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SPEECH

OPENING ADDRESS

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Thank you very much, Stephen Burbank. It is a great opportunity to join you today at the University of Pennsylvania on the seventy-fifth anniversary of the Federal Rules of Civil Procedure. Every senator wakes up every morning eager to go out and deliver an impassioned speech on the subject of the Federal Rules of Civil Procedure. You laugh, but you are here to listen to a speech on the Federal Rules of Civil Procedure.

I imagine that many law students who arrive here at this famous law school in Philadelphia, the city that hosted our nation's Constitutional Convention, dream of litigating epic constitutional cases before the United States Supreme Court. For the students here, perhaps learning the Federal Rules of Civil Procedure may not be very high on your priority list, but you

† United States Senator for Rhode Island. This text is an adaptation from the opening address delivered on November 15, 2013, at *The Federal Rules at 75*, a symposium hosted at the University of Pennsylvania by the *University of Pennsylvania Law Review*.

will find out—as I found out—that command of procedure is essential to a litigator's prowess.

More broadly, the way we fashion procedure is pivotal to the quality of justice our system provides. Supreme Court Justice Abe Fortas said it well when he wrote that, "Procedure is the bone structure of a democratic society."[1] I'm going to ask you to remember two things from this speech. That's the first one: "[p]rocedure is the bone structure of a democratic society." In short, procedure is power.

Today, I want to focus on the way that civil procedure affects the power of an important political institution within our system of self-government—and that is the civil jury.

Let's start, in this historic place, with some history. The earliest tendrils of the jury system appeared in England in the twelfth century. By the fifteenth century, civil juries had blossomed to the point where independent persons gathered together and heard witness testimony brought by opposing counsel. When the earliest American settlers came to this land, they transplanted juries here: 1624 into Virginia, 1628 into Massachusetts, 1677 into New Jersey, and 1682 into Pennsylvania. If you do the math, that makes last year the 330th anniversary of the Pennsylvania civil jury.

Civil juries provided a treasured means of self-government to early Americans as they chafed under colonial rule. Efforts by the English government to deny that right helped foment the American Revolution. When our original Constitution was silent on the civil jury, Americans sounded the alarm and the Seventh Amendment[2] was promptly sent to the states in the Bill of Rights.

Alexander Hamilton described this in *The Federalist* No. 83, where he stated that:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.[3]

The civil jury: the very palladium of free government.

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1 ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 60 (1968).

2 U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

3 THE FEDERALIST NO. 83 (Alexander Hamilton).

Colonial Americans understood, like Sir William Blackstone, that "[e]very new tribunal erected, for the decision of facts, without the intervention of a jury . . . is a step towards establishing aristocracy, the most oppressive of absolute governments."[4] The founders intended the civil jury to serve as an institutional check on that power by giving ordinary American people direct control over one vital element of government.

The civil jury is not just a fact-finding appendage of a court. It has an institutional and structural purpose. Alexis de Tocqueville observed that the jury should be understood as a "political institution" and "one form of the sovereignty of the people."[5] Sir William Blackstone explained that trial by jury "preserves in the hands of the people that share, which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens."[6] That's the second line I want you to remember: the civil jury "prevents the encroachments of the more powerful and wealthy citizens."

Uniquely, in a Constitution that is largely devoted to protecting the individual against the power of the state, the civil jury is designed to protect the individual against other more powerful and wealthy individuals.

Today, the civil jury remains a political institution. It fosters civic engagement. It educates citizens about the workings of their government. It knits together people from all walks of life. It dissolves power down to the people. It offers a final check on abuse, when other institutions of government are compromised.

The jury trial has never been the exclusive method for concluding litigation in federal courts, but it is now close to vanishing. When the Civil Rules were adopted, around eighteen percent of cases were resolved by either a jury or a bench trial. Now, less than two percent of cases reach a jury or a bench trial. Most litigants do not have a reasonable prospect of presenting their claims to a jury of their peers.

Some reasons for this trend are practical. The economics of the modern legal practice force litigants into early settlement. Judges add to the pressure with concerns about managing and expediting their dockets. But some changes come via the Federal Rules of Civil Procedure.

Recent amendments and interpretations governing pleading standards and motions to dismiss, class action lawsuits, summary judgment, and case management procedures have all narrowed the gateway to a jury trial. For

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[4] 3 WILLIAM BLACKSTONE, COMMENTARIES *380.

[5] ALEXIS DE TOCQUEVILLE, AMERICAN INSTITUTIONS 363 (Francis Bowen ed., Henry Reeve trans., 7th ed. 1874).

