers (21 MC 100)

Allegations of respiratory injury presented a more complicated jurisdictional challenge than *Graybill* and *Spagnuolo*. The first workers to allege respiratory injuries from the WTC site filed lawsuits in New York state court in 2002.<sup>40</sup>

The workers claimed that they suffered the injuries as a result of breathing air at the WTC site that was polluted by a multitude of toxins released during the collapse of the towers and the fires that burned there for months afterwards. They alleged that New York City, the PANYNJ, and private entities<sup>41</sup> were negligent because they failed to provide the workers with appropriate respiratory masks and safety gear.<sup>42</sup>

Eager to be included in the statutory liability cap, the defendants removed the cases to SDNY under the ATSSSA. Over the next several

in cases such as this involving injuries common to construction and demolition sites generally, and risks and duties not alleged to be particular to the special conditions caused by the terrorist-related aircraft crashes of September 11.”) (emphasis added).

37. *Id.* at 352.

38. *Id.*

39. This is not the first time that courts have resorted to proximate cause analysis in order to define the scope of federal jurisdiction. See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534–38 (1995) (examining the proximate cause of damage by a vessel to affirm a finding of federal admiralty jurisdiction).

40. *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d 357, 381 (S.D.N.Y. 2003), *aff’d in part*, 414 F.3d 352 (2d Cir. 2005).

41. *Id.* Private entity defendants included Silverstein Properties and the multitude of contractors and construction companies involved in the cleanup operation. See *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 540 nn.10–13 (S.D.N.Y. 2006).

42. *In re World Trade Ctr. Disaster*, 270 F. Supp. 2d at 361. See also Eggen, *supra* note 31. In a related case, it was alleged that to the extent that “the equipment was available[,] there was little effort to properly fit the masks, to educate workers regarding the risks, to overcome to considerable misinformation that had been put forth, or to enforce the equipment’s use by the workers.” Conk, *supra* note 33, at 200 (citing plaintiffs’ statement of facts).

months Judge Hellerstein received about 1200<sup>43</sup> such respiratory injury claims and grouped them alongside other personal injury claims.<sup>44</sup> The number of plaintiffs alleging respiratory injury had, however, grown so significantly that the court and the parties agreed that they warranted the creation of a separate master calendar designation.<sup>45</sup>

It was during this time that Judge Hellerstein first ruled on the motions to remand the cases to state court. Plaintiffs were most likely anxious to see the cases back in New York state court because it provided a forum which would be familiar with processing workers' compensation claims,<sup>46</sup> and, more importantly, a forum which was almost certainly free from the liability cap of the ATSSSA.

The district court ruling on subject matter jurisdiction attempted to split the difference. Judge Hellerstein accepted that the ATSSSA provided an adequate basis for federal question jurisdiction. The court's task, then, was to interpret the meaning of "resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001" of the ATSSSA.<sup>47</sup> Having already ruled that ordinary workplace accidents that occurred after September 11, 2001, itself were not sufficient bases of federal jurisdiction alone,<sup>48</sup> the court was left with the task of sorting out exactly how unique respiratory injuries were to the events of September 11th and how far removed in time the injuries could be from September 11th and still "arise from" events of that day.

The court held that "claims for respiratory injury based on exposures suffered at the World Trade Center site between September 11, 2001 and September 29, 2001 'arise out of,' 'result from,' and are 'related to' the attacks of September 11, 2001" because they involved the official search

---

43. See *In re World Trade Ctr. Disaster*, 456 F. Supp. 2d at 539 ("I ordered further that Plaintiffs file separate claims for each individual claimant, holding that the individual issues relevant to each claimant predominated over common issues.").

44. These cases were placed on the suspense docket along with all other September 11th-related cases. A few of the respiratory injury plaintiffs who filed claims during this period also filed claims with the VCF, and their claims were dismissed in April 2004 along with the other plaintiffs who had opted to avail themselves of the VCF procedure as an alternative to litigation. *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH), 2004 U.S. Dist. LEXIS 6780 (S.D.N.Y. Apr. 21, 2004) (order granting extension of suspense docket in part, dismissing claims in part).

45. *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Feb. 13, 2003) (order establishing master docket).

46. A few plaintiffs, however, did not move for remand and agreed with defendants that federal law governed the case. *In re World Trade Ctr. Disaster*, 270 F. Supp. 2d at 363 n.4.

47. ATSSSA, Pub. L. No. 107-42, § 408(b)(3), 115 Stat. 230 (2001), *reprinted in* 49 U.S.C. § 40101 note (Supp. III 2003).

48. See *supra* notes 34-38 and accompanying text.

and rescue effort.<sup>49</sup> All other claims alleging injuries that occurred after this period were remanded to state court because “[b]y September 29, 2001, that predominant task officially ended and workers’ efforts were focused on . . . clean-up of the World Trade Center site.”<sup>50</sup>

Recognizing that the plain language of the statute contains language of complete preemption,<sup>51</sup> the court identified its primary interpretive task as defining the scope of state law claims that are preempted by the federal cause of action established in the ATSSSA. Judge Hellerstein was particularly sensitive to the fact that a finding of preemption in these cases would displace not only ordinary state law tort claims, but also state labor law claims. He found that the ATSSSA lacked the clear congressional intent to preempt “such a strong and long-standing state policy” and to “oust the court having expertise interpreting [New York Labor Law].”<sup>52</sup>

Relying on the outer jurisdictional boundaries set by *Graybill* and *Spagnuolo*, Judge Hellerstein concluded that the jurisdiction over the workers’ claims needed to be limited to avoid a seemingly unlimited field of jurisdiction. At the same time, he acknowledged the legislative history that underscored the congressional intent to “promote efficiency” in the September 11th litigation and Congress’s intent to provide defendants, including New York City, with “much needed relief from potential liability arising out of the attacks on the World Trade Center . . .”<sup>53</sup> Judge Hellerstein thus sought a point in time that demarcated a shift from September 11th events to ordinary workplace events and held that “September 29, 2001 is a proper demarcation point and the World Trade Center site is a proper geographical limitation” because

[a]fter that point, or outside the World Trade Center site, the goals of demolition, clean-up and removal of debris were dominant, the traditional state interest in regulating the health and safety of employees in the work place re-emerged, and any federal interest in displacing traditional state police powers waned.<sup>54</sup>

The court then employed the tort doctrine of proximate cause to

---

49. *In re World Trade Ctr. Disaster*, 270 F. Supp. 2d at 361.

50. *Id.* at 372.

51. *Id.* at 368. The doctrine states that “if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily ‘arises under’ federal law.” *Id.* at 366 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 24 (1983)).

52. *Id.* at 374.

53. *Id.* at 371 (quoting 147 Cong. Rec. H7649 (daily ed. Nov. 1, 2001) (statement of Rep. Sensenbrenner quoting letter submitted by Mayor Rudolph Giuliani in support of the amendment)).

54. *Id.* at 374.

reinforce its holding that “the causal relationship with the terrorist-related aircraft crashes becomes attenuated, and duties and responsibilities associated with the workplace become predominant.”<sup>55</sup> Proximate cause thus returned to the court’s jurisdictional analysis as a way of linking the task of statutory interpretation with the more functional task of attempting to group cases sensibly for litigation purposes.

Several parties agreed with the court that, like the duty of care question generally, the question of subject matter jurisdiction was so important to how the litigation would proceed that it required early resolution. Finding that “the scope of federal jurisdiction in these cases involves a controlling question of law as to which there is a substantial ground for difference of opinion” and that an “immediate appeal also may materially advance the ultimate termination of the litigation,” Judge Hellerstein certified the issue for interlocutory appeal.<sup>56</sup>

The number of respiratory injury cases filed ballooned while the court waited for a definitive statement on jurisdiction from the Second Circuit. Judge Hellerstein denied certification of any class actions and required that each plaintiff file under a separate docket number in order to best organize pleadings and potential causation questions.<sup>57</sup> The individual complaints had begun to present extraordinary organizational challenges for Judge Hellerstein’s chambers, and he sought a way to engage the parties’ help in organizing the information about each litigant so that the information would be accessible to the court, the parties, and the public.<sup>58</sup> Charged with this task, plaintiffs’ and defendants’ committees negotiated a new set of Master Complaints that included a “check box” section.<sup>59</sup> The court hoped to collect data on, among other things, the nature of injuries alleged, the type of worker involved, where on the WTC site the worker was assigned, and the time period that he or she worked. Although the Federal Rules of Civil Procedure do not require this sort of detailed pleading, Judge

---

55. *Id.* at 377.

56. *Id.* at 381. As a technical matter, Judge Hellerstein could only certify those cases for appeal in which he had denied the motions to remand because a district court grant of remand for lack of subject matter jurisdiction is not appealable. See 28 U.S.C. § 1447(d) (2000).

57. *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 539 (S.D.N.Y. 2006).

58. Transcript of Status Conference at 3–6, *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Apr. 18, 2005) (on file with author); Transcript of Status Conference at 19–38, *In re Sept. 11 Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. July 13, 2005) (on file with author).

59. See *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Sept. 15, 2006) (order designating Check-Off (“Short Form”) Complaint Related to the Master Complaint); *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Aug. 8, 2005) (case management order).

Hellerstein urged the parties to consider the advantages to defining the contours of each case and of the litigation as a whole as early as possible.<sup>60</sup>

In July of 2005, the Second Circuit delivered an opinion interpreting the jurisdictional and preemptive scope of the ATSSSA in quite general terms,<sup>61</sup> holding that “Congress intended the ATSSSA to preempt at least the claims brought by the plaintiffs in the 35 cases dealt with in the district court’s opinion.”<sup>62</sup> The court not only emphasized the forceful language of the statute in displacing state law remedies, but also recognized the boundary issue because “the respective reaches of terms such as ‘arising out of,’ ‘resulting from,’ and ‘relating to’ are not self-evident.”<sup>63</sup> Comparing § 405 of the statute (VCF eligibility) with § 408 (creating the cause of action), the court concluded that the “resulting from *or relating to*” language in § 408 was clearly broader than “arising out of.”<sup>64</sup> Because the terms “resulting from” and “relating to” are ambiguous, the court turned to legislative history for support, and was persuaded of the statute’s expansive scope by statements from legislators who referred to “all lawsuits,” “all civil litigation,” and “all civil suits.”<sup>65</sup> The court then stated that “[t]he provisions of § 408 give no indication that Congress intended preemption to be limited to claims with respect to persons who were on the hijacked airplanes or who were present at one of the crash sites at the time of the crashes or immediately thereafter.”<sup>66</sup> The Second Circuit believed the causal connection between the events of September 11th and the respiratory injuries were “considerably more extensive than simple ‘but for’ causation.”<sup>67</sup> The court wrote:

As it requires no great stretch to view claims of injuries from inhalation of air rendered toxic by the fires, smoke, and pulverized debris caused by the terrorist-related aircraft crashes of September 11 as claims “relating to” and “arising out of” those crashes, we conclude that Congress

---

60. Transcript of Status Conference at 19–38, *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Apr. 18, 2005) (on file with author); Transcript of Status Conference at 5–7, *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Feb. 7, 2005) (on file with author).

61. As a technical matter, the court of appeals only had jurisdiction over the appeals of the plaintiffs challenging the denial of their request to remand the cases to state court. *In re WTC Disaster Site*, 414 F.3d 352, 363 (2d Cir. 2005). The Second Circuit held that the orders of remand issued by the district court were unreviewable under 28 U.S.C. § 1447(d). *Id.* at 363–71.

62. *Id.* at 375.

63. *Id.*

64. *Id.* at 376 (“[A] phrase such as ‘relat[ing] to’ is ‘clearly expansive.’” (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995))).

65. *Id.* at 377.

66. *Id.* at 376.

67. *Id.* at 378.



intended the ATSSSA's cause of action to be sufficiently expansive to cover claims of respiratory injuries by workers in sifting, removing, transporting, or disposing of that debris.<sup>68</sup>

Convinced that the respiratory injury plaintiffs all shared questions of fact and law with other claimants under the ATSSSA, the Second Circuit rehearsed the usual litany of reasons to consolidate cases, namely, the "undesirable effects that litigation of September 11 claims in the various state and federal courts would inevitably produce."<sup>69</sup> The circuit court did not address Judge Hellerstein's observation that accepting jurisdiction over a large open-ended class of litigants might have efficiency problems of its own.<sup>70</sup>

After this lengthy discussion of the statute's apparently clear preemptive force, the court acknowledged the prominent role that state law would continue to play in adjudication of the claims. It stated, "What ATSSSA itself displaces is not the substantive standards governing liability, but only the state-law damage remedies."<sup>71</sup>

Despite its confidence in interpreting the ATSSSA, the court declined to delineate the exact boundaries of the statute. "No doubt there will be some claims whose relationship to the terrorist-related aircraft crashes of September 11, 2001, is 'too tenuous, remote, or peripheral,' to warrant a finding that those claims 'relat[e] to' those crashes; *but we make no attempt to draw a definitive line here.*"<sup>72</sup>

The district court responded by extending jurisdiction to all cases covered by the reasoning of the Second Circuit,<sup>73</sup> and has since ruled on motions by some of the defendants concerning sovereign immunity

---

68. *Id.* at 377.

69. *Id.* at 378 ("These effects might include: inconsistent or varying adjudications of actions based on the same sets of facts; adjudications having a preclusive effect on non-parties or substantially impairing or impeding non-parties' abilities to protect their rights; victims or their survivors without any possibility of recovery when the limits of liability have been exhausted in other lawsuits; the difficulties in mediation when defendants are sued in multiple state and federal courts, and the waste of private and judicial resources in multiple state and federal courts hearing cases involving the same factual and legal issues." (quoting *Can. Life Assurance Co. v. Converium Rückversicherung (Deutschland) AG*, 335 F.3d 52, 59 (2d Cir. 2003))).

70. *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d 357, 378-79 (S.D.N.Y. 2003).

71. *In re WTC Disaster Site*, 414 F.3d at 380.

72. *Id.* at 381 (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995)) (emphasis added).

73. See *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH), 2005 U.S. Dist. LEXIS 14705, at \*8-9 (S.D.N.Y. July 22, 2005) (order following appellate remand extending jurisdiction).

defenses.<sup>74</sup>

## 2. Off-Site Workers (21 MC 102) and “Straddler” Plaintiffs (21 MC 103)

Following the Second Circuit decision, the jurisdictional problems had not been completely solved.<sup>75</sup> The district court had begun to receive a new variety of respiratory distress claims from workers who were employed in construction or cleanup efforts in the buildings and areas surrounding Ground Zero and scattered throughout lower Manhattan.

Like their earlier “on-site” counterparts,<sup>76</sup> the off-site claimants filed in state court and the defendants removed the cases to federal district court pursuant to the ATSSSA. In all, 190 of these plaintiffs allege to have worked both on and off the WTC site, and the district court created yet another Master Calendar docket number to accommodate their status.<sup>77</sup> The district court has not yet ruled on the jurisdictional issues. At present, the parties are proceeding as if subject matter jurisdiction exists and have drafted master complaints and case management orders to mirror those employed in the 21 MC 100 litigation.<sup>78</sup> One key difference between the two dockets is that the off-site litigants will not have access to the Captive Insurer that will fund the awards or settlements of plaintiffs suing the City and its contractors.

## 3. Appointment of Special Masters

By the fall of 2005, Judge Hellerstein’s concern for the enormity and complexity of the full scope of September 11th litigation before him increased. He expressed concern to the parties that the litigation would continue for a very long period of time and this was contrary to the

---

74. See *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520 (S.D.N.Y. 2006).

75. See *In re World Trade Ctr. Disaster Site Litig.*, 2005 U.S. Dist. LEXIS 14705, at \*9 (concluding that subject matter jurisdiction issues may be revisited upon future challenges).

