

President Ramo: Ladies and gentlemen, let me just encourage everybody to sit down. We are going to begin lunch, and then I will introduce our wonderful luncheon speaker, but if you would sit down, we will have lunch served and at least get started. Thank you.

(Lunch was enjoyed by the group.)

President Ramo: Ladies and gentlemen. Some number of years ago, I do not even remember exactly, maybe three or four years ago, we began what to me is an important tradition for Wednesday lunch, in which we invited somebody to come and speak either to review the Supreme Court Term, which, of course, we are always in the middle of, or to discuss serious legal issues that involved the highest court. And because I am a person in practice and not always reading all of the cases and not reading all of the law-review articles—I know that is a shock—although I did, Goodwin, read all of my Young Scholars papers—it seemed to me that this was really an important thing to continue. When I was thinking, this year, about whom we might have to address us that has had both wide experience in all areas of the law and who would be fascinating to listen to, I thought immediately of Judge Willy Fletcher, and I wondered if I might be able to talk him into coming to address us today.

He was so relieved, Goodwin, that I was not calling to ask him to be on the Young Scholars Committee, *(laughter)* that he agreed immediately to come, and so I want to just spend a moment or two introducing everyone to Judge Fletcher, in this case Judge Willy Fletcher, of the Ninth Circuit.

He has had an amazing academic career that includes, of course, not only graduating with distinction as an undergraduate and from law school, but he was a Rhodes Scholar, and he was a Rhodes Scholar at a time when that included also having some athletic ability, but I have never asked him really exactly what that was. Maybe you can enlighten us a little bit, Willy.

He is among those rare judges, of whom our Council member Diane Wood is one as well, who has remained a serious scholar and a serious teacher, and I cannot think of anyone whose words will be

more important as we all get on our planes, elevated by this entire Meeting, whose words will send us even better on the way than our next speaker.

Please help me welcome, from the Ninth Circuit and from the West Coast, our friend, Judge Willy Fletcher. (*Applause*)

Judge William A. Fletcher (CA): Roberta, thank you very much.

You will soon learn the mistake that Roberta made in inviting me to address you. I debated what to talk about, but then the Court made up my mind for me, about a month ago, when it decided *McCutcheon* [*McCutcheon v. Federal Election Commission*, 572 U.S. ___, 134 S. Ct. 1434 (2014)]. I will talk about the Supreme Court and campaign finance. I did not speak to Gerhard yesterday, but he cooperated and said campaign finance might be something to talk about.

Congressman Edward Keating once quoted Justice [Louis D.] Brandeis as saying, “We may have democracy, or we may have wealth concentrated in the hands of a few, but we cannot have both.”

Now Brandeis may or may not have said exactly those words. He certainly did not ever write exactly those words, but we do know from his writings that he expressed those sentiments in various ways.

When Brandeis was confirmed to the Court in 1916, after a bitter fight I might add, the distribution of income and wealth in this country was heavily skewed to the rich in very much the same percentages as today. In Brandeis’s day, the top one percent had 19-1/2 percent of the nation’s income. Today, the top one percent has 22-1/2 percent of the nation’s income. In Brandeis’s day, the top one percent had 38 percent of the nation’s wealth; today the top one percent has 34 percent. And today, the disparities are increasing.

As the disparities increase, the ability of today’s wealthy to influence elections through campaign contributions has greatly increased, particularly in the wake of *Citizens United* [*Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)], decided four years ago, and *McCutcheon*, decided last month.

To give you just one set of numbers, and I could give you many, in the wake of *Citizens United*, which held unconstitutional any limitation on the amount a corporation could contribute in independent expenditures, so-called independent—I do say so-called—independent expenditures increased in Presidential elections by 245 percent, in House elections by 662 percent, in Senate elections by 1338 percent.

I share Justice Brandeis's view that our democracy is threatened as the increasingly wealthy are increasingly able to spend large amounts of money, sometimes unlimited amounts of money, to influence political results.

How has this happened? How have we come to this pass? I will try to explain it by looking at the two major structural election cases decided by the Supreme Court in the last 50 years, *Baker v. Carr* [369 U.S. 186], 1962; *Buckley v. Valeo* [424 U.S. 1], 1976.

I put to one side *Bush v. Gore* [531 U.S. 98 (2000)]. It is not, in my view, a structural case. It was indeed self-described, perhaps I should say self-confessed, as a ticket for this day and train only, a case addressing a particular situation and designed to achieve a particular result.

