

**Senator Sheldon Whitehouse Remarks  
NYU Civil Jury Project Fall Conference  
September 11, 2015**

Please join me in thanking NYU and directors Steve Susman, Professor Samuel Issacharoff, and Professor Catherine Sharkey, for their efforts and foresight in creating this terrific Project. It's been an enormous undertaking, and we are all grateful for your work. And we are especially grateful for Steve's generosity. The civil jury has vital importance to our American system of government. But we risk losing it if we forget its historical underpinnings and its role in our self-governance. The Civil Jury Project will help prevent that loss. So thank you.

For centuries, the jury has served as a last sanctuary within our Constitutional structure for people seeking justice and fair treatment under the law. Life is not always fair, and when the forces of society align against us—when big interests control our executive officials, when lobbyists have the legislature tied in knots, when media outlets steer public opinion against us—it is the hard square corners of the jury box that stand firm against the tide of influence and money.

To paraphrase Joe Biden, it's a big effing deal. To truly appreciate why, we must understand its history.

Early elements of the jury system date back almost a millennium, to twelfth century England, when Henry II established the civil jury as an instrument for justice. Back through the mists of time, it is hard to imagine the political calculation that led to that decision, but we can imagine a king a bit skeptical of his minions as they travel about to dispense the king's justice.

We can imagine a king saying, "Look, get a bunch of the locals together and let them figure it out. They're more likely to get it right, and they'll have more ownership of the results." Plus he may have thought, "There is less chance you'll take gratuities and sour the justice done in my name." In any event, the civil jury flourished in England.

The earliest American settlers also valued the jury. They brought it with them as precious cargo from England to our shores.

In fact, the Virginia Colony established the jury in 1624, roughly a year before the Dutch even settled this island of Manhattan. Early Americans created juries in 1628 in the Massachusetts Bay Colony, in 1677 in the Colony of West New Jersey, and in 1682 in Pennsylvania.

Later in the Colonial Period, civil juries provided a treasured means of self-governance to early Americans chafing under colonial rule, and protecting the civil jury was a "casus belli" of the Revolution. In fact, in our Declaration of Independence's list of grievances, the colonists admonished King George III for "depriving us in many cases, of the benefits of Trial by Jury."

Then, when our original Constitution was silent on the civil jury, Americans sounded the alarm and the Seventh Amendment was sent to the states in the Bill of Rights.

Alexander Hamilton is perhaps the most famous Revolutionary Era New Yorker. He stated in *The Federalist* No. 83, “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.”

How could the civil jury be “a valuable safeguard to liberty” or the “very palladium” of free government? Because it would serve as an institutional check on political power. Writing in the mid-nineteenth century in his famous *Democracy in America*, Alexis De Tocqueville observed that the jury should be understood as “a political institution” and “one form of the sovereignty of the people.”

What did this “political institution” achieve? How did it protect “the sovereignty of the people”? Two ways, as Sir William Blackstone had explained. Trial by jury, Blackstone said, “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.”

These are separate thoughts.

First, the civil jury devolves a share of government power, “which they ought to have,” directly to the people. In the rest of government, people choose others to make decisions for them; here, if chosen, people make decisions themselves.

Second, and uniquely in a Constitution otherwise devoted to protecting the individual against the power of the state, the civil jury is designed to protect the individual against other individuals—other “more powerful and wealthy” individuals.

Former Chief Justice William Rehnquist observed about this era, “The founders of our nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign.”

This is a little institution, but with a big role.

Despite the deep roots and important role of the civil jury, we have witnessed a steady decline in its use—a steady erosion over the last several decades. This gradual erosion is neither random nor coincidental. Before we look at why this is happening, let’s look at how.

For one, the cost of modern litigation often forces parties into early settlements. Often, judges manage their dockets by adding pressure on parties to settle. Judges may also tolerate “paper blizzard” defense strategies that can cause litigation fatigue and push parties to settle.

On top of that, the Supreme Court has issued decisions relating to arbitration, pleading, class actions, and punitive damages that have begun to choke off access to civil juries. These decisions usually ignore, rather than interpret, the Seventh Amendment. It is hard to imagine decisions touching so intimately on gun ownership not addressing the Second Amendment. Not all amendments are created equal, it seems. The decisions make it harder both for individuals to bring their claims before a civil jury, and for the jury to play its intended institutional function.

Over the past decades, the Supreme Court has repeatedly, zealously expanded mandatory binding arbitration, meaning fewer litigants have access to a jury. The Court has held that arbitrators may even adjudicate whether the arbitration clause itself is unconscionable. It has held that mandatory arbitration clauses may entirely prohibit class actions. And it has authorized big corporations to force unknowing consumers, signing up for telephone service or a credit card, to surrender their constitutional right to a trial and instead be funneled into business-friendly arbitration. It is hard to imagine countenancing other enumerated rights to be so easily signed away.

It is not just the Court's rulings on arbitration that have reduced the role of the jury, but also its decisions regarding the Federal Rules of Civil Procedure.

In the well-known *Ashcroft v. Iqbal* and *Bell Atlantic Corporation v. Twombly* cases, the Court invented a new "plausibility" pleading standard, under which judges screen complaints to make their own assessment of the facts and inferences. This can prevent plaintiffs from even reaching discovery, let alone ultimately presenting their case to a jury of their peers. As Justice John Paul 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." Yet the recent trend in judicial interpretation of the Federal Rules of Civil Procedure is, in fact, to keep litigants out, and away from a jury trial.

The Roberts Court has also made it harder to jointly seek redress for widespread harm through a class action. Instead, injured Americans are left to pursue relief one by one. Having to bring cases one by one makes it far more difficult for victims to hold wrong-doers accountable before a jury for small-denomination but large-scale frauds.