76. The parties and district court agreed to a formal definition of what constituted the World Trade Center site. It is defined as “the 16-acre site including the sites of the buildings known as 1 World Trade Center, 2 World Trade Center, 3 World Trade Center (a/k/a the Marriott World Trade Center Hotel), 4 World Trade Center, 5 World Trade Center and 7 World Trade Center, as well as the surrounding plaza and underground shopping, parking, and public transit facilities.” *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Feb. 7, 2005) (case management order outlining timing and manner of discovery).

77. See *In re Combined World Trade Ctr. & Lower Manhattan Disaster Site Litig.*, No. 21 MC 103 (AKH) (S.D.N.Y. Mar. 28, 2007) (case management order).

78. See *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, No. 21 MC 102 (AKH) (S.D.N.Y. June 29, 2007); *In re Combined World Trade Ctr. & Lower Manhattan Disaster Site Litig.*, No. 21 MC 103 (AKH) (S.D.N.Y. Mar. 28, 2007); *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, No. 21 MC 102 (AKH) (S.D.N.Y. Mar. 21, 2007); *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, No. 21 MC 102 (AKH) (S.D.N.Y. Feb. 20, 2007).

congressional desire for a speedy and efficient resolution of the lawsuits. At this time, he contemplated appointing mediators to oversee one or more aspects of the litigation, especially with an eye toward some sort of a global settlement.<sup>79</sup>

Several attempts to mobilize this plan did not result in any appointments for the litigation as a whole. Judge Hellerstein was eventually able, however, to appoint Special Masters for the respiratory distress cases.<sup>80</sup>

### C. THE LIABILITY INSURANCE ENTANGLEMENT—03 CIV. 0332

The events of September 11th gave rise to numerous disputes between insureds and insurers and amongst the insurers themselves, and Judge Hellerstein accepted jurisdiction over the liability insurance litigation pursuant to the ATSSSA.<sup>81</sup>

As a preliminary matter, adjudicating the rights of the insureds and the responsibilities of the insurers was complicated by the change in ownership of the World Trade Center preceding the collapse of the towers.<sup>82</sup> This left the court with a combination of “binders” and completed insurance contracts.<sup>83</sup> As of September 11, 2001, the insurance coverage was still in

---

79. Transcript of Status Conference, *In re* Sept. 11th, No. 21 MC 97 (AKH) (S.D.N.Y. Sept. 8, 2005) (on file with author).

80. See *In re* World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 576 (S.D.N.Y. 2006).

81. Most of these cases did not come to Judge Hellerstein because they were not brought pursuant to the ATSSSA. See *supra* note 14 and accompanying text. In fact, many of these cases were filed in and remained in state court.

82. The PANYNJ sold the World Trade Center to Larry Silverstein through various entities known as Silverstein Properties or World Trade Center Properties in early 2001 after months of intense negotiations. Charles V. Bagli, *Deal Is Signed to Take Over Trade Center*, N.Y. TIMES, Apr. 27, 2001, at B1. The PANYNJ had wanted to divest itself of the WTC. The sale was accomplished by granting a ninety-nine year lease to Silverstein Properties and associated subsidiaries (World Trade Center Properties, etc.). *Id.*

83. As is typical in large real estate transactions, Silverstein sought insurance coverage for the property that was not finalized until after the deal had closed. The process of obtaining liability insurance was further delayed by the fact that the WTC had been owned and operated by the PANYNJ, an entity that enjoyed sovereign immunity due to its status as an intergovernmental agency. Therefore, the premises did not have a liability record and the insurance broker had difficulty obtaining bids from prospective insurers without this data. See *In re* Sept. 11th Liab. Ins. Coverage Cases, 458 F. Supp. 2d 104, 108–12 (S.D.N.Y. 2006). In such transactions, the insurers issue a “binder” to the insured that contains the typical and anticipated state-specific clauses for the property and risks to be insured. The parties then continue negotiations and the final policy is issued a few months later. Another feature of a large real estate transaction is the insurance “tower,” that is, the entity is insured by one large primary policy, and then is insured for additional sums by layers of excess insurers. Silverstein secured a primary and secondary “umbrella” policy from Zurich American Group (Zurich) and eight layers of excess insurance involving as many as twenty other insurers above that. *Id.* at 109. The aggregate policies totaled \$1 billion in coverage. The primary policy was a \$2 million per occurrence, \$4 million

various states of completion. Only a few of the insurers had issued final policies. The rest, including the primary insurer, had only issued binders, followed by scattered negotiation communications.<sup>84</sup> The situation was further complicated by the existence of two other towers of liability insurance, the insurers for PANYNJ (who still owned and operated aspects of the WTC site such as the PATH station), and the insurers for Westfield, the holding company that leased and operated the shopping mall space beneath the WTC site.<sup>85</sup>

Although Judge Hellerstein hesitated to accept jurisdiction of this case as part of the ATSSSA consolidation, the parties convinced him that resolution of the insurance dispute was integral to administration of the underlying cases. The court then found itself drawn into a bitter and complicated dispute beset by discovery difficulties and having little to do with the legal and factual questions of the underlying lawsuits.<sup>86</sup> In reaching its decisions, the court realized that it would have to make several purely hypothetical findings about the extent of coverage in the absence of clear contours of the underlying litigation and sought to avoid making such speculative rulings. On the other hand, the ATSSSA had linked the resolution of the underlying litigation inextricably to the limits of the available liability insurance coverage.<sup>87</sup> The course of the litigation and the possibility of reaching any sort of settlement will depend on knowledge of the available pool of insurance. These issues remain largely unresolved.

#### D. THE PROPERTY DAMAGE CASES (21 MC 101) AND THE SPECIAL CASE OF 7WTC

The ATSSSA authorized a federal cause of action for plaintiffs seeking redress for property damage as a result of the events of September 11th.<sup>88</sup> The plaintiffs were not, however, eligible to file claims for property damage before the VCF.<sup>89</sup>

The property damages claims proceeded alongside the personal injury and wrongful death cases under the heading 21 MC 97 for the first three

---

aggregate, and the Zurich umbrella covered \$50 million per occurrence in excess of the primary policy. *Id.* at 109–10.

84. *See id.* at 109.

85. *See id.* at 110, 116.

86. *See In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114 (S.D.N.Y. 2007) (order granting sanctions for pleadings and discovery abuses).

87. *In re Sept. 11th Liab. Ins. Coverage Cases*, 458 F. Supp. 2d at 128.

88. ATSSSA, Pub. L. No. 107-42, § 408(b)(1), 115 Stat. 230 (2001), *reprinted in* 49 U.S.C. § 40101 note (Supp. III 2003).

89. *Id.* § 405(c)(3)(B)(i).

years of the September 11th litigation.<sup>90</sup> This was unremarkable given the common issues of causation and duty of care along with similar discovery needs of the plaintiffs. As time passed, however, differences among the groups of plaintiffs emerged.

As a preliminary matter, the fact that the property damage plaintiffs were attached to the personal injury and wrongful death plaintiffs meant that the property damage plaintiffs had to accept a slower timeline for litigation. Although the court ruled on preliminary issues of duty of care and proximate cause on a Rule 12(b)(6) motion to dismiss standard, the court and the parties understood that the “real” work of moving the litigation forward could not begin until the VCF had closed and its attendant issues were settled.<sup>91</sup>

The property damage plaintiffs and the personal injury and wrongful death litigants did not always stand as one unified group. Although common issues remained, the property damage plaintiffs had their own agenda, particularly concerning damages. Moreover, on several occasions, the property damage plaintiffs expressed concerns that a high-visibility trial featuring the wrongful death plaintiffs might result in extremely high jury verdicts, thus cutting deeply into the liability cap; or that some of the personal injury and wrongful death plaintiffs would act as unreasonable “hold-outs,” thus preventing a reasonable global settlement plan.<sup>92</sup> In March 2005 the court ordered the creation of yet another Master Calendar docket, 21 MC 101, *In re September 11 Property Damage and Business Loss Litigation* to coordinate all property damage plaintiffs.

One class of property damage lawsuits presents unique issues—the insurers who were subrogees of the owners and occupants of the building 7 World Trade Center (“7WTC”).<sup>93</sup> Among the neighboring buildings to sustain structural damage on September 11th, 7WTC was the only building that was not directly hit but nonetheless collapsed completely. Building 7WTC housed a large trading floor for Citigroup as well as New York City’s Office of Emergency Management. Both entities relied upon massive oil tanks stored in the building’s basement to serve as emergency

---

90. Transcript of Status Conference at 2, 4–5, *In re Sept. 11th Litig.*, No. 21 MC 97 (AKH) (S.D.N.Y. Feb. 25, 2005) (on file with author).

91. See generally Transcript of Status Conference, *In re Sept. 11th*, Nos. 21 MC 97 & 21 MC 100 (AKH) (S.D.N.Y. Mar. 17, 2004) (on file with author).

92. See Transcript of Status Conference at 3–8, *In re Sept. 11th Litig.*, No. 21 MC 97 (AKH) (S.D.N.Y. Feb. 25, 2005) (on file with author).

93. Luckily, 7WTC was successfully evacuated before it collapsed. Therefore, the 7WTC cases involve only property damage claims and no personal injury or wrongful death claims.

power generators. This fact opened up new avenues of causation arguments for the defendants, and caused them to implead other parties whom they believed shared or bore either complete or partial responsibility.<sup>94</sup> The defendants made motions to dismiss based on these causation arguments, related duty of care arguments, and sovereign immunity arguments from state law and federal law sources. Judge Hellerstein granted some of these motions in part and dismissed a number of defendants, but the core cases remain and the causation questions remain open. The 7WTC cases have developed a sufficiently unique path such that they often meet apart from the other litigants for status conferences and oral arguments.<sup>95</sup>

#### E. SPECIAL DISCOVERY DIFFICULTIES

The September 11th litigants have faced unusual stumbling blocks in the discovery phase of litigation. The disputed documents are primarily those that the plaintiffs have sought from the aviation defendants and from the Transportation Security Administration (“TSA”). The TSA classifies many documents as “Sensitive Security Information” (“SSI”), and will not release these documents for discovery, or will only release redacted versions. The decision to classify material as SSI is an administrative decision, appeal of which can be made only to a federal circuit court.<sup>96</sup> This presents a two-fold problem. It denies litigants the documents they need, and it denies the trial judge the authority to referee discovery disputes—a classic district court function.<sup>97</sup>

As this Part has demonstrated, the group of lawsuits originally styled *In re September 11th Litigation* have become five distinct tracks of cases: the personal injury/wrongful death cases; the property damage cases; the liability insurance case; the on-site respiratory damage cases; and the off-site respiratory cases. These cases are in addition to the lawsuits and

---

94. See *In re Sept. 11 Prop. Damage & Bus. Loss Litig.*, 468 F. Supp. 2d 508, 510–11 (S.D.N.Y. 2006); *Indus. Risk Insurers v. Port Auth. of N.Y. & N.J.*, 387 F. Supp. 2d 299, 301 (S.D.N.Y. 2005). It also produced the strange situation in which the very entity for which the city claimed sovereign immunity, New York City’s Office of Emergency Management, was also the target of a new causation argument and the court authorized a period of limited discovery to create a factual record pertaining to the sovereign immunity issues. Interpreting the New York Defense Emergency Act, N.Y. UNCONSOL. LAW §§ 9101–9202 (2007), the court held that the City was entitled to immunity from suit. *In re Sept. 11 Prop. Damage & Bus. Loss Litig.*, 468 F. Supp. 2d at 518.

95. See, e.g., *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Jan. 10, 2007) (order regulating preliminary discovery proceedings).

96. 49 U.S.C. § 46110 (2000); *In re Sept. 11th Litig.*, 236 F.R.D. 164, 168 (S.D.N.Y. 2006). See also 49 C.F.R. § 1520.5 (2006) (defining SSI material).

97. See, e.g., Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 130 (2006).

motions that concerned the VCF. All groups present different legal, factual, and organizational challenges for the parties and for the court. Each case and group was brought under the ATSSSA, a statute that supposedly was passed to bring a speedy and efficient resolution to disputes arising out of the events of September 11th. No trial on issues of liability has been set in any action, nor has any proposal for settlement been presented to the court. The cases remain tied to each other by the statutory jurisdictional mandate and the liability insurance cap. The following chart summarizes the field of the September 11th litigation.

FIGURE 1. SURVEY OF THE 9/11 LITIGATION

= Personal injury and wrongful death claims     
  = Property damage claims  
 = Respiratory damage claims     
  = Insurance disputes

Group	ATSSSA	Plaintiffs	Defendants	Current Status
VCF Cases	Administrative relief authorized by ATSSSA.	Personal injury/wrongful death claimants; Some respiratory injury claimants.	Fund administrator; Competing claimants to decedent funds.	Closed.
21 MC 97	Yes.	Personal injury and wrongful death claims of those injured on September 11th at the WTC Site, the Pentagon, and in Shanksville, PA.	Airlines; airline security; WTC owners and operators (Silverstein Properties; Westfield Properties; PANYNJ).	Motion to dismiss denied. Some cases to proceed to trial on the issue of damages only. Discovery difficulties as to issues of liability.
Lawsuits against terrorists	No. Jurisdiction excluded by plain language of ATSSSA.	Personal injury/wrongful death claimants.	Terrorists and their alleged financial backers.	Cases pending.
21 MC 101	Yes.	Property damage claimants.	21 MC 97 defendants.	Discovery difficulties as to issues of liability. No trial date set.
7WTC	Yes.	Insurers of property damaged at 7WTC (primarily Con Edison and PANYNJ).	21 MC 101 defendants plus Citicorp; City of New York; architects, engineers and other design professionals.	Claims dismissed against design professionals; some issues of sovereign immunity settled; no trial date set.

21 MC 100	Yes (per Second Circuit opinion).	Workers at the WTC site in the months after 9/11 alleging respiratory injuries.	City of New York, PANYNJ; private contractors and construction companies at the WTC Site.	Initial jurisdictional issues litigated; some sovereign immunity issues decided; special masters appointed.
21 MC 102	Disputed.	Workers in lower Manhattan outside of the WTC Site alleging respiratory injuries.	Employers; private contractors and construction companies.	Validity of subject matter jurisdiction still pending.
21 MC 103	Disputed.	Workers who worked both on the WTC Site and elsewhere in lower Manhattan in the months after 9/11 alleging respiratory injuries.	Relevant 21 MC 100 and 21 MC 102 defendants.	Validity of subject matter jurisdiction still pending.
03 Civ. 332	Yes.	Liability insurers.	Primary and secondary liability insurers (as defendants and counterclaimants).	Early discovery difficulties settled; no trial date set.
Misc. Insurance disputes	No.	Property damage claimants/insurers.	Insurers.	Some cases closed; others proceeding in various federal and state courts.

### III. EVENT JURISDICTION

Part II narrated the course of the September 11th litigation from late 2001 to 2007. This Part situates the litigation in the context of more traditional doctrines of federal jurisdiction and federal preemption of state law causes of action. That is, it hypothesizes how the jurisdictional questions might have played out without the ATSSSA, and then examines exactly how the statute has shaped the contours of the litigation. Part III.A outlines the trend of congressional and judicial expansion of federal jurisdiction, and summarizes the possible bases for federal jurisdiction in the September 11th cases, focusing on “arising under” jurisdiction and protective jurisdiction. Part III.B introduces the label “event jurisdiction” to describe the motivating principle behind the federalization of claims arising from September 11th. The concept of protective coordination introduced in Part IV requires a careful evaluation of event jurisdiction, because in order for Congress to coordinate all cases in a single forum, there must first be federal jurisdiction over all claims so as to avoid parallel litigation in state



courts.