[6] BLACKSTONE, *supra* note 4, at *380.

example, in *Iqbal*[7] and *Twombly*,[8] the Supreme Court interpreted Rule 12, which governs motions to dismiss, to eliminate traditional notice pleading and make it far easier for corporate defendants to dismiss cases. This prevents plaintiffs from reaching discovery and ultimately presenting their case to the jury. The Court invented a new "plausibility" standard, whereby a judge screens a complaint to make his own assessment of the facts and inferences. As Justice Stevens reminded us in his dissent in *Twombly*, "[u]nder the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in."[9] More and more, it seems, the trend in judicial interpretation of the Federal Rules is, in fact, to keep litigants out.

For class actions, the Court interpreted Rule 23 to make it more difficult for a certified class of plaintiffs to reach a civil jury and prove a pattern of discrimination. In *Wal-Mart v. Dukes*,[10] the Roberts Court changed the commonality requirement of Rule 23(a), making it far more difficult for individual citizens who had been injured to join together, bring their case before a jury, and hold corporate wrongdoers accountable for the small-denomination, but large-scale, frauds that are the stuff of class actions. This was an epic change.

In summary judgment, we are still living with the *Celotex* trilogy from the 1980s.[11] According to the text of Rule 56, summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In *Celotex* itself, the Court held that the moving party need not produce evidence showing the absence of a genuine issue of material fact, but merely show "that there is an absence of evidence to support the nonmoving party's case."[12] The burden shifted a little there. In *Anderson v. Liberty Lobby, Inc.*, the Court held the same standard of proof required at trial would also apply at the summary judgment stage.[13] Since the plaintiff usually bears the burden of trial, the burden shifted again. Then, in *Matsushita v. Zenith*, the Court held the party with the burden of proof at trial must create more than a "metaphysical doubt" about the relevant facts, solidifying the shift.[14]

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7 Ashcroft v. Iqbal, 556 U.S. 662 (2009).

8 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

9 *Id.* at 575 (Stevens, J., dissenting).

10 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

11 Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

12 *Celotex*, 477 U.S. at 325.

13 *Anderson*, 477 U.S. at 254-56.

14 *Matsushita*, 475 U.S. at 586.

Together, these changes made it easier for courts to grant summary judgment, and courts took notice. Federal courts have cited this trilogy in astounding numbers. *Anderson* has been cited more than 175,000 times, *Celotex*, more than 165,000 times, and *Matsushita* more than 80,000 times.

Amendments to Rule 16, which covers pretrial conferences, case scheduling, and case management, have steered case management more toward settlement than toward trial. This preference for settlement is going to get stronger as we have more budget problems in Washington and we have less money to support the activities of our judiciary.

Twenty-five years ago, when the *University of Pennsylvania Law Review* commemorated the fiftieth anniversary of the Civil Rules,[15] Professor Maurice Rosenberg said that the 1983 amendments to Rule 16 had "helped shift the center of gravity from the trial to the pretrial stages" of civil litigation.[16] These amendments cemented the judge's managerial role. Professor Rosenberg also noted that the word "management," for the first time, appeared in the Civil Rules in those 1983 amendments.[17]

Finally, while not a rule, the growing practice of judges tolerating "paper blizzard" defense strategies and accepting the accompanying delay in access to a jury rewards defendants who can bankroll aggressive and imaginative defense pretrial strategies and "starve out" the plaintiff.

It need not have been this way. Congress intended that changes to the Civil Rules would take place through the process laid out by the Rules Enabling Act. Instead, as I have described, many of the most significant changes in civil procedure—the amendments to Rule 16 aside—have been made by judicial fiat. The Rules Enabling Act, passed in 1934 and amended in 1988, requires advisory committees convened by the courts to develop amendments for the civil rules through a public rulemaking process.[18] The courts then decide whether to transmit such amendments to Congress, which has seven months to modify or reject those amendments. This process is intended to reflect the considered views of litigants and judges, to establish a thoughtful record, and to preserve a meaningful role for Congress. Decisions such as *Iqbal* and *Twombly* not only implicitly overruled precedents, such as *Swierkiewicz v. Sorema*,[19] but also bypassed this rulemaking

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15 *See* Symposium, *The 50th Anniversary of the Federal Rules of Civil Procedure, 1938–1988*, 137 U. PA. L. REV. 1873 (1989).

16 Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2203 (1989).

17 *Id.* at 2199.

18 Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2012)).