Recent Supreme Court decisions have also limited the civil jury's traditional authority to impose punitive damages. All the beneficial features of the jury as a mechanism for redress against the powerful, all the historic wisdom of the Founding Fathers about the jury's role, all gave way to the apparently higher purpose of assuring "predictability" for corporations. I wish I were joking.

Collectively, these Supreme Court decisions have choked off access to the jury.

Which gets me to the "why." Remember Blackstone's words: the jury "prevents the encroachments of the more powerful and wealthy" citizens. The jury is intended to be a thorn in

the side of the powerful and wealthy. It is intended to make the powerful and wealthy stand annoyingly equal before the law with everyone else.

The jury is intended to be the little branch of government the wealthy and powerful can't get to, can't fix, can't control. That's why jury panels are new every time. If you had a permanent panel of the same jurors every time, the powerful and wealthy would tend to influence the institution. The jury stands against all that tide of influence. That's what it's there for. That's how it was designed.

Who is more powerful and wealthy today than big corporations? And big corporations hate the jury. The small institution has big enemies.

This enmity has practical repercussions. The big corporations and their front groups have not been idle. If I say "frivolous" and you think "litigation," that's a repercussion. If I say "runaway" and you think "jury," that's a repercussion. If damages awards have been limited in your state, that's a repercussion. And when you look at a Supreme Court that has the most pro-corporate record in decades, perhaps since the *Lochner* era; a record so pro-corporate that, by 9-1, Americans now disbelieve individuals can get a fair shake there against a corporation—that's a repercussion. It's no coincidence the pro-corporate Court is choking off access to a jury.

Our Founding Fathers would be astonished to see how far we have fallen from the popular affection for the jury trial in 1776. Today, some even question the very need for the civil jury. These critics argue that it would be cheaper and more efficient to do away with the institution altogether, or to make it more like arbitration, with professional panels. There is the argument that everyday American citizens cannot possibly understand or decide the disputes at issue in complex litigation.

If we trust juries to resolve criminal cases where a defendant's life can hang in the balance, surely we can trust a jury to resolve a breach of contract.

Most important, the civil jury provides benefits beyond the resolution of legal disputes. The civil jury ought to be as necessary a part of our constitutional system today, as it was seen to be at the birth of our nation.

Here's why:

First, the civil jury prevents judicial autocracy. With all due respect to judges, by removing fact determination from the province of the judge, a jury offsets any institutional bias that may be introduced through judges' societal preferences. It also helps prevent cases from being fixed. It's hard to fix the case, if a jury fixes the facts. This is what Alexander Hamilton meant when he called the civil jury a "security against corruption."

Second, service on civil juries fosters civic education and engagement. As De Tocqueville wrote, the civil jury “should be regarded as a free school which is always open and in which each juror learns his rights.”

Third, the civil jury brings together Americans of different walks of life to deliberate together and to reach a reasoned conclusion. Jury by jury, this service strengthens the bonds of our democracy. As Attorney General, I talked to dozens of juries and grand juries; even when the testimony had been horrible stuff to hear, they always felt good about their service.

Finally, the big one: the civil jury is not just about “dispute resolution.” The civil jury helps check power. The American system of government is built on the premise that divided government and separated powers – checks and balances – will best protect individual liberty. The civil jury distributes authority of the state directly to citizens, giving them direct power to resolve disputes. And it gives them this power in a way that makes it very hard for special interests to control. That’s the big effing deal.

And it’s an even bigger deal in the wake of the Supreme Court’s dreadful *Citizens United v. Federal Election Commission* decision. Today the influence of wealth and power suffuses the Legislative and Executive Branches. Corporate lobbying, and corporate and billionaire election spending, are at unprecedented levels. In our political debate, dark money dollars drown out the voices of average citizens in what has been called “a tsunami of slime;” and all that money is not spent for nothing.

The result stinks. Ideas that corporate power resists are ignored; reforms that corporations object to are thwarted; tax and other arrangements that secure corporate advantage are protected.

The elected branches are constantly induced to provide sweet deals for power and wealth, often at the direct expense of ordinary Americans. That’s the world I live in.

But that tide of corporate money and influence comes to a crashing stop at the jury box. There, the merits of the case dictate the jury’s decision, not influence and power and wealth. There, dark money political spending has no role. There, the mighty corporation must stand equal before the law, even with the humble citizen it has injured.

Powerful interests love a game that is rigged in their favor. Always have; always will—it’s a tale as old as time. Rigging the game doesn’t go over well in the jury box. Special interests seek special influence with legislators and regulators all of the time. It is a constant activity, licensed and regulated by lobbying and campaign finance laws; but tampering with a jury is a crime.

The jury is indeed a thorn in the side of interests comfortably astride the rest of government. It is not surprising that those interests have sought to choke off the jury. The question for us today

is, “Should we let them?” As a nation, should we chart our course by the star our Founders followed or tread the low path of convenience and accommodation of big interests?

Juries take some care and feeding, literally and figuratively. Jury trials make judges and courtroom staff have to work harder. Juries summon regular citizens away from their daily responsibilities. I get all that.

But in a world of influence, made worse by *Citizens United*, juries are the institution of government most resistant to political influence. In a world where so many feel powerless, juries give regular citizens real authority. In a world of fractious partisanship, juries make citizens work together and decide together. And in a world in which injustices pile up against barricades of well-kept indifference, a jury can blow the status quo to smithereens.

It’s the little institution, with the great big role.

It is my hope that the Civil Jury Project will highlight this vital constitutional role of the civil jury, and preserve and enhance the jury as an element of the uniquely American system of self-government our forefathers fought and bled and died to create and preserve. It is no small matter.

Thank you, again, for the opportunity to speak with you today, and for your interest in this exciting new project.