#### A. THE ATSSSA IN CONTEXT: THE TREND TOWARD BROADER FEDERALIZATION OF FORUM AND SUBSTANTIVE LAW

Many commentators have noted a trend toward federalization of forum.<sup>98</sup> A corollary phenomenon to the federalization of forum is the federalization of substantive areas of law that had once been state law claims.<sup>99</sup> The ATSSSA is a curious example of both of these trends. The ATSSSA specifies that the SDNY has exclusive jurisdiction over the September 11th cases<sup>100</sup> but the authority for a grant of federal jurisdiction is not obvious. While the statute mandates that state law is the applicable law of all actions brought under it,<sup>101</sup> the courts have turned to the doctrine of *complete preemption* of state law to uphold the statute's jurisdictional grant.<sup>102</sup> This Part addresses federal question jurisdiction from a different perspective. Instead of analyzing the scope of jurisdiction granted by the statute, this Part examines the authority for Congress to grant jurisdiction in this manner in the first place by exploring the controversial concept of "protective jurisdiction" in which federal courts have jurisdiction over nondiverse parties and the rule of decision is state law.

Shortly after Congress passed the ATSSSA, a few commentators began to identify the jurisdictional provisions of the act as an instance of protective jurisdiction.<sup>103</sup> Despite this academic commentary, the parties to

98. See, e.g., Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1314 (2004) ("Over the last several years, the Supreme Court repeatedly has found preemption of important state laws, and done so when federal law was silent about preemption or even when it explicitly preserved state laws."); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1414 (2006) ("[T]he Rehnquist Court, despite its federalist billing, has largely been an active promoter of the federalization of large bodies of substantive law and the law governing forum selection."); Stephen I. Vladeck, *The Increasingly "Unflagging Obligation": Federal Jurisdiction After Saudi Basic and Anna Nicole*, 42 TULSA L. REV. 553, 554 (2007) ("[T]he Court has taken an increasingly skeptical view toward doctrinal or statutory exceptions to federal jurisdiction . . .").

99. Samuel Issacharoff and Catherine Sharkey argue, for example, that judicially created limits on punitive damages in state law cases in state courts represents a "partial federalization" of these regulatory areas. See Issacharoff & Sharkey, *supra* note 98, at 1420–22.

100. See ATSSSA, Pub. L. No. 107-42, § 408(b)(1), 115 Stat. 230 (2001), *reprinted in* 49 U.S.C. § 40101 note (Supp. III 2003).

101. See *id.* § 408(b)(2).

102. The Second Circuit held that federal jurisdiction exists to the extent that the statute completely preempts state law. See *In re WTC Disaster Site*, 414 F.3d 352, 372–75 (2d Cir. 2005); *supra* notes 49–56 and accompanying text.

103. See Segall, *supra* note 9, at 363–64. See also Andrew C. Baak, Comment, *The Illegitimacy of Protective Jurisdiction Over Foreign Affairs*, 70 U. CHI. L. REV. 1487, 1507 n.110 (2003); Qian A. Gao, Note, *"Salvage Operations Are Ordinarily Preferable to the Wrecking Ball": Barring Challenges*

the September 11th litigation have not argued that the federal courts lack jurisdiction under this doctrine, nor has the district court itself raised the argument *sua sponte*.<sup>104</sup> In fact, it is not at all clear that the ATSSSA is an instance of protective jurisdiction.<sup>105</sup> The aim of this Article, however, is not simply to present a doctrinal argument for or against the statute's status as an instance of protective jurisdiction. Rather, it shows how the problems that have arisen during the September 11th litigation as a result of the ATSSSA's jurisdictional provisions are merely symptoms of a larger, contentious issue. The inquiry may be instructive of when the use of a protective jurisdictional statute is most effective. This, in turn, may illuminate some of the current theories of protective jurisdiction.

The problem of protective jurisdiction emerges from the fact that in some instances, Congress establishes federal jurisdiction without identifying a specific underlying federal right or defense,<sup>106</sup> or establishes federal jurisdiction with a specific mandate that state law will furnish the substantive rules of decision.<sup>107</sup> The Supreme Court first approved this sort of jurisdictional grant in *Osborn v. Bank of the United States*,<sup>108</sup> holding that Congress was authorized under Article III of the Constitution to grant federal jurisdiction over all cases involving the National Bank, even if the claim was governed by state law and the parties were not diverse.<sup>109</sup> Since that time, scholars and jurists have debated the rationale and scope of Justice Marshall's decision in *Osborn*.<sup>110</sup> The theory used to describe Congress's power to grant jurisdiction over these cases has come to be known as "protective jurisdiction,"<sup>111</sup> a phenomenon that "tends to arise in situations in which Congress has authorized a federal forum, the accepted minimum requirements for a case to arise under federal law are not met, and no other basis for federal jurisdiction can be found under Article III of

---

to *Subject Matter Jurisdiction*, 105 COLUM. L. REV. 2369, 2400 (2005); Erin Elizabeth Terrell, Note, *Foreign Relations and Federal Questions: Resolving the Judicial Split on Federal Court Jurisdiction*, 35 VAND. J. TRANSNAT'L L. 1637, 1639 n.5 (2002).

104. Theoretically, any court at any time could consider the basis for federal jurisdiction and dismiss the case for lack of subject matter jurisdiction. See 28 U.S.C. § 1331 (2000).

105. See *infra* notes 120–31 and accompanying text.

106. See *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 257 (1992) (upholding federal jurisdiction over state law claims in which the Red Cross is a party because it as an organization chartered by the federal government).

107. See 42 U.S.C.A. § 2210(n)(2) (West 2008). See also Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 558–65 (1983).

108. *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 824 (1824).

109. *Id.* at 823.

110. See Goldberg-Ambrose, *supra* note 107.

111. See *id.* at 542–43; Segall, *supra* note 9, at 364.

the Constitution.”<sup>112</sup>

Judges and commentators have defined protective jurisdiction according to a variety of criteria.<sup>113</sup> Some view protective jurisdiction “as a necessary and proper means of furthering the objects of federal legislative power identified in [A]rticle I.”<sup>114</sup> In other words, the boundaries of constitutional “arising under” jurisdiction are coterminous with Congress’s legislative power. In the judiciary, Justice Jackson was the main proponent of this theory in his *National Mutual Insurance Co. v. Tidewater Transfer Co.* plurality opinion.<sup>115</sup> Finding that Congress “has deliberately chosen the [federal] district courts as the appropriate instrumentality through which to exercise part of the judicial functions incidental to exertion of sovereignty”<sup>116</sup> over the District of Columbia, Justice Jackson concluded that Congress was appropriately exercising its legislative powers.<sup>117</sup>

The concurring and dissenting justices argued that Justice Jackson relied on shaky precedent<sup>118</sup> due to his use of cases that have “since been discredited.”<sup>119</sup>

Some proponents of this sort of theory argue that the Article I power to preempt state law necessarily includes the “lesser” power to create federal jurisdiction.<sup>120</sup>

---

112. Goldberg-Ambrose, *supra* note 107, at 546–47.

113. These definitions emerge from consideration of different instances of purported protective jurisdiction and the reasoning behind judicial approval of federal jurisdiction in each case; thus the scholarship includes proposed definitions of protective jurisdiction as well as specific constitutional theories to justify (or argue against) its existence. For example, in a leading article on the subject, Carole Goldberg-Ambrose identified three major theories of protective jurisdiction: Effectuation Theory, the Greater Power Theory, and the Partial Occupation Theory. *Id.* at 583–95.

114. *See id.* (describing what the author calls the “Effectuation Theory”).

115. *See Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 588–604 (1949). The Court considered the constitutionality of an act extending the diversity jurisdiction statute, 28 U.S.C. § 1332, to include jurisdiction over suits between citizens of the District of Columbia and the States or Territories. Two Justices found that the statute satisfied the constitutional diversity provision by arguing that the District was a State. *Id.* at 617–26 (Rutledge, J., concurring). Justice Jackson wrote the other plurality opinion holding that protective jurisdiction existed. *Id.* at 583–604 (Jackson, J., plurality opinion).

116. *Id.* at 591.

117. *Id.* (“[U]nless we are to deny to Congress the same choice of means through which to govern the District of Columbia that we have held it to have in exercising other legislative powers enumerated in the same Article, we cannot hold that Congress lacked the power it sought to exercise in the Act before us.”).

118. *Id.* at 610–11 (Rutledge, J., concurring).

119. *See* Goldberg-Ambrose, *supra* note 107, at 584.

120. *See* Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948) (“Where . . . Congress . . . can declare as federal law that contracts of a given kind are valid and enforceable, it must be free to take the lesser step of drawing suits upon such contracts to the district courts without displacement of the states as sources of the

Congress echoed these sentiments in the passage of the ATSSSA. The strongest argument was the threat that the aviation industry would collapse under the weight of crushing jury verdicts in thousands of lawsuits.<sup>121</sup> This justification arguably was weakened when Congress amended the statute to include *all* defendants in the liability cap including the City of New York and other ground defendants, entities that attracted little or no attention as potential subjects of financial collapse. Congress also appeared motivated to provide a federal stage for the resolution of disputes arising from such a prominent national tragedy. It is harder, however, to conjure an Article I or Article III area of competence merely from the fact that the September 11th attacks struck at the emotional and political heart of Americans. One could argue instead that Congress sometimes has an interest in ensuring that a certain group of cases are litigated together in one forum. In order to accomplish this, it must first ensure that the federal forum has subject matter jurisdiction over all relevant causes of action. This provides the justification for permitting state claims to be litigated in federal court as a matter of supplemental jurisdiction<sup>122</sup> or pursuant to bankruptcy jurisdiction.<sup>123</sup> This raises the question of whether the concept that this Article labels “protective coordination” is enough of a federal interest to justify federal subject matter jurisdiction absent any other attendant federal claim or defense. This question would probably remain largely academic because any coordination of cases by Congress would likely take place in the context of a statute addressed at a specific concern, and the analysis would then return to the federal nature of the underlying problem.

The protective jurisdiction arguments do not end with congressional intent, however. It might be that the ATSSSA itself provides sufficient internal logic to escape the label of protective jurisdiction. First, the creation of the VCF could qualify as satisfying the constitutional requirements of a theory of protective jurisdiction known as the “Partial Occupation Theory” which would “limit protective jurisdiction to subject areas in which Congress has already undertaken some degree of substantive

---

operative, substantive law.” (citation omitted)). Carole Goldberg-Ambrose calls this variation on the Article I powers theory the “Greater Power Theory.” Goldberg-Ambrose, *supra* note 107, at 589. On this account, cases arise under federal law “whenever Congress has the power to enact substantive rules to govern them, but chooses instead to confer jurisdiction on the federal courts and rely on state-made rules.” *Id.*

121. 147 Cong. Rec. H5892 (daily ed. Sept. 21, 2001) (statement of Rep. Spratt).

122. 28 U.S.C. § 1367 (2000).

123. See 28 U.S.C. § 1334(b) (2000), which provides in full:

Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

regulation.”<sup>124</sup> Locating the source of authority for protective jurisdiction in Article III, proponents of this theory argue that this power was justified when “there is an articulated and active federal policy regulating a field . . . .”<sup>125</sup> Here, protective jurisdiction gives Congress the opportunity to achieve some degree of uniformity without imposing its own specific rules of decision.<sup>126</sup>

By establishing the VCF as a remedy with federally created rules of decision and administration by a federally authorized Special Master, the ATSSSA jurisdictional grant is simply a complement to an area in which Congress has already regulated at the substantive law level. The problem with this argument is that the ATSSSA jurisdictional grant for lawsuits is broader than the claims eligible for the VCF. Suits for property damage, for instance, are explicitly excluded from the VCF. Moreover, the Second Circuit explicitly held that the personal injury and wrongful death lawsuits eligible for federal jurisdiction occupied a broader field than those eligible for VCF claims.<sup>127</sup> Therefore, it is unclear that Congress actually has engaged in substantive regulation of the “field” of lawsuits outside those eligible for the VCF.<sup>128</sup>

The second argument for jurisdiction internal to the ATSSSA is that the liability cap adds an element of substantive regulation to the law, thus removing it from the realm of “pure jurisdictional statutes.” In *Mesa v. California* the Supreme Court stated that a “pure jurisdictional statute” cannot by itself support federal jurisdiction.<sup>129</sup> The statute in question, 28

---

124. Goldberg-Ambrose, *supra* note 107, at 592. See also Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 184 (1953) (defining protective jurisdiction as including cases brought in federal court “where no construction or enforcement of federal law is required—that is, where the substantive law is not national, but state”). Mishkin thought that *Osborn* represented an instance of protective jurisdiction because Congress was justified under the “arising under” clause of Article III to “use the ‘inferior’ federal courts as a means of protecting interests around which it proposes to throw its cloak.” *Id.* at 188. He suggested that the purpose of protective jurisdiction “would be the protection of some congressionally favored interest by exploiting the institutional differences between the federal and state courts.” *Id.* at 184.

125. Mishkin, *supra* note 124, at 192; Segall, *supra* note 9, at 383 (offering a stronger version of this theory, suggesting that “Article III authorizes Congress to enact pure jurisdictional statutes if doing so furthers legitimate Article I concerns”).

126. Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 19–20 (1957).

127. *In re WTC Disaster Site*, 414 F.3d 352, 375–76 (2d Cir. 2005).

128. *But see O’Connor v. Commonwealth Edison Co.*, 770 F. Supp. 448, 452 (C.D. Ill. 1991) (“[I]t is clear that Congress could have preempted all state law and common law causes of actions involving nuclear incidents or nuclear power under the commerce clause of Article I, Section 8 of the United States Constitution as long as Congress provided an alternative remedy for potential plaintiffs.” (citing *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 87–89 (1978))).

129. *Mesa v. California*, 489 U.S. 121, 136 (1989) (citation omitted).

U.S.C. § 1442(a), allows federal employees to remove state court traffic prosecutions from state to federal court.<sup>130</sup> The Court held that removal was improper unless the defendants asserted a federal defense. The federal element could not come from § 1442(a) alone because it “is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant; . . . [s]ection 1442(a), therefore, cannot independently support [Article] III ‘arising under’ jurisdiction.”<sup>131</sup> The ATSSSA furthers several substantive goals, most notably, the limitation of liability of the airlines and other defendants. Thus, it is unlikely that the term “pure jurisdictional statute” would apply.

In light of these justifications, it is possible that the statute occupies the murky category of constitutionally permissible protective jurisdiction. But the real question is, does the existence of the liability cap change the remedy in such a significant way that it has, in fact, changed the underlying state law cause of action? The liability cap does not *change* the remedy per se; it simply sets an upward limit on the damages available to all litigants. In this way, the liability cap does not look terribly different from the federal judicially created limits on punitive damages in state law lawsuits.<sup>132</sup> On the other hand, one might argue that the real force of substantive state law regulating primary conduct lies in the ability of states to enforce these standards through the remedies they impose.

It may also be understood as symptomatic of a growing hostility at the federal level toward litigation.<sup>133</sup> Congress is authorized under Article III to grant the federal courts jurisdiction over cases that arise under federal law.<sup>134</sup> Congress has used this power to create a general grant of jurisdiction to the federal courts for all cases “arising under the

130. 28 U.S.C. § 1442(a) (2000).

131. *Mesa*, 489 U.S. at 136.

132. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (holding that “grossly excessive” punitive damage awards violate the Due Process Clause of the Fourteenth Amendment). Undoubtedly, the punitive damages issue does not raise the problem of protective jurisdiction because it is an example of partial federalization in which some sort of federal law limits state law as applied in state court. See Issacharoff & Sharkey, *supra* note 98, at 1420–28.

133. See Conk, *supra* note 33, at 183 n.28; Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1152–53 (2006) (“[T]he Court has shown its greatest sympathy for federalism doctrines that protect the states from litigation and has shown almost no interest in developing new doctrines that provide the states with greater autonomy . . . if [it] could conceivably be used to develop a more litigation-friendly environment.” (citations omitted)). See also Chemerinsky, *supra* note 98, at 1315 (“The Court has eagerly found preemption of state laws regulating business . . . . [M]ost of [its] decisions invalidating federal laws have struck down civil rights laws . . .”).