19 Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

process and deprived Congress and the public of the roles reserved for them in the Rules Enabling Act.

The result has been rule changes based on judicial hunch—for example, that there is widespread plaintiff discovery abuse—rather than on a comprehensive record of evidence. Congress established the Rules Enabling Act process exactly to avoid this sort of policymaking by judicial guesswork. It is frustrating when Congress passes laws intended to provide civil judicial relief for injured parties before civil juries, only to find that courts curtail that relief through reinterpretation of the Rules of Civil Procedure.

Unfortunately, as the lack of a legislative response to the *Twombly* and *Iqbal* cases demonstrates, Congress itself has some blame to bear here. Congress is not always well-positioned to respond to judicial policymaking. Still, the present structural challenges should not dissuade us from fighting for a litigant to have a realistic opportunity to present a factual dispute to a civil jury. The Founding Fathers would be astounded to see where we have come.

Congress could help revive the jury trial through the rulemaking process with a greater substantive focus on jury access and by including diverse viewpoints on the relevant advisory committees so judicial docket management and settlement concerns do not trump all else.

We can also accomplish this through legislation that overturns specific cases that limit jury access. Congress could consider wholesale procedural changes, such as the creation of a new procedural track enabling simple cases to move more readily to jury trial. And, it would help if we confirmed more judges with a proper understanding of the political and historical role of the civil jury.

Our goal—like the purpose of the Seventh Amendment—should be to reestablish the special constitutional institution that gives an injured individual the opportunity to have his or her day in court in front of a group of peers. We must remember the constitutional role of the jury, the political role of the jury, the educational role of the jury, and the empowering civic role of the jury. In doing so, we will be truer to our democracy and to our history.

Let me close with a more contentious point. This gradual suffocation of the civil jury is neither random nor coincidental. Blackstone warned, in my second favorite quote that I asked you to remember, that the civil jury would be a thorn in the side of the more wealthy and powerful, of those who are used to special treatment. There, in front of the civil jury, they have to stand annoyingly equal before the law. As a body that "prevents the

encroachments of the more powerful and wealthy,"[20] the civil jury inevitably provokes their annoyance, their enmity, and their opposition.

In America nowadays, our most wealthy and powerful beings are corporations, and juries are indeed a thorn in their side. Corporate influence suffuses the legislative and executive branches. Corporate lobbyists, campaign contributions, and, thanks to *Citizens United*,[21] unlimited election spending are all big bucks, and that money is not spent for nothing. Ideas that corporate power resists can be banished. Reforms that corporations object to can be stymied. Tax and other arrangements that secure corporate profits can be achieved. The legislative and executive branches can provide sweet deals for big corporations.

But that whole tide of corporate money and influence comes to a crashing stop against the hard square corners of the jury box. There, the proud and mighty must stand even before the law, with some menial person they have injured. CEOs and important officials might be obliged to testify. And rigging the game doesn't work well. Tampering with legislators and regulators is a constant, even licensed, corporate activity, but tampering with a jury is a crime. The jury is, indeed, a thorn in the side of corporations comfortable astride the rest of government.

It should be no surprise that corporations spread a mythology of greedy trial lawyers, runaway juries, abusive discovery, and preposterous verdicts. It should be no surprise that corporations seek the appointment of "business-friendly" judges. It should be no surprise that an already "business-friendly" Congress and those "business-friendly" judges steadily whittle away at our access to this vital and historic American institution of self-government, the civil jury.

The cost of this institution vanishing is high. We measure it in how often we are frustrated that political might makes right, how often we are frustrated that the voices of the wealthy and powerful fill the halls of government, and how often we are frustrated that lost causes pile up against bulwarks of well-kept indifference.

I'll spot you that juries can be a thorn in the side of some and can sometimes be inconvenient. They do take some effort. They require care and feeding, both figuratively and literally. But I think that an institution that makes popular sovereignty real, an institution that checks the encroachments of the wealthy and powerful, an institution that will listen when the ears of the other branches of government are deaf to you, and an institution

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20 BLACKSTONE, *supra* note 4, at *380.

21 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

that brings ordinary Americans together to make important decisions in their community—that's an institution that is well worth all the trouble.

I think we should chart our course by the star our Founders followed and not tread the low path of efficiency, convenience, and accommodation. For the larger purposes and values our Founders fought for when they built us this goodly heritage, we should do everything we can to bring the American civil jury roaring back to life. I humbly propose that the Federal Rules of Civil Procedure should support that endeavor.

Thank you very much.