134. U.S. CONST. art. III, § 2.

Constitution, laws, or treaties of the United States,”<sup>135</sup> although this grant of jurisdiction is narrower than the constitutional limits because the federal issue must appear on the face of the plaintiff’s well-pleaded complaint.<sup>136</sup> Congress can also grant jurisdiction more directly by creating a substantive federal right or defense, and affirmatively grant federal courts jurisdiction over its enforcement.<sup>137</sup>

The ATSSSA prioritizes federal interests by ensuring a federal forum for the litigation and by shaping the substantive rules of decision.<sup>138</sup> Samuel Issacharoff and Catherine Sharkey provide a useful model for understanding the interplay of jurisdiction and preemption in the context of federalism. They suggest thinking of the problem as a two-by-two matrix with substantive and procedural dimensions. Actions by Congress to “exert a federal interest” thus can be described as falling into one of four quadrants: “At one pole are statutes . . . in which field preemption of the substantive law is accompanied by exclusive federal-court jurisdiction. . . . At the other extreme are Dormant Commerce Clause cases in which the Court has to define the federal interest in the absence of congressional action.”<sup>139</sup> The ATSSSA falls, for the most part, into “Quadrant II,” the group of cases in which Congress has decided to centralize jurisdiction in federal courts, but has not established any substantive federal law to provide the rules of decision.<sup>140</sup>

One recent illustration of the federalization of jurisdiction is the Class Action Fairness Act of 2005 (“CAFA”)<sup>141</sup> which authorized a substantial expansion of federal jurisdiction over traditionally state law claims. CAFA’s proponents touted the statute as a national remedy for class action “abuses” in state courts in which state law procedural devices were blamed for empowering litigants to bring “nationwide” class actions in states with plaintiff-friendly law.<sup>142</sup> Obtaining class certification in federal court under

---

135. 28 U.S.C. § 1331 (2000).

136. See, e.g., *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 14 (1983) (“[A] case may not be removed to federal court on the basis of a federal defense.”); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (outlining the well-pleaded complaint rule).

137. See §§ 1330, 1333–1365. Other specific grants of federal jurisdiction are “scattered throughout the United States Code.” 32A AM. JUR. 2D *Federal Courts* § 884 (2007).

138. Congress did not replace state law with a new regulatory regime, but it did change the application of state law by instituting the liability cap. See *infra* Part V.C for a reflection on such liability caps.

139. Issacharoff & Sharkey, *supra* note 98, at 1357.

140. See *id.* at 1415.

141. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.) [hereinafter CAFA].

142. See, e.g., *NLJ Roundtable: Class Action Fairness Act*, NAT’L L.J., May 16, 2005, at 18

Federal Rule of Civil Procedure 23 is perceived to be a more stringent standard. The statute allows for easier removal of class actions to federal court by amending the diversity jurisdiction statute to allow minimal diversity and a class-wide amount in controversy of five million dollars.<sup>143</sup>

CAFA is an example of a congressionally created widening of federal jurisdiction. The Supreme Court has interpreted existing statutory and judge-made jurisdictional doctrines to broaden federal jurisdiction. The Court recently resolved disputes about the scope of diversity jurisdiction,<sup>144</sup> supplemental jurisdiction,<sup>145</sup> and the probate exception to federal bankruptcy jurisdiction<sup>146</sup> in favor of a broader interpretation of each. In the realm of arising-under jurisdiction, the Court expanded the *Merrell Dow*<sup>147</sup> doctrine for determining when a well-pleaded complaint stated a federal cause of action.<sup>148</sup> The Court also narrowed the ability of lower courts to rely on the *Rooker-Feldman*<sup>149</sup> doctrine as a tool of dismissing cases for lack of jurisdiction.<sup>150</sup>

Protective jurisdiction is such a highly charged concept because it sits at the uncomfortable intersection of federal and state regulatory regimes. It has been suggested that the Court does a disservice when it perpetuates the

---

(statement of John Beisner, Partner, O'Melveny & Myers LLP); Issacharoff & Sharkey, *supra* note 98, at 1416 (considering CAFA to reflect "the broader concern about the need for federal oversight of legal claims that affect the entire national market").

143. CAFA § 4(a)(2) (adding new 28 U.S.C. § 1332(d)(2)).

144. See *Wachovia Bank v. Schmidt*, 546 U.S. 303, 306–07, 318 (2006) (holding that, for purposes of diversity jurisdiction, a bank is located in the state where it has its main offices); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 (2005) (upholding diversity jurisdiction when named defendant is diverse but unnamed prospective defendants are not).

145. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 566–67 (2005) ("[T]he threshold requirement of § 1367(a) is satisfied in cases . . . where some, but not all, of the plaintiffs in a diversity action allege a sufficient amount in controversy. . . . [Section] 1367 by its plain text . . . authorized supplemental jurisdiction over all claims by diverse parties arising out of the same Article III case or controversy, subject only to enumerated exceptions . . .").

146. *Marshall v. Marshall*, 547 U.S. 293, 299–300 (2006).

147. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804 (1986).

148. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 319–20 (2005). This was a state law quiet title action that involved the interpretation of federal tax laws to determine if notice by certified mail is adequate. *Id.* at 311. The Court upheld federal jurisdiction, but confined the holding to such "rare" state law cases that "involve[] contested issues of federal law" indicating that "jurisdiction over actions like *Grable's* would not materially affect, or threaten to affect, the normal currents of litigation." *Id.* at 319–20.

149. Under the *Rooker-Feldman* doctrine, lower federal courts lack jurisdiction to review state court judgments. See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

150. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292–94 (2005) (holding that the *Rooker-Feldman* doctrine does not bar proceedings in federal court with proper jurisdiction because a state court judgment currently exists).



idea that regulatory and adjudicatory spheres can be neatly divided between federal and state authority. Lawmakers and judges should instead become more comfortable with the inescapable reality that there are large “gray areas” of interjurisdictional competence in both the hypothetical and real worlds.<sup>151</sup> The role of the courts should be to interpret and mediate this space so that state and federal authorities can cooperate with certainty. Under this view, the exercise of protective jurisdiction and the ATSSSA promotes a sort of coregulation by state and federal authorities.<sup>152</sup> The state lawmakers retain their interest in defining the primary conduct of actors within their jurisdiction. The federal lawmakers in turn guard national interests by providing select litigants with the perceived advantages of a federal forum and a backstop on remedies that could cripple an industry of national importance.<sup>153</sup>

Others might read the ATSSSA as a more sinister type of jurisdictional grant. From this perspective, the statute, just like protective jurisdiction, is merely a way for the federal government to pay lip service to state regulatory authority while imposing a procedural regime that radically alters the outcome of lawsuits brought under the state law in question. The ATSSSA does not purport to change any state law standards of conduct, rather it consciously adopts them. The federal force is found in the limitation of liability and the exclusivity of the federal forum. This sort of “stealth preemption” of state law is in fact *more* pernicious than a traditional preemption of state law because “[t]he authors of these proposals can thus call themselves ‘federalists’ and can declare that states remain the font of [relevant state] law [and] [i]t is only by looking deeper . . . that one can begin to see how they might interfere with the states’ abilities to enforce and make their own laws.”<sup>154</sup>

This is the raw nerve that protective jurisdiction touches. It is as if the commentators who analyze it are simply rehearsing the dogma that protective jurisdiction by definition must be the adoption of a wholly state law claim. The constitutional and policy-oriented discomfort, however, has its source in the intuition that the state law cause of action has somehow

---

151. See Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 567–96 (2007).

152. This is consistent with the calls by some academics for the recognition and further use of multijurisdictional solutions. See Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1226–35 (2004).

153. See Segall, *supra* note 9, at 391–93.

154. Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 64–65 (1999) (arguing that federally mandated alterations to state court procedure are a sort of “stealth preemption” of state law regimes).

changed by virtue of its transformation into a federal cause of action. Perhaps protective jurisdiction, then, is just preemption by another name,<sup>155</sup> another form of stealth preemption of state law. As one scholar cautions, “Stealth preemption, though less visible than substantive preemption, is far more destructive of our political system, *precisely because it is so invisible and little understood.*”<sup>156</sup>

## B. EVENT JURISDICTION

The jurisdictional puzzles and other practical problems that the ATSSSA created cannot be attributed entirely to problems of protective jurisdiction, nor can they be explained by the underlying worries that motivate criticism of that and other doctrines concerning federal subject matter jurisdiction. The problem with the ATSSSA is that Congress has engaged in a different sort of jurisdictional rationale that this Article labels “event jurisdiction.”

In event jurisdiction, Congress has not decided that there is a type of conduct, or industry, or type of cause of action that is of national importance and therefore deserving of federal jurisdiction. Instead, Congress has chosen to designate a certain event as one of national significance, and therefore in need of federal jurisdiction.

The problem with this approach is that it is unlikely that the event itself is the reason for lawsuits following thereafter. It is, rather, the *harms* that emerge as a result of the event that give rise to the need for legal recourse. And these harms, though related to and emerging from an event of national significance, may not themselves be the sort of harms that are appropriate subjects of national regulation or a federal forum. The ATSSSA is the first “fully active” instance of event jurisdiction—that is, Congress has created federal jurisdiction based on an event and this has been followed by litigation. There are, however, statutory provisions that under certain circumstances would produce the result of event jurisdiction. For example, should the country experience a major nuclear attack or accident, the litigation following such a disaster would take place in federal court according to a statute that federalizes claims along event jurisdiction principles.<sup>157</sup>

---

155. See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 *YALE L.J.* 1564, 1631 (2006) [hereinafter Resnik, *Law's Migration*] (“Today’s foreign affairs preemption has become so broad that it resembles what federal courts’ scholars call ‘protective jurisdiction’ . . .”).

156. Parmet, *supra* note 154, at 3 (emphasis added).

157. 42 U.S.C.A. § 2210(n)(2) (West 2008). For a more detailed discussion, see *infra* notes 243–

Because federal courts are courts of limited jurisdiction, event jurisdiction is subject to two lines of inquiry: first, whether Congress has the constitutional authority to grant the jurisdiction in question and, second, whether it is a good idea as a policy matter to expand federal jurisdiction to cover the class of cases at hand. Federal diversity jurisdiction is a nice example of this. Complete diversity is required for subject matter jurisdiction in ordinary state law cases litigated in federal court.<sup>158</sup> For certain types of cases where Congress wants to ease access to federal courts, it has established minimum diversity as the standard for meeting the subject matter jurisdiction requirement.<sup>159</sup> Although Congress has the authority to grant subject matter jurisdiction over cases with minimum diversity,<sup>160</sup> it is still worth debating whether such grants are sensible as a policy matter.<sup>161</sup>

Expansion of diversity jurisdiction enlarges the number of state law cases eligible for litigation in a federal forum. Over the past few decades, scholars have proposed a variety of methods for understanding the expanding grant of federal jurisdiction, as well as increasing federal substantive regulation over a field that was traditionally considered an area of state law.<sup>162</sup> Most of these theories assert that the emergence of national markets for consumer products or financial securities, for example, warrant uniform regulation, or at the very least, a judicial system capable of producing uniform results in procedure. CAFA, for example, might reflect the fact that the class action decision of one state court could have “spill-over effects” on the commerce and laws of many other states.<sup>163</sup>

---

52 and accompanying text.

158. 28 U.S.C. § 1332(a) (2000); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

159. See, e.g., *Multiparty, Multiforum Trial Jurisdiction Act of 2002*, 28 U.S.C.A. § 1369 (West 2008) (providing for expanded federal jurisdiction over mass accident cases by loosening the diversity jurisdiction requirements).

160. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 n.13 (1978).

161. For a comprehensive policy discussion of minimal diversity, see C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613, 684–92 (2004).

162. See Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303 (1994) (preferring a structural account of federalism over a normative or content-based view of the division of authority); Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL’Y REV. 187 (1996); Judith Resnik, *Afterword: Federalism’s Options*, 14 YALE L. & POL’Y REV. 465, 485–94 (1996) [hereinafter Resnik, *Afterword*] (tracking the development of and debate over boundaries between federal and state authority); Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL’Y REV. 227 (1996).

163. See Issacharoff & Sharkey, *supra* note 98, at 1371, 1416–17. See also C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487, 490 (2006) (concluding that “(1) Congress has inappropriately attempted to equate the

Event jurisdiction, however, defies such analysis. At first blush, an event such as a large-scale catastrophe might appear to be a solid reason for federalizing causes of action. Catastrophes predictably generate litigation, and Congress might want to take action to manage the scope of these cases. Like the legislators after September 11th, lawmakers in the future might reasonably believe that by eliminating parallel litigation in federal and state courts they would increase the efficiency of the litigation. With cases proceeding in a single court system (and possibly before a single forum), Congress could reduce the process costs associated with duplicative discovery, inconsistent rulings, and a lack of uniformity across settlements and jury awards. Given that postcatastrophe litigation is likely to be both very extensive and highly visible, packaging the cases together in a federal forum presumably would mitigate the high procedural costs associated with sprawling litigation.

It is easy to see the national interest in protecting the aviation industry from financial collapse in the personal injury and wrongful death cases. But it is harder to articulate the federal interest in adjudicating a toxic tort that affects workers local to one state or region. As the workers' respiratory injury claims demonstrate, not every toxic tort has the "spill-over" effects to neighboring states that would ordinarily prompt a call for a national remedy or federal forum. The claims instead allege misconduct in the supervision of a workplace, the regulation of which falls solidly in the realm of traditional state functions. To the extent that one might suggest an enlarged national role for regulation of the workplace torts, these arguments should be based upon a unified account of workplace safety that involves national interests, not piecemeal instances of workplace accidents that capture the national imagination.

Event jurisdiction robs litigants and courts of the ability to discern state and national interests emerging from various aspects of a tragedy. Instead of focusing on an analysis of what is appropriately federal and what

---

alleged adverse interstate commerce effects of what it terms 'interstate cases of national importance' with the purposes of the Diversity Clause; and (2) Congress has exceeded its powers to the extent it has attempted to justify the 2005 Act's jurisdiction-expansion provisions as 'necessary and proper' to achieve the purposes of Constitutional provisions external to Article III itself, such as the Commerce Clause") (citations omitted); Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261, 1262-63 (1991) (arguing that "preferences for uniform national real estate law . . . seem especially out of place"). *But see* Resnik, *Afterword, supra* note 162, at 482 ("Global trading, national and transnational companies, national law firms, the Internet, a population of which 17 percent move annually and of which some 40 percent do not live in the state of their birth—none of these are easily categorized as belonging either singularly to one state or exclusively to the national government.").

is appropriately state, event jurisdiction requires courts to engage first in an act of statutory interpretation. They will be forced to decide what Congress meant when it defined the event in question, and they will then have to decide how closely related the lawsuits are to the event. The answers to these questions may or may not map onto a more logical understanding of what constitutes an appropriate subject of federal regulation or federal forum. This might be because Congress itself has not engaged in a meaningful debate about the implications of expanding federal jurisdiction because it was focused on the national character of an *event* rather than the interstate aspect of conduct to be regulated.

The flaw in this reasoning is that federalization of claims around the category of a single event is very likely to be both over- and underinclusive. Event jurisdiction is overinclusive in the sense that it anticipates that certain cases are related when, as the litigation unfolds, it turns out that they are not related in a manner that would normally call for consolidation. As the September 11th litigation has shown, the harms resulting from a single event produce results that affect different litigants in different ways. In the event that these federalized claims are in fact consolidated before a single judge, this might actually slow down rather than speed up the litigation process, as one group of litigants must step aside while the judge addresses issues pertaining to other members of the group. If the cases proceed before different judges, it appears that little has been gained in the name of procedural efficiency by simply federalizing the cases.<sup>164</sup> Different trial courts would still require the intervention of an appellate court to ensure consistent decisions, and without an underlying substantive federal cause of action, the difficult choice of law problems might prevent uniformity of outcomes anyhow.<sup>165</sup>

Event jurisdiction is also likely to be underinclusive because of litigants who appear to have only a tenuous relationship to the event in question, but whose claims are actually related to those litigants whose claims have already been federalized. This is especially likely to be true when a catastrophic event produces environmental damage that is far-reaching both in time and in geography. These are claims that may (or may not) benefit from consolidation, but are packaged together based on their relationship to an event, rather than on their relationship to each other. So

---

164. The exception, of course, is if Congress has created a substantive cause of action or a remedy that somehow alters the state law regime in a manner that furthers some other interest.

165. CAFA has been criticized for intensifying these sorts of choice of law problems. See Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1840–41 (2006).

long as some cases remain in state court and others are in federal court, the efficiency gains which Congress had hoped for are lost, and process costs may in fact increase due to litigation over the scope of subject matter jurisdiction.

Once the jurisdictional category has been drawn as a rigid rule set in reference to a single event, the “relatedness” question becomes one of statutory interpretation, rather than a function analysis of which cases would benefit from coordination. Statutory interpretation is likely to be even more difficult in these cases since Congress presumably passes such legislation in a hasty reaction to a devastating event.<sup>166</sup> The ATSSSA illustrates this truncated process. As the Second Circuit observed, “[t]he legislative history is understandably sparse, given the swiftness with which Congress acted after the events of September 11; there apparently were no committee reports prior to the ATSSSA’s initial passage, and only a conference committee report prior to the Act’s amendment.”<sup>167</sup>

The indeterminacy of the jurisdictional analysis is evident in the September 11th litigation thus far. At the conclusion of its opinion in *In re World Trade Center Disaster Site*, the Second Circuit conceded that it did not have a clear answer to the question of what the jurisdictional boundaries of this “event” were. As the off-site respiratory injury cases show, the jurisdictional litigation is already doomed to repetition. Suppose that the district court or the Second Circuit holds that injuries sustained by workers clearing debris and cleaning buildings around lower Manhattan but not directly on the WTC site are not sufficiently related to the events of September 11th so as to “arise from” the terrorist attacks as required by the statute. Such an interpretation of the ATSSSA might be appropriate given its text and legislative history. The underlying claims themselves, however, seem to be no different from the on-site cases, save for the fact that they occurred a few blocks away.<sup>168</sup>

These difficulties expose the problem inherent in federalizing claims arising out of an event. The only way to avoid extensive litigation over the boundaries of jurisdiction or to avoid a seemingly arbitrary division of cases between state and federal court is to federalize an enormous swath of

---

166. For a broader analysis of the relationship among fear, risk perception, and democratic governance, see generally CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005).

167. *In re WTC Disaster Site*, 414 F.3d 352, 376 (2d Cir. 2005).

168. The one major difference is that the City is not a defendant in many of these cases. The fact of the City’s presence as a defendant, however, hardly seems like an appropriate demarcation for where federal jurisdiction should end and state court jurisdiction should begin.

claims normally brought under state law in state court. In doing so, the federal government may lose the ability to articulate sound policy and constitutional arguments for the federalization of substance and forum.

#### IV. PROTECTIVE COORDINATION

The ATSSSA grants a federal forum for the group of cases arising out of the events of September 11th and the attendant difficulties with the boundaries of this subject matter jurisdiction are noted above. The ATSSSA also dictated the SDNY as a specific venue for the cases and imposed a liability cap on the damages awarded, thus mandating a consolidation of all litigation brought under the statute. This Part explores that intersection between federalization and aggregation.

The first September 11th cases filed in the SDNY primarily alleged wrongful death, personal injury, and property damage claims. With only a few exceptions, most cases were filed in or removed to the SDNY.<sup>169</sup> After Judge Hellerstein was assigned the first filed case, the clerk of the court, either by his own determination or by request of the parties, referred all other seemingly related cases to Judge Hellerstein.<sup>170</sup> This means that, for the most part, the consolidation and coordination of September 11th cases occurred *ex ante*, that is, before any cases were filed. This Part explores the contrast between this approach and the more conventional *ex post* approach in which the litigants or court personnel decide to coordinate a group of cases after they have been filed. Part IV.A outlines the normal legal tools for coordinating and consolidating cases for litigation. Part IV.B discusses the way in which venue is chosen or assigned. Part IV.C introduces the concept of “protective coordination” to show how the ATSSSA deviates from these rules and practices by deciding *ex ante* to coordinate a group of cases for litigation and specifying in the text of the statute the judicial district which has exclusive jurisdiction.

##### A. THE LAW OF COORDINATION AND CONSOLIDATION

Without an explicit statutory directive such as that found in the ATSSSA, the process of aggregating cases is more complex. The most familiar mechanism for aggregating what are, in fact, separate cases in complex litigation is the possibility of consolidation of multidistrict litigation for pretrial purposes under 28 U.S.C. § 1407.<sup>171</sup> This statute states

---

169. See *supra* Part II.

170. For an explanation of the internal transfer procedures of federal district courts, see *infra* notes 190–91 and accompanying text.

171. 28 U.S.C. § 1407 (2000). The class action lawsuit is the other major tool for organizing

that “when civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”<sup>172</sup> Under this statute, the cases involving the common questions of fact are referred to the JPML, which then decides whether or not to consolidate the cases for pretrial purposes.<sup>173</sup> This practice is thought to serve the purposes of judicial economy by avoiding duplicative discovery and motion practice in different jurisdictions.<sup>174</sup>

The JPML consists of “seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit.”<sup>175</sup> The JPML is responsible for identifying civil actions pending in different federal courts involving one or more common questions of fact,<sup>176</sup> determining after briefings and hearings whether any of those actions should be transferred to a single district for coordinated or consolidated pretrial proceedings,<sup>177</sup> and then selecting the judge or judges before whom the consolidated pretrial proceedings should be conducted.<sup>178</sup>

Section 1407 requires that the individual actions consolidated in a multidistrict litigation (“MDL”) must involve “one or more common questions of fact . . . .”<sup>179</sup> The JPML has also held that common questions of law also justify the creation of an MDL.<sup>180</sup> The JPML must choose the particular district for centralization,<sup>181</sup> and must also find that centralization serves the interest of the parties and witnesses and promotes the just and efficient conduct of the litigation.<sup>182</sup> The statute does not articulate a standard any more specific than these broad interests which effectively

complex litigation in federal courts. *See* FED. R. CIV. P. 23.

172. 28 U.S.C. § 1407(a).

173. *Id.* § 1407(a), (c).

174. U.S. *ex rel.* Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 238 F. Supp. 2d 270, 273 (D.D.C. 2002). *See also* Richard L. Marcus, *Reassessing the Magnetic Pull of Megacases on Procedure*, 51 DEPAUL L. REV. 457, 468–70 (2001) (summarizing the creation and purpose of the multidistrict litigation statute).

175. § 1407(d).

176. The JPML may do this on its own initiative, or upon motion of the parties. *Id.* § 1407(c)(i)–(ii).

177. *Id.* § 1407(c).

178. *Id.* § 1407(b).

179. *Id.* § 1407(a). *See, e.g., In re Ford Motor Co. Crown Victoria Police Interceptor Prods. Liab. Litig.*, 259 F. Supp. 2d 1366, 1367 (J.P.M.L. 2003).

180. *In re Gator Corp. Software Trademark & Copyright Litig.*, 259 F. Supp. 2d 1378, 1380 (J.P.M.L. 2003).

181. Parties often contest which district should be chosen for an MDL.

182. *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 420–22 (J.P.M.L. 1991).



function as a three-part test.<sup>183</sup>

The JPML has adopted the practice of classifying its dockets into eight general category areas: air and common disasters, antitrust, contract, employment practices, patent and trademark, products liability, securities law, and miscellaneous.<sup>184</sup> Although these categories are only labels for administrative efficiency, they present a good picture of how the JPML understands multidistrict litigation. Actions are mostly consolidated according to the type of cause of action or a single occurrence and not arranged around a large event. The September 11th cases encompass much more than the category of air and common disaster. Air and common disaster cases typically involve a group of litigants that were all injured in the same discrete airplane crash or common carrier accident. The JPML would probably not expect a products liability case or a toxic tort to be litigated in the same manner as the wrongful death claims after the crash of an airplane.

The JPML also has a continuing role in actions where the docket involves a large number of cases filed over a lengthy period of time. After the JPML has ordered the initial consolidation, cases filed in other district courts that appear to be related are referred to the JPML as tagalong actions. If the panel agrees that the case is related according to the criteria of the original consolidation, it will transfer the case to join the other for pretrial consolidation.<sup>185</sup> The respiratory distress claims would probably be handled in much the same manner had they been consolidated for pretrial purposes by the JPML in one judicial district. The question of whether the off-site respiratory plaintiffs ought to join the on-site litigants would be subject to a much more functional analysis, rather than to a completely separate and controlling question of statutory interpretation, that is, whether the claims of the off-site litigants "arose from" the events of September 11th in the same way as do the claims of the on-site litigants.

For the first thirty years of its existence, consolidation under the Multidistrict Litigation Act ("MDLA") served as a de facto transfer of all consolidated cases. Although § 1407 states that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred

---

183. Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Public Policy?*, 23 MEM. ST. U. L. REV. 841, 847 (1993).

184. Nangle, *supra* note 28, at 342.

185. For example, the JPML oversees the continuing transfer of tagalong actions in "major ongoing dockets [such as] the asbestos and breast implant products liability litigations." *See id.*

unless it shall have been previously terminated,”<sup>186</sup> transferee courts used § 1404 and § 1406 to order the consolidated cases transferred permanently for trial. This practice drew increasingly sharp criticism from academic commentators<sup>187</sup> until the Supreme Court specifically barred the practice in 1998.<sup>188</sup> Since then, commentators have debated the effectiveness of MDLs as consolidation tools. One judge, for example, complained that the Supreme Court “has substantially eviscerated the practice, purposes, [sic] of the MDL assignments.”<sup>189</sup> The decision underscores the fact that actions consolidated pursuant to § 1407 are not class actions aggregated for motion practice and settlement by a multijudge panel instead of a single district judge pursuant to Federal Rule of Civil Procedure 23. They are actions with more limited commonalities that may require individual trials in different district courts. In other words, had some of the September 11th personal injury and wrongful death cases been consolidated by the JPML, they might have been transferred back to the Eastern District of Virginia or another district for trial purposes.

The JPML is the primary vehicle for interdistrict transfer of cases. Federal Rule of Civil Procedure 42(a) (“Rule 42(a)”) provides a mechanism for intradistrict consolidation.<sup>190</sup> Because this rule is limited to cases already pending before a single district, it is unlikely to be applied in large-scale cases attracting national attention. In addition to the authority granted under Rule 42(a), SDNY Local Rule 15 sets forth the criteria for consolidating or coordinating civil cases. The rule states that:

[A] civil case will be deemed related to one or more other civil cases and will be transferred for consolidation or coordinated pretrial proceedings when the interests of justice and efficiency will be served. In determining relatedness, a judge will consider whether (i) a substantial saving of judicial resources would result; or (ii) the just efficient and economical

186. 28 U.S.C. § 1407(a) (2000).

187. Practitioners, however, apparently did not question the practice. *See* Nangle, *supra* note 28, at 345 (“The so-called practice of ‘self-transfer’ has been engaged in for many, many years without any question from counsel for plaintiffs or defendants.”).

188. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (holding that a district court conducting pretrial proceedings pursuant to § 1407 lacks authority to invoke 28 U.S.C. § 1404(a) to assign transferred case to itself for trial).

189. *Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing on H.R. 2112 and H.R. 1751 Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 106th Cong. 125 (1999) (statement of John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation and United States District Judge, Southern District of Georgia).

190. FED. R. CIV. P. 42(a) (“If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.”).

conduct of the litigations would be advanced; or (iii) the convenience of the parties or witnesses would be served."<sup>191</sup>

Local Rule 15 thus provides not only for the more formal "consolidation" of cases of the type seen in § 1407 or Rule 42(a) actions, but also for a looser and more informal "coordination" of cases which simply enables a district judge who is familiar with the facts and issues of one case to preside over other cases that are more or less related. The effect of such a local rule is to increase the likelihood that cases consolidated in a single venue will be litigated before a single judge.

## B. THE LAW OF TRANSFER OF VENUE

The ATSSSA specifies the SDNY as the exclusive venue for all actions filed pursuant to the statute. Normally, in federal practice, venue is proper in any judicial district in which any defendant resides, if a substantial part of the events or omissions giving rise to the claim occurred.<sup>192</sup> When an action is brought in an improper venue, the court can dismiss the case for improper venue, or transfer the case to any district in which venue is proper.<sup>193</sup> If an action has been brought in a jurisdiction where venue is proper, a party may still move for a transfer under 28 U.S.C. § 1404(a) which authorizes transfer from a proper venue "[f]or the convenience of parties and witnesses [and] in the interests of justice . . . ."<sup>194</sup>

The party requesting the transfer of venue bears the burden of showing that a balance of factors weighs in favor of transfer.<sup>195</sup> The district court judge enjoys broad discretion in deciding whether to grant the transfer.<sup>196</sup> In making its decision, the district court should consider the statute's "enumerated" factors of convenience of parties, convenience of witnesses, and the interests of justice. The analysis, however, is not limited to these factors because "courts have recognized that such determinations require a case-by-case evaluation of the particular circumstances at hand and a consideration of all relevant factors."<sup>197</sup>

191. S.D.N.Y. R. 15(a).

192. 28 U.S.C. § 1391(a)-(b) (2000).

193. *Id.* § 1406(a).

194. *Id.* § 1404(a).

195. *See, e.g.,* Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515-16 (10th Cir. 1991); Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970).

196. *See, e.g.,* Filmline (Cross-Country) Prods., Inc. v. United Artists Corp., 865 F.2d 513, 520 (2d Cir. 1989).

197. *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 691 (8th Cir. 1997) (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)).

Several such factors likely would have been considered by a court faced with a transfer of venue motion in a September 11th case. As the Third Circuit has noted, there are both private and public interests to be considered.<sup>198</sup> Courts have stressed the high importance of respect for the plaintiff's choice of forum.<sup>199</sup> Other factors to be considered include:

[T]he accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical.<sup>200</sup>

### C. PROTECTIVE COORDINATION

The lawsuits brought pursuant to the ATSSSA landed in the SDNY by specific instruction of the statute itself, not by judges using the standards for transfer of venue and not by the JPML evaluating a proposed consolidation of cases for pretrial purposes. That feature of the ATSSSA has gone virtually unnoticed by practitioners and commentators alike. Perhaps because Manhattan bore the brunt of the attacks, very few thought to question the statutory assignment of venue.<sup>201</sup> It is, however, one of the most striking features of the statute because it is so unprecedented. Never before has Congress dictated such a specific venue for such a specific group of cases. Venue alone, however, has not tied these cases together. The venue provision in combination with Local Rule 15 practically guaranteed that the cases would end up before a single judge. It is, however, the statutory liability cap that ensured that the groups of cases would remain bound together.

There is little question that before a single action had even been filed,

---

198. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995).

199. *See, e.g., Shutte*, 431 F.2d at 25 (“It is black letter law that a plaintiff’s choice of a proper forum is a paramount consideration in any determination of a transfer request, and that choice ‘[s]hould not be lightly disturbed.’” (quoting *Ungrund v. Cunningham Bros., Inc.*, 300 F. Supp. 270, 272 (S.D. Ill. 1969))); *Tex. Gulf Sulphur Co. v. Ritter*, 371 F.2d 145, 147 (10th Cir. 1967) (“[U]nless the evidence and the circumstances of the case are strongly in favor of the transfer the plaintiff’s choice of forum should not be disturbed.”).

200. *Tex. Gulf Sulphur Co.*, 371 F.2d at 147. *See also Terra Int’l, Inc.*, 119 F.3d at 696; *Jumara*, 55 F.3d at 879–80; *Chrysler Credit Corp.*, 928 F.2d at 1516.

201. *But see Berkowitz, supra* note 8, at 25 (“The vesting of exclusive jurisdiction in the Southern District of New York poses a . . . problem.”).

Congress made a conscious decision to consolidate all lawsuits arising out of the events of September 11th. Senator Schumer emphasized that “[t]he intent here is to put all civil suits arising from the tragic events of September 11 in the Southern District.”<sup>202</sup> Senator McCain said “the bill attempts to provide some sense to the litigation by *consolidating* all civil litigation arising from the terrorist attacks of September 11 in one court.”<sup>203</sup> Senator Hatch announced that he was “pleased that we *consolidated* the causes of action in one Federal court.”<sup>204</sup> The motivation for such consolidation was clear: consolidating the cases would “provide some sense”<sup>205</sup> to the litigation, ensure “consistency in the judgments awarded,”<sup>206</sup> and make the litigation faster and more efficient overall.

This method of controlling the course of litigation is unique in its specificity, but it is not entirely detached from previous congressional action.<sup>207</sup> Congress has specified venue through statutory means before. In addition to the general venue statute, Congress has authorized specific venue criteria for certain entities or proceedings.<sup>208</sup> Sometimes a statute that creates a federal cause of action will also specify venue.<sup>209</sup> The difference between these statutes and the ATSSSA is that the former simply outline a standard by describing where venue is proper, thus narrowing the very broad criteria of 28 U.S.C. § 1391, the general venue statute. They do not set venue outright by providing a strict rule for a specific venue.

This Article labels this sort of congressional action “protective

202. 147 CONG. REC. S9592 (daily ed. Sept. 21, 2001) (statement of Sen. Schumer).

203. *Id.* at S9594 (statement of Sen. McCain) (emphasis added).

204. *Id.* at S9595 (statement of Sen. Hatch) (emphasis added).

205. *Id.* at S9594 (statement of Sen. McCain).

206. *Id.* at S9595 (statement of Sen. Hatch).

207. The phenomenon of protective coordination (especially as coupled with event jurisdiction) is not limited to U.S. law. For example, after the Bhopal Gas Leak Disaster of 1984, the parliament in India passed a law creating a special national court to process claims “arising out of, or connected with, the disaster.” The government assumed the claims of all injured parties and the court was given the powers of a normal civil court. *See* The Bhopal Gas Leak Disaster (Processing of Claims) Act, No. 21 of 1985 (India).

208. For example, 28 U.S.C. § 1394 is the special statute for national banks, stating that “[a]ny civil action by a national banking association to enjoin the Comptroller of the Currency, under the provisions of any Act of Congress relating to such associations, may be prosecuted in the judicial district where such association is located.” 28 U.S.C. § 1394 (2000). *See also id.* § 1391(d) (aliens); *id.* § 1391(e) (defendant is an officer or employee of the United States); *id.* § 1391(f) (action against foreign state); *id.* § 1395 (fine, penalty, or forfeiture); *id.* § 1396 (Internal Revenue taxes); *id.* § 1397 (interpleader); *id.* § 1398 (Interstate Commerce Commission orders); *id.* § 1399 (partition action involving United States); *id.* § 1400 (patents and copyrights); *id.* § 1401 (stockholder’s derivative actions); *id.* § 1402 (United States as defendant); *id.* § 1403 (eminent domain).

209. *See, e.g.*, 42 U.S.C.A. § 2210(n)(2) (West 2008); 42 U.S.C. § 300aa-1 to 300aa-34 (2000).

coordination” because, like protective jurisdiction, it demonstrates a congressional will to shape the course of certain litigation according to particular federal interests. It does this by tying together certain causes of action and ensuring that they will be litigated together in a single district court, or by tying the outcomes of the cases together with a common denominator such as the liability cap.

Protective coordination can be understood as a strong form of the methods Congress employs in order to tie cases together for litigation purposes. Imagine a spectrum where congressional coordination of litigation runs from weak to strong. At one end are the very weak tools for coordinating multiple causes of action such as 28 U.S.C. § 1367 (supplemental jurisdiction), the specific venue statutes listed above, and the tendency for Congress to concentrate appeals from certain administrative actions in the D.C. Circuit. These statutes make it likely or even mandatory that certain types of cases will be filed in the same judicial district, but not necessarily as a coordinated litigation. In the middle of the spectrum one finds such tools as 28 U.S.C. § 1407, coordination for pretrial purposes which was a direct congressional answer to cries for a more efficient means to prepare large numbers of complex actions for trial or settlement. Other examples might be the statutory provision which allows a bankruptcy court to hear causes of action on related matters,<sup>210</sup> the statutory and rule interpleader options for stakeholder actions,<sup>211</sup> or the Multiparty, Multiforum Jurisdiction Act.<sup>212</sup> These stronger methods of coordination are tools that Congress has made available to litigants but they do not mandate coordination. Instead, they encourage the litigation to take shape in a certain way. The tools of protective coordination are much stronger because they act to identify a specific type of cases brought by identifiable litigants and because they specify or narrowly describe the judicial district in which the lawsuits must be brought. One example of protective coordination is the jurisdiction provision of the Price-Anderson Act.<sup>213</sup> As

---

210. Interestingly, some commentators believe that this aspect of federal bankruptcy jurisdiction raises protective jurisdiction problems. See, e.g., Thomas Galligan, Jr., *Article III and the “Related to” Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. PUGET SOUND L. REV. 1, 14–21 (1987) (arguing that “related to” bankruptcy jurisdiction raises the problem of protective jurisdiction). But see Goldberg-Ambrose, *supra* note 107, at 551–58 (arguing that such bankruptcy jurisdiction is not an instance of protective jurisdiction).

211. 28 U.S.C. §§ 1335, 1397, 2361; FED. R. CIV. P. 22.

212. § 1369 (Supp. IV 2004).

213. 42 U.S.C.A. § 2210(n)(2) (West 2008) (“With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without

noted above, this narrow specification is not a choice that Congress makes very often.

The ATSSSA illustrates the features of protective coordination: Congress has identified a distinct class of cases and litigants and has directed them to a specific forum. Three aspects of the Act reinforce the strength of the protective coordination effect. First, Congress created a federal cause of action, ensuring that *all* lawsuits, not just those amenable to federal jurisdiction, would be eligible at the outset for consolidation in one judicial forum.<sup>214</sup> Therefore, it is not a coincidence that the ideas of event jurisdiction and protective coordination are linked in the context of the ATSSSA; once Congress concluded that all September 11th litigation should be coordinated, federalization of all claims relating to that event was a necessary step. Second, the statute names the SDNY specifically as the forum for all cases.<sup>215</sup> Third, Congress ensured the coordination of the cases by limiting the remedy for all cases to the available liability insurance.<sup>216</sup> This liability cap creates a fixed pie of available damages, tying the claims brought under the statute together almost as if it were an interpleader action.

One way of thinking about protective coordination is to divide the tools for coordinating litigation into *ex ante* and *ex post* methods. Most lawsuits are coordinated *ex post*, that is, after they have been filed. In protective coordination, the decision to consolidate is made before any party sets foot in court. The ATSSSA is a stark illustration of how Congress can achieve an *ex ante* coordination of cases and the utility of employing this method of litigation coordination.

This Article does not argue that protective coordination is beyond the reach of Congress's authority. The *ex ante/ex post* distinction, however, raises questions of institutional competence. Just because Congress *can* dictate the *ex ante* coordination of lawsuits does not mean that it is wise for it to do so.

---

regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court . . . or United States district court shall be removed or transferred to the United States district court having venue under this subsection.”)

214. ATSSSA, Pub. L. No. 107-42, § 408(b)(1)–(3), 115 Stat. 230 (2001), *reprinted in* 49 U.S.C. § 40101 note (Supp. III 2003).

215. *Id.* § 408(b)(3). The Price-Anderson Act, by comparison, specifies the forum as “the United States district court in the district where the nuclear incident takes place,” making more than one venue a lawful possibility for jurisdiction after a nuclear incident. 42 U.S.C.A. § 2210(n)(2).

216. ATSSSA § 408(a).

Another dimension of the *ex ante/ex post* approach to consolidation is the degree to which a statute mandates a specific consolidation result. In the *ex ante* approach, Congress dictates a rule, subject to little or no interpretation, and with a mandatory result. In the *ex post* approach, cases are consolidated according to a standard that Congress has dictated, and according to which any number of aggregation and/or venue choices are possible. This distinction goes beyond a simple rules/standards dichotomy. Note, for example, that the ATSSSA gives a rule (venue must be in the SDNY) whereas the Price-Anderson Act gives a standard (venue must be where nuclear accident took place), but both mandate a *specific* judicial district as a result. Contrast this with the general venue statute in which venue may be proper in any number of judicial districts. In other words, the hallmark of the *ex post* approach is that it delivers a standard under which multiple parties and institutions with the best information about the cases negotiate a result which is one of many lawful possibilities.

In the *ex post* approach, the standards for coordinating cases either by transfer of venue, intrajurisdictional transfer under Rule 42(a), or interjurisdictional transfer by the JPML are very fluid. It is not surprising that, in the end, Congress has directed the judge or panel to approve or deny a consolidation according to a dynamic balancing test of several factors, one of them being the malleable “in the interest of justice” standard. The decision to consolidate cases and the choice of forum for the consolidation are extremely context sensitive. Judges are in a much better position to make this decision than Congress because they have the contours of the existing litigation before them, and because they have the interested parties as advocates for a variety of positions.

The course of the September 11th litigation demonstrates the weakness in the *ex ante* approach. In just five years, the September 11th cases have mutated from the single designation “In re September 11th Litigation” to five separate tracks of cases, a path that surprised the judge and litigants alike.<sup>217</sup> Moreover, these tracks of cases do not seem particularly well-suited to consolidation—that is precisely why they were broken up in the first place. The legal and factual issues in a complex aviation disaster turn out to be quite different from those in an environmental toxic tort, which are, in turn, different from an insurance dispute. In the *ex ante* approach, Congress is expected to anticipate the scope of the cases and the types of harms that will arise out of one event such as “September 11th Terrorist Attack” or one description such as

---

217. See *supra* Part II.



“nuclear incident.” This expectation is quite optimistic given that the litigants themselves did not realize the full scope of the cases until a few years after the event in question. A poorly informed judgment about the scope of consolidation may also carry some costs. Once a group of cases has started to proceed before a certain judge it may be costly to break off one or more groups of cases and transfer them to another judge or another judicial district which must then familiarize itself with the case. In other words, a faulty *ex ante* aggregation by Congress may fail to deliver on reducing process costs, and, in fact, may burden litigants and the courts with the additional costs of “disaggregation.”

The nature of toxic tort cases further dampens Congress’s ability to accurately foresee the scope of litigation and the advisability of consolidation. Toxic tort cases necessarily involve complex theories of causation that differ from plaintiff to plaintiff. They present novel scientific problems. Most importantly, the existence of a toxic tort at all might not be apparent until months or even years after the incident in question. The September 11th cases demonstrate that the largest number of plaintiffs may not appear until well after the some litigation for harms arising out of an event has already commenced.<sup>218</sup> In that case, the latent nature of the harm effectively excluded them from the VCF, leaving the plaintiffs only with a litigation option that Congress explicitly meant to discourage. In some cases latent harms might not appear for even longer. For example, the harms to pregnant women may not be apparent until well after their children have been born.

The September 11th cases also show the difficulty of consolidating the cases before one judge. The ATSSSA itself does not mandate this result, but the statute worked in tandem with the local SDNY rules to create this predictable outcome. Having designated all cases arising out of the events of September 11th as one federal cause of action, it is not surprising that court personnel assumed that all actions so filed were related with little thought otherwise. Once assigned, the judge must administer a heavy load of cases. The burden is not so much in numbers—many judges do a remarkable job of administering large MDLs over very long periods of time.<sup>219</sup> The difficulty is instead that the judge must direct his attention to many different cases with strikingly different needs and organizational complexities. Moreover, even assuming that the groups of cases share

---

218. See Eggen, *supra* note 31, at 421–24.

219. See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005) (hearing suit brought by Vietnamese nonprofit organization and Vietnamese citizens against chemical manufacturers, consolidated before Judge Weinstein).

many issues of fact and law with each other, it remains a fact that a judge can, as a practical matter, only manage one trial at a time. District judges have other cases on their docket that require trial time, most notably, criminal defendants with speedy trial rights. Therefore, the groups of cases might wait an even longer time for trial than would normally be expected. This is evident in the September 11th cases. A September 11th insurance coverage dispute has already gone to trial,<sup>220</sup> and a few actions filed after Hurricane Katrina have gone to trial.<sup>221</sup> Yet the cases filed pursuant to the ATSSSA are not even close to trial.<sup>222</sup>

Finally, judges will be left with the task of interpreting the statute that mandates consolidation. Some aspects of this might be very clear, such as the choice of SDNY as the forum. Others, however, could be very ambiguous, such as the designation of the class of cases. The interpretive problems described in Part II.B apply with equal force to the problem of protective coordination: the answer to the question, Which cases did Congress mean to consolidate? might be very different from the answer to the question, Which cases does it make sense to consolidate?

Judges and litigants also have the luxury of time to craft nuanced and creative solutions to the organization of complex litigation. Congress, in creating a consolidation *ex ante*, is unnecessarily acting hastily, passing a bill with even less scrutiny and debate than normal. This is yet another institutional deficiency.

The success of the ATSSSA's protective coordination goal can be measured by the standards of those who wrote the statute. The record shows that Congress wanted to consolidate these cases because that would provide the most efficient resolution and would ensure consistency in awards. Judged on its own terms, the ATSSSA has been, at best, equally effective at achieving these goals as traditional consolidation methods might have done, and it has most likely made things worse.

The choice to federalize all causes of action might have been an effort

---

220. See Dean Starkman, *Jury's Decision Leaves Rebuilding of World Trade Center in Turmoil*, WALL ST. J., Apr. 30, 2004, at A1; Dean Starkman, *Jury Rules for Silverstein on Trade Center Insurance*, WALL ST. J., Dec. 7, 2004, at A11.

221. Judge Senter in the Southern District of Mississippi has already conducted one trial in one of the consolidated actions regarding denial of coverage by insurance companies. See, e.g., Mitchell F. Crusto, *The Katrina Fund: Repairing Breaches in Gulf Coast Insurance Levees*, 43 HARV. J. ON LEGIS. 329, 329-39 (2006) (providing an overview of Hurricane Katrina insurance litigation); Allen Kanner, *Louisiana Insurance Litigation Following Katrina and Rita*, 1 ANN. 2006 ATLA-CLE 589 (2006) (same).

222. It is important to remember that other factors contribute to this situation, namely, the discovery difficulties caused by SSI procedures. See *supra* Part II.E.

to ensure consistency in the litigation process and awards, but it is not clear that this has been effective. The courts have been occupied with tricky jurisdictional issues that have delayed the start of discovery and organization of the group. It might turn out that, in the end, some cases that look very related to the respiratory distress cases are litigated in state court anyway. If this is not true, and a vast number of these cases remain before Judge Hellerstein, this might be at a high cost to some basic federalism values.

The choice to dictate the SDNY as venue has had, at best, a neutral effect on the litigation. For many lawsuits, the SDNY was probably the obvious choice of forum, but the victims of the attacks came from many other states and countries.<sup>223</sup> Even if the lawsuits brought by these personal injury and wrongful death plaintiffs were consolidated for pretrial purposes, the recent Supreme Court ruling makes it more likely that they still might have been able to litigate a good portion of the case in the forum of their choice.<sup>224</sup> Finally, the ATSSSA itself mandates that “[t]he substantive law for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred . . . .”<sup>225</sup> Because this involves three states, it may be that the JPML or a judge considering transfer of some cases would conclude that the questions of law are not uniform enough for consolidation.<sup>226</sup>

For others, it is unlikely that the process of transferring some personal injury/wrongful death cases from the Eastern District of Virginia (Pentagon cases) would have been particularly onerous. Some of the respiratory distress cases might have been filed in the Eastern District of New York or

---

223. As one commentator has observed, “Convenience, in the doctrine of forum non conveniens, has always been a part of venue determinations. The September 11 attacks involved travelers from all over the country, yet Congress did not consider the difficulties many of the families would face participating in lengthy trials in New York City.” Berkowitz, *supra* note 8, at 25.

224. See *supra* notes 188–89 and accompanying text.

225. 49 U.S.C. § 40101 (2000).

226. For example, Virginia law allows hedonic damages for pre-impact emotional distress, whereas New York law does not. Compare *Gonzalez v. N.Y. City Hous. Auth.*, 572 N.E.2d 598, 600–01 (N.Y. 1991) (restricting recovery to “pecuniary injuries”) with 17B MCKINNEY’S CONSOLIDATED LAWS OF N.Y. ANN., ESTATES, POWERS & TRUSTS LAW § 11-3.2(b) (2001). The problem of uniformity of law at the nexus of federalization of forum and aggregation of claims is not unique to this situation. As several commentators have noted, CAFA has presented similar difficulties. See generally Issacharoff, *supra* note 165; Daniel R. Karon, “How Do You Take Your Multi-state, Class-action Litigation? One Lump or Two?” *Infusing State Class-action Jurisprudence into Federal, Multi-state, Class-certification Analyses in a “CAFA-nated” World*, 46 SANTA CLARA L. REV. 567 (2006); Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593 (2006); Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723 (2006).

the District of New Jersey. If anything, the exclusive jurisdiction of the SDNY led the parties and court personnel to an immediate conclusion of relatedness of cases that resulted in the consolidation of all of these cases before a single judge, not just a single district.

The choice to establish the liability cap might be the most damaging decision of all, for this has tied the cases together in resolution as well as in litigation. The resolution of a toxic tort that affects a large number of plaintiffs over a long period of time will have very different trial and settlement dynamics than an air and common disaster where both plaintiffs and damages are known.<sup>227</sup> Despite this, all litigants are forced to divide the same pie. This has had the overall effect of slowing down the litigation, not making it speedier or more efficient.<sup>228</sup>

## V. LESSONS FOR THE FUTURE

The September 11th litigation experience shows that there are lessons to be learned from the ATSSSA aside from the debates over the propriety of any future compensation fund such as the VCF. This Article has evaluated the Act as an overall statutory response to the specter of litigation in the wake of a large disaster. This Part draws together the specific problems of the ATSSSA with the larger concepts of protective coordination and event jurisdiction to suggest a framework for how Congress should consider drafting this sort of legislation—if at all—in the future. In this Part, some more recent experiences in postcatastrophe litigation from Hurricane Katrina<sup>229</sup> are used as a counterpoint to the September 11th experience. While these events are not completely analogous, there are several similarities from the perspective of postdisaster litigation worth examining because the Katrina litigation provides a noteworthy window into the course of postdisaster litigation that is proceeding in the absence of any event-based Congressional action coordinating the litigation by assignment of venue or federalization of claims.<sup>230</sup>

---

227. For a more detailed discussion of examples of liability cap design from other federal statutes, see *infra* Part V.C.

228. It will be interesting to see whether the bifurcated trial on damages in only six of the personal injury/wrongful death cases will do anything to advance the overall resolution of that track of the litigation. See *supra* note 27.

229. For purposes of this Article, the focus remains on Hurricane Katrina, and avoids the question of whether Hurricane Rita might have been a separate “event.” Litigation that concerns both hurricanes is noted throughout.

230. The catastrophes of September 11th and Hurricane Katrina are events that deserve to be analyzed on their own terms, and this Article does not purport to equate the very different dimensions and experiences of devastation and suffering that each event caused. It is, in fact, one of this Article’s

### A. REFLECTIONS ON THE ABSENCE OF CONGRESSIONAL ACTION ON POSTDISASTER LITIGATION MATTERS

One possibility for a congressional response is for Congress *not* to act with respect to the litigation options for victims of a national catastrophe. Plaintiffs would be left to pursue traditional state and federal remedies unaltered by an event-specific statute, or a statute dictating the aggregation of claims. This approach has the advantage of avoiding the jurisdictional and organizational challenges that the ATSSSA has created in the September 11th litigation. On the other hand, the lawsuits would be spread across a number of federal and state jurisdictions and this may lead to the familiar problems of duplicative discovery, inconsistent applications of law, and inconsistency in awards or settlements. The JPML could be called upon to consolidate like cases in one district for pretrial proceedings but could not alter the allocation of cases in both federal and state courts. It is a difficult counterfactual question to imagine whether these problems would be more of a hindrance in the September 11th litigation than the problems caused by the ATSSSA. The Hurricane Katrina litigation, however, provides a picture of how multijurisdictional postdisaster litigation looks.

The post-Katrina litigation is multijurisdictional, taking place across three states and at the federal and state level. Since Mississippi, Louisiana, and Texas were all hit by the hurricane, it is not surprising that plaintiffs filed lawsuits in their home jurisdictions.<sup>231</sup> The cases filed include class

---

principal contentions that all catastrophic events are disastrous in their own way. The following similarities highlight only what is comparable from a postdisaster litigation perspective. Both events were sudden disasters, but only arguably unexpected—that the World Trade Center was a terrorist target and that a powerful Hurricane could hit the Gulf Coast were not unknown possibilities. Both caused shocking loss of human life, personal injury, and severe property damage. Both were initiated by forces that are more or less beyond the reach of a litigation remedy—the terrorists and their backers who orchestrated September 11th and the forces of nature that produced the Hurricane. Suing the terrorists and their financial backers has proved remarkably difficult. And although one might find it rather counterintuitive to “sue the weather,” there is indeed a class action lawsuit pending against oil companies for actions leading to the global warming alleged to have produced the Hurricane of such striking force. *See* *Comer v. Nationwide Mut. Ins. Co.*, No. 1:05 CV 436-LTD-RHW (S.D. Miss. Feb. 23, 2006).

Moreover, causation of the damage in each event is riddled with intervening or contributing actions of third party actors well within the reach of litigation. The alleged negligence of the aviation defendants and WTC owners and operators in the case of September 11th, and the weak levee in New Orleans are only the most obvious examples.

Finally, both were undisputedly “national” events. Although the damage to person and property was local in each case, the whole nation felt the economic and political consequences of each. Moreover, coverage of the aftermath captivated the public’s attention and prompted an outpouring of charitable relief. The backdrop for litigation was thus set after each event: a large number of parties would seek redress for a wide variety of claims following an event that played out on the national stage.

231. One commentator has noted the effect of geography on the nature of claims filed:

actions, individual actions, and individual actions consolidated in a particular venue for pretrial coordination. The litigation thus far has concerned tort claims and actions against insurance providers for coverage of damage sustained as a result of the storm. There is a possibility that, as in the case of the September 11th litigation, a “second generation” of toxic tort cases will emerge in the more distant aftermath of the hurricane. Possible claims include those brought by plaintiffs seeking compensation for damage to person and property caused by the mold that has flourished in the affected areas.<sup>232</sup> Landfills and debris removal programs are another potential source of environmental hazard and future litigation.<sup>233</sup>

At present, the claims emerge from several different groups of plaintiffs who have identified different types of damages and different sources of harm. Many of the lawsuits involve damage allegedly caused by the failure of the levees and floodwalls. Cases were filed in state and federal court, and defendants removed most of the state cases to the Eastern District of Louisiana.<sup>234</sup> The en banc court of that district determined that all related cases should be consolidated before Judge Stanwood R. Duval, Jr. and bear the caption *In re Katrina Canal Breaches Consolidated Litigation*.<sup>235</sup>

Despite the consolidation, the issue remains multijurisdictional

Mississippi's southern counties directly abut the sea, with no man-made barriers to separate them from the 30-foot storm surge that moved ashore. Residential areas, gambling barges, hotels, and small towns simply collapsed under the blow. Primary litigation issues there involve who will pay to repair the damage caused by an act of nature alone—largely disputes with insurers over coverage.

Louisiana presented different geography and industries. Man, not nature, played a far larger role. Consequently, the tort system occupies a far greater role in sorting out the question of who will pay.

John P. Manard, Jr., Patrick O'Hara & Kelly R. Blackwood, *Katrina's Tort Litigation: An Imperfect Storm*, 20 NAT. RESOURCES & ENV'T 31, 31 (2006).

232. See *id.* at 37 (“[I]t would not be surprising to see mold litigation in future years based upon the contention that the steps taken to eliminate mold proved to be inadequate, thus exposing people to harmful mold in the air. Landlord/tenant situations would seem to provide the more likely scenarios. Commercial enterprises could also be at risk for exposure of employees or customers.”).

233. See *id.* (“[S]uch large-scale waste disposal in this type of wetlands environment might well be expected to involve waste sites that will generate litigation in future years, particularly if the areas around them are repopulated.”).

234. *Borders v. La. Citizens Prop. Ins. Co.*, No. 07-5399 (E.D. La. Nov. 8, 2007).

235. See United States District Court, Eastern District of Louisiana, *Katrina Canal Breaches Consolidated Litigation*, Introduction, at <http://www.laed.uscourts.gov/canalcases/intro.htm> (last visited Jan. 2, 2008). The consolidated cases concern damages involving the 17th Street Canal, the London Avenue Canal, the Industrial Canal, and the Mississippi Gulf River Outlet. The court identifies two factors as common among all of the claims: “[T]he recourse sought involves a determination as to whether the failing of a specific levee or levees was caused by negligent design, construction or maintenance. A corollary to this issue is whether the water damage exclusion in all-risk insurance policies apply to these damages.” *Id.*

because there is no federal statute like the ATSSSA to grant federal jurisdiction and specify venue. Therefore, many of these cases remain in state court. The judges and litigants recognize, nonetheless, the importance of coordination “to reduce needless duplication and streamline discovery.”<sup>236</sup> As a result, Judge Duval is involving the state court judges in the relevant federal proceedings. They have attended status conferences and have “recognized the efficacy of creating coordinating discovery and agreed to review the proposed schedule, comment thereon to this Court, and with its adoption by this Court, to present the First Discovery Plan to their respective *en banc* courts for possible adoption.”<sup>237</sup> As of the writing of this Article, this cooperation between state and federal court in this disaster litigation is just beginning. The results for coordination of efforts within the context of the traditional federal division of cases look promising.

The Katrina experience thus far shows that a status quo approach to postdisaster litigation does not guarantee chaos in the litigation environment. Postdisaster litigation may be seen as one of many contexts in which judges and lawmakers must navigate solutions to the reality that in a federal system of dual sovereignties there will be overlapping adjudicative efforts.<sup>238</sup> The answers here lie in creative approaches to interjurisdictional cooperation.<sup>239</sup> The Hurricane Katrina litigation will inevitably have its own surprises and difficulties. It will not, however, be plagued with the

---

236. *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182 (E.D. La. Jan. 11, 2007). The court further noted that “any discovery concerning the United State[s] Government must ultimately be overseen by this district court” and that “the overall cost of this litigation could be greatly diminished by establishing certain protocols, creating discovery depositories and allowing discovery conducted in the federal litigation to be used in the state court proceedings . . . .” *Id.*

237. *Id.*

238. See Resnik, *Afterword*, *supra* note 162, at 498 (“That state and federal courts overlap to a large extent is not surprising when one remembers that courts’ dockets reflect the overlapping work of the state and federal governments.”).

239. A number of commentators have written about the possibilities of cooperative federalism in the judicial context. See, e.g., Ralph I. Lancaster & Catherine R. Connors, *Creation of a National Disaster Court: A Response to “Judicial Federalism In Action,”* 78 VA. L. REV. 1753 (1992); Resnik, *Afterword*, *supra* note 162, at 468–69 (describing cooperative federalism efforts and noting that “[t]he practice of these judges and lawyers . . . all crisscross state and federal lines but are not in focus in United States legal federalism”); Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171 (1995); William W. Schwarzer, Alan Hirsch & Edward Sussman, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529 (1995) (proposing *inter alia* to amend the multidistrict litigation statute to provide for limited removal of state court cases to federal court for coordinated discovery procedures); William W. Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992) (detailing several recent examples of cooperative federalism in complex litigation).

problems that the jurisdictional aspects of the ATSSSA have caused in the September 11th litigation.

The status quo approach by itself also means, however, that two of Congress's concerns from the aftermath of September 11th remain unaddressed: a need to show a "national" response to victims of a national tragedy, and the need to relieve a sensitive industry from potentially crippling liability. It is possible, however, for Congress to address these concerns without altering the status quo of litigation options. It is possible, for example, to imagine that the ATSSSA had retained the VCF entirely while remaining silent about the content of the litigation options. It is also possible to envision different ways in which Congress could have approached the perceived problem of liability of the aviation defendants, for example, by providing tax cuts, direct industry subsidies, or by having the U.S. government itself assume vicarious liability for all damages.<sup>240</sup>

#### B. LESSONS ON THE FEDERALIZATION OF FORUM AND UNDERLYING SUBSTANTIVE CAUSES OF ACTION

When Congress passed the ATSSSA it was believed that the creation of an exclusive federal forum would bring with it certain benefits of speed and efficiency.<sup>241</sup> The September 11th litigation has shown that this tactic can create problems of its own. To the extent that Congress still wants to provide a federal forum or to ensure that all claims would be litigated at the federal and not state level, the ATSSSA experience points to some suggestions for less problematic ways to achieve those goals.

Future statutes should be drafted to avoid the problems of event jurisdiction. Although a specific event might be the impetus for Congress to pass the legislation at issue, it should resist the urge to use that event as a blanket basis for federal jurisdiction. Instead, the statute itself should address specific classes or types of claims. This sort of drafting should force legislators to decide and articulate up front exactly what sort of lawsuits they wish to take place in a federal forum, and should help avoid the problems of line-drawing that judges have experienced in attempting to determine the proper boundaries of jurisdiction in the September 11th respiratory injury cases. One strategy might be to have the jurisdictional categories outlined in the legislation align more closely with the underlying categories of substantive law of the claims to be federalized. Furthermore,

---

240. This is the government's strategy in statutes addressing other areas of public health or disaster management. See *infra* notes 243–56 and accompanying text.

241. See 144 CONG. REC. S9595 (statement of Sen. Hatch), *supra* note 204 and accompanying text.



when authorizing a federal forum in such cases, legislators should also remain keenly aware of the problem of protective jurisdiction. Although an event is itself a poor organizing concept for determining the boundaries of jurisdiction, an event of national importance and its aftermath may be useful in articulating or justifying a federal basis of jurisdiction while retaining state law for the substantive rules of decision.

Additionally, legislators should consider seriously whether a very specific venue provision such as the SDNY mandate from the ATSSSA is necessary. This Article has demonstrated the perils of such *ex ante* decisions to consolidate litigation in one judicial district. To the extent that it *would* make sense to litigate certain claims together, the parties and district judges can avail themselves of JPML procedure to attain a consolidation in one district for pretrial purposes. In the event that Congress once again passes such a venue mandate, it will become important for the district court judges and personnel to be aware of how this statutory scheme interacts with the local rules. This Article has shown how the combination of the ATSSSA venue provision with the SDNY local rules led to an assignment of many tracks of cases to one judge as “related,” when it turns out that they were not necessarily so. The court personnel should be particularly attentive to issues of relatedness in these sorts of cases.

One way for Congress to ensure that a future statute is not vulnerable to attack on protective jurisdiction grounds is to infuse the law with more substantive measures.<sup>242</sup> As the ATSSSA shows, it is possible for Congress to alter parties’ substantive rights in litigation without creating completely new causes of action.

There is already a substantial debate about how much, if at all, the federal government ought to alter the traditional state law remedies available to litigants in ordinary litigation. These considerations would surely play a role in the design of any substantive law measures. The contribution of this Article, however, is to note that such substantive additions should be crafted to avoid the litigation problems that have arisen in the September 11th litigation.

In addition to any lessons about substantive remedies, it is here at the intersection of federalization of forum and federalization of substantive law that the nexus between event jurisdiction and protective coordination is most apparent. When Congress desires for a group of cases to be litigated

---

242. See *supra* Part II.

together, it will first need to create an exclusive federal cause of action to ensure complete aggregation. If aggregation of cases is the motivating force behind this federalization, then it is not surprising that Congress would use the language and thought process behind aggregation to shape the contours of the federalization of forum. The experience of the September 11th litigation, however, demonstrates the ways in which the desire to aggregate cases around the causation concept of an event creates a problematic jurisdictional category.

### C. REFLECTIONS ON THE USE AND DESIGN OF LIABILITY CAPS

The September 11th litigation has shown how problematic a blanket liability cap on damages can be, especially when it is combined with the amorphous group of cases defined by an event jurisdiction concept. The lesson from the liability cap experience is this: Congress should avoid employing substantive remedies that have the effect of tying together large and potentially unforeseen groups of cases. If legislators have determined that a certain event necessitates the limitation of liability in a particular industry, these liability limitations should be tailored to meet that purpose only. And if legislators favor a broad-scale liability cap with the potential of tying disparate groups of cases together, they should more thoroughly consider the options for handling the problem of future claimants.

#### 1. Industry- or Claim-specific Liability Caps

A few examples of industry- or claim-specific liability caps exist, as well as liability cap schemes that are more event-oriented. The Price-Anderson Act sets out a liability cap scheme that most resembles the ATSSSA, and like the ATSSSA, its aim is to control potentially unwieldy litigation in the wake of a catastrophic event.<sup>243</sup> Price-Anderson is a useful comparison both in its current form and in terms of various proposals that have been made to amend its liability cap provisions.

Like the ATSSSA, the Price-Anderson liability cap scheme is based on a combination of capped private liability against a background of government contribution and a process for expedited processing of victims' claims. Liability is limited to a set amount of liability insurance that nuclear contractors are obligated to purchase, plus a guaranteed indemnification by the U.S. government.<sup>244</sup> Although the Act serves to put a distinct dollar

---

243. See 42 U.S.C.A. § 2210(e) (West 2008).

244. *Id.* § 2210(b)(1)(C) (including a scheme for retroactive or "deferred" premiums for secondary private insurance that is purchased if the primary insurance is exhausted after a nuclear event).

limit on the total amount of damages recoverable after a nuclear incident, particularly from private sources, it also contains an express provision that Congress would revisit the extent of private liability and public contribution in the event of an actual nuclear incident.<sup>245</sup> Finally, the Act was the context in which the Supreme Court had the opportunity to definitively confirm Congress's power to legislate a liability cap for damages arising out of a nuclear disaster because it "provide[s] a reasonably just substitute for the common-law or state tort law remedies it replaces."<sup>246</sup>

Although the Price-Anderson Act has grounded lawsuits arising out of small-scale accidents at nuclear facilities, the statute remains untested as a method of managing the administrative complexities of mass tort litigation, or whether various classes of litigants under the Price-Anderson Act would encounter difficulties similar to what the ATSSSA plaintiffs now face. The Supreme Court recognized the problem of accommodating a large number of claimants in a postdisaster litigation scenario in *Duke Power Co. v. Carolina Environmental Study Group, Inc.* Congress's consideration of this problem, in fact, was one factor motivating the Court to approve the legislated liability cap.<sup>247</sup> The Court quoted the legislative history extensively:

[A] defendant with theoretically 'unlimited' liability may be unable to pay a judgment once obtained. When the defendant's assets are exhausted by earlier judgments, subsequent claimants would be left with uncollectable awards. The prospect of inequitable distribution would produce a race to the courthouse door in contrast to the present system of assured orderly and equitable compensation.<sup>248</sup>

The September 11th litigation exposes the flaw in this reasoning. Although a liability cap would serve to curtail a race to the courthouse among *known* victims, it does nothing to accommodate the needs of an unknown class of future claimants. Moreover, the specter of future

---

245. *Id.* § 2210(e)(2) ("[T]he Congress will thoroughly review the particular incident in accordance with the procedures set forth in subsection 170(i) of this section and will in accordance with such procedures, take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude.").

246. *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 88 (1978). This ruling is generally thought to affirm Congress's power to use liability caps to regulate tort claims and has been cited as the authority for Congress to do so in the ATSSSA context.

247. *Id.* at 90.

248. *Id.* (quoting *To Amend and Extend the Price-Anderson Act: Hearing on H.R. 8631 Before the J. Comm. on Atomic Energy*, 94th Cong. 69 (1975) (statement of William A. Anders, Chairman, U.S. Nuclear Regulatory Commission)).

claimants produces the gridlock in settlement seen in the September 11th claimants. The Price-Anderson answer to the problem of future claimants is a statutory provision (again, noted with approval by the Supreme Court) that “no more than 15% of the [liability] limit can be distributed pending court approval of a plan of distribution taking into account the need to assure compensation for ‘possible latent injury claims which may not be discovered until a later time . . . .’”<sup>249</sup> Future statutes with a liability cap like the ATSSSA would do well if, at a minimum, they contained the 15 percent rule found in the Price-Anderson Act.

It is also worth reconsidering some of the proposals for managing liability caps that have arisen in the context of Price-Anderson, but that were never adopted. For example, in 1983 the Nuclear Regulatory Commission proposed eliminating the aggregate liability cap with an annual limit on liability, whereby “each large reactor licensee would be subject to annual assessments, to be paid until all public liability had been satisfied . . . .”<sup>250</sup> Another proposed amendment to the Price-Anderson Act, offered by Senator Stafford in 1987 was to eliminate the liability cap altogether, and replace it with an obligation of the federal government to indemnify all liability above the levels that had previously been part of the liability cap; doing so would, in effect, stipulate a postaccident procedure whereby Congress could draw on a variety of sources besides federal funds to fulfill this obligation.<sup>251</sup>

In addition to the strengths and weaknesses seen in the liability cap model from the Price-Anderson Act, a few other statutory models exist. The Public Readiness and Emergency Preparedness Act (“PREPA”) immunizes designers and manufacturers of countermeasures that are used during a period designated by the Secretary of Health as a “public health emergency” or “threat” of a future emergency.<sup>252</sup> This statute is addressed to “all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure.”<sup>253</sup> PREPA is primarily an administrative remedy scheme; litigation is available only in narrow situations in which plaintiffs allege “willful misconduct,” and the statute grants the District Court for the

249. *Id.* at 92 (quoting § 2210(o)(1)(C)).

250. Dan M. Berkovitz, *Price-Anderson Act: Model Compensation Legislation?—The Sixty-Three Million Dollar Question*, 13 HARV. ENVT’L L. REV. 1, 18 (1989).

251. *Id.* at 33, 33 n.148.

252. Public Readiness and Emergency Preparedness Act, 42 U.S.C.A. § 247d–247d-6d(b)(1) (West 2008) [hereinafter PREPA].

253. *Id.* § 247d-6d(a)(1).

District of Columbia exclusive jurisdiction over such claims.<sup>254</sup> PREPA is an example of how Congress can respond to certain disasters without the full use of protective coordination or event jurisdiction concepts that shaped the ATSSSA. Although PREPA is tied to a certain event, a national health emergency, jurisdiction is based on a *type* of claim as well—the covered countermeasures.<sup>255</sup> Moreover, Congress has decided to protect the industry in question with immunity and an administrative remedy for victims. Although this method may be subject to other sorts of criticisms in the realm of tort reform,<sup>256</sup> it avoids the litigation and jurisdictional difficulties that a liability cap would produce.

A second example is the Y2K Act.<sup>257</sup> Congress passed this statute in anticipation of widespread problems relating to computer compliance and readiness at the millennium.<sup>258</sup> Legislators were persuaded that major upsets in computer functioning could lead to unchecked litigation and enormous liabilities in certain industries.<sup>259</sup> The statute is replete with liability limitation measures such as limitations on punitive damages,<sup>260</sup> economic loss,<sup>261</sup> and special pleading and notice requirements.<sup>262</sup>

What distinguishes PREPA and the Y2K Act from Price-Anderson is that the liability cap measures are aimed at individual cases and claims, *not* at the group of cases as a whole. Therefore, at least from a litigation efficiency perspective, these methods of liability limitation are preferable to the general liability cap employed by the ATSSSA.

Another potential problem with an ATSSSA-style liability cap is the relationship between establishing the cap and the availability of liability insurance. The ATSSSA, a statute completely retrospective in scope, does nothing to address the availability of liability insurance, because all parties facing liabilities had procured liability insurance prior to the event in question and the subsequent congressional directive tying the limitation of liability to the amount of available liability insurance. Any liability caps

---

254. *Id.* § 247d-6d(e)(1).

255. *Id.* § 247d-6d(a)(1). The statute still has serious boundary issues. The definitions of both the national emergency or threat thereof as well as “countermeasure” seem to invite extensive litigation over their limits.

256. *See* Conk, *supra* note 33, at 228–32.

257. Y2K Act, 15 U.S.C.A. §§ 6601–6617 (West 2008). Because the millennium passed without a major computer event, we will not know how effective the statute would have been at limiting liability.

258. *Id.* § 6601.

259. *Id.* § 6601(a)(6)–(7).

260. *Id.* § 6603.

261. *Id.* § 6611(a)–(b).

262. *Id.* §§ 6606–6607.

that are either prospective, or somehow bridge the prospective/retrospective gap must account for how such a liability cap will affect the pricing and availability of liability insurance. Congress has already shown sensitivity to this problem. The Price-Anderson Act requires nuclear contractors to purchase the maximum amount of available privately underwritten liability insurance.<sup>263</sup> The Terrorism Risk Insurance Act, which constructs a similar program of public and private insurance for losses caused by cases of foreign terrorism, also requires the purchase of privately underwritten insurance.<sup>264</sup> Continued attention to the requirement for purchase of private insurance is essential, for a prospective liability scheme that mirrors the ATSSSA would create an incentive for the amounts of liability insurance coverage to drop dramatically.

## 2. Liability Caps and the Bankruptcy Analogy

The September 11th plaintiffs are not the first litigants to encounter the problems associated with distributing a fixed pool of assets among a large group of plaintiffs that includes an unknown number of future claimants. This is a common scenario in the bankruptcy proceedings of corporations involved in the manufacture of products that result in mass torts, such as asbestos manufacturers. Some commentators have even suggested that bankruptcy proceedings are a preferable forum for the resolution of certain complex litigation matters.<sup>265</sup> The solutions that have been proposed and implemented in these matters may give some guidance as to the structure that Congress could give to a liability cap in order to avoid the problems that have arisen as a result of the ATSSSA's liability cap.

One proposal is to give periodic rather than lump sum awards to mass tort claimants in a bankruptcy.<sup>266</sup> This model would function like a variable annuity in which the size of the payments would vary with respect to the amount of money available and the best current estimates as to the numbers of current and future plaintiffs. This model might work particularly well if combined with a liability cap that uses the annual rather than aggregate approach once proposed for the Price-Anderson Act.

---

263. 42 U.S.C.A. § 2210(b) (West 2008).

264. Terrorism Risk Insurance Act of 2002, 15 U.S.C.A. §§ 6701–6781 (West 2008).

265. See, e.g., Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. (forthcoming 2008).

266. See generally Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 864–65 (1984).

Another model called the “capital markets approach”<sup>267</sup> involves using the fixed pool of money to create a trust or financial instrument. Claimants are then issued shares of the fund with one share per dollar of the claim.<sup>268</sup> The final number of shares equals the aggregate dollar value of claims, and when the instrument matures, each shareholder shares pro rata in the fund.<sup>269</sup> The advantage of this approach is that current claimants can have immediate access to funds by selling their shares on the market, and the market itself will value the shares according to how many claims investors expect will ultimately be filed.<sup>270</sup>

Building this sort of mechanism into a liability cap could provide needed structure to the resolution of claims. Congress could mandate the structure in the text of the statute, or the parties to the litigation could agree to this sort of fund distribution as part of a settlement plan.<sup>271</sup>

Finally, Congress should be attuned to the problem of representation of future claimants. In the case of a toxic tort MDL, there might not be a class action under which the court is required to designate a class of future claimants and assign it its own representative,<sup>272</sup> nor might there be a bankruptcy in which the court appoints a guardian for future claimants.<sup>273</sup> Mindful of this, Congress might mandate that the district court overseeing claims subject to a liability cap appoint a guardian or representative for future claimants, and structure the arrangement so that the representatives have incentives to meaningfully represent that group.<sup>274</sup>

## VI. CONCLUSION

In an age of instant and pervasive mass media coverage, events of

---

267. See Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 394–401 (1994).

268. *Id.* at 396.

269. *Id.* at 397.

270. See generally Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435 (2004) (critiquing the “capital markets approach”).

271. Furthermore, it may be possible to structure a fund that is not a blanket settlement—that is, a distribution that anticipates both litigated and settled claims. An example from the class action context is the Fen-Phen settlement in which present and future claimants were given both litigation and settlement options. Richard Nagareda has likened this to a “put option” in the financial markets. See Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 796–829 (2002).

272. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

273. See Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise—Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2063 (2000) (stating that “the Bankruptcy Code does not expressly provide for [appointing legal representatives for future claimants]).

274. See Listokin & Ayotte, *supra* note 270, at 1456–60.

great dimensions can take on instant national significance. The pressure for a federal response is high and the action taken is often hasty. The story of the ATSSSA shows how Congress, eager to fashion a national response to a catastrophic event, created a remedy that raised serious jurisdictional concerns from the standpoint of federalism and for coordination of complex litigation. To assert federal judicial supremacy over resolution of disputes, Congress simply asserted jurisdiction over the entire event. To show that the federal control would provide a sleek and efficient response, Congress tied the cases together for litigation in a single judicial district. In the short time since the September 11th attacks, Congress has shown a willingness to use the ideas of event jurisdiction and protective coordination as organizing concepts for a new statutory regime. The response to Hurricane Katrina demonstrates that it is not a foregone conclusion that Congress will rush to write statutes designing remedies that bundle together claims and place them under exclusively federal jurisdiction. PREPA, however, shows Congress's favorable disposition toward using events as an organizing concept of jurisdiction, although no statute precisely like the ATSSSA has been passed.

This Article shows the problems that occur when Congress addresses issues of potential industry collapse and efficient recovery to victims by altering the jurisdictional boundaries that normally apply to litigation. Moreover, experience in other situations shows the possibilities for dealing with these problems by other means. Government can protect a vulnerable industry by a number of means including direct subsidies and tax breaks.<sup>275</sup> Another such approach would be for the government to immunize an industry from certain claims and then assume all liability claims itself under the Federal Tort Claims Act,<sup>276</sup> as it did in the National Swine Flu Immunization Program of 1976.<sup>277</sup> Statutes such as the Price-Anderson Act that involve both a compensation fund and a litigation option organized around event jurisdiction and protective coordination, and involving a liability cap, require serious rethinking. The Hurricane Katrina experience shows how coordination of postdisaster litigation can proceed when judges and litigants make a more functional analysis of which cases to coordinate

---

275. See Ellen P. Aprill & Richard Schmalbeck, *Post-Disaster Tax Legislation: A Series of Unfortunate Events*, 56 DUKE L.J. 51 (2006) (critiquing the efficacy of tax measures imposed after September 11th and Hurricane Katrina).

276. 28 U.S.C. §§ 1346(b), 2671–2680 (2000).

277. National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113 (repealed 1978). One author has observed that the Swine Flu cases “show[] that an FTCA mass inoculation claim against government itself can be competently handled by ordinary tort principles derived from state law.” Conk, *supra* note 33, at 244.



and where they should be litigated. It also demonstrates that interjurisdictional cooperation between state and federal courts may allow parties to achieve the efficiencies of pretrial procedure that Congress believed it could achieve by simply federalizing all claims arising out of a certain event.

It may be that the events of September 11th were so unique that they created a "perfect storm" of potential litigation and hasty congressional response that is unlikely to occur again. Even so, it is important to understand the difficulties that have ensued as a result of the ATSSSA. If event jurisdiction and protective coordination never fully emerge as organizing concepts of jurisdiction, then it might be that legislators have understood the problematic nature of these ideas.