So back to the two cases with which I will be concerned. First, *Baker v. Carr*. In *Baker v. Carr*, the Justices were confronted with a serious and real-world problem, our own American homegrown rotten-borough system.

In the years following the Civil War, there had been a steady migration from the countryside to the cities, but there had not been a commensurate redrawing of the lines of the electoral districts. As the cities became more and more crowded, the countryside more and more emptied out, and the lines not redrawn, the rural districts came to have disproportionate, sometimes severely disproportionate, influence over politics.

In the particular case in front of the Court in *Baker v. Carr*, the malapportionment in Tennessee, 37 percent of the voters elected 60 percent of the state representatives in the House, 40 percent elected 63

percent of the state senators. This general pattern was replicated across the entire country.

Because of the very nature of the problem, a political solution was going to be very difficult. The English rotten-borough system was finally reformed by Parliament in 1832, but only when the English perceived a very real threat of revolution comparable to what was being threatened at that time on the continent. So the Justices understood that if this problem was going to be resolved, it likely had to be done by the Court.

There had been a long lead-up to *Baker v. Carr*, not only in the sense of this migration, but in the sense of the case law. The Supreme Court had previously seen the malapportionment question in *Colegrove v. Green* [328 U.S. 549], in 1946, and had declined to address it, calling it a political question. They had addressed it in the case of racial gerrymandering in *Gomillion v. Lightfoot* [364 U.S. 339 (1960)] and made an exception to get rid of racial gerrymanders. But not until 1962, finally, does the Court say that malapportionment is not a political question. Justice [Felix] Frankfurter dissented, saying the Court should not enter into the political thicket.

On that Court, there was some genuine political sophistication among the Justices. Chief Justice [Earl] Warren, of course, had served as Governor of California, and Justice [Hugo L.] Black had, for a number of years, served as Senator from Alabama. So the Court had some sense of the stakes and some sense of what it was doing. It announced one person, one vote, as the governing principle a year later in *Gray v. Sanders* [372 U.S. 368 (1963)], but everyone knew in 1962, at the time *Baker* was decided, that one person, one vote, was going to be the principle.

Simplification is virtually inevitable when judges make rules, as distinct from legislatures passing statutes, because our very sense of legitimacy of judicial decisionmaking depends on its being principled. Therefore, we end up with an almost necessary simplification of the law governing malapportionment when the Supreme Court steps in. The Court gave us this principle one person, one vote, as to which

all other principles must either give way, or have effect only after that principle has been satisfied. Given what was at stake, the Justices thought the simplification was worth it.

I think, in the long run, it probably has been worth it, but I want to point out that *Baker v. Carr* has come with significant costs, not all of them readily foreseeable by the Justices at the time. The political scientists saw them fairly early, and some of the practicing politicians saw them very early, but I am not sure even they could have foreseen them fully.

The primary and most immediately obvious consequence is that we now need to reapportion every 10 years with the census. Reapportionment means opportunities for gerrymandering, and we now get gerrymandering in every state every 10 years. Gerrymandering does two things. The most obvious is that it advantages the party in power, who draw district lines to their own advantage.

The second, almost as obvious but not quite, is that gerrymandering tends to create safe seats. Safe seats have a very interesting and, to my mind, bad consequence. If you are in a safe district and a Democrat, your threat is always during the primary and always from your left. If you are in a safe Republican seat, it is the converse, your threat at the primary is always from the right. This means, then, that we necessarily get increased polarization in our politics. So we end up with safe seats, and we end up with Democrats and Republicans who are fearful of their radical wings, which makes compromise among elected representatives more difficult.

Baker v. Carr has also led to term limits, as a consequence of the safe seats that were created. In the end, we have, I think, a slightly better world than the world with which we began in 1962, but not a greatly better world when we take into account the various consequences that have flowed from the implementation of one person, one vote.

I don't think I would go back to the pre-1962 world, but I would see *Baker v. Carr* as a cautionary rather than an inspirational tale.

Fourteen years later, we got *Buckley v. Valeo*. Like *Baker v. Carr*, *Buckley* was a break from the past, but it was a much more radical break than in *Baker*, both procedurally and substantively.

Procedurally, or perhaps I should say jurisdictionally, the story starts in 1793. In 1793, then-Secretary of State Jefferson wrote a letter to the Justices of the United States Supreme Court asking 29 numbered questions. The Washington Administration was concerned about what it should do as a neutral power during the Napoleonic Wars. It did not want to create any unnecessary enemies, and there were a number of complicated legal questions about vessels coming into American ports. Jefferson wrote to the highest court in the land to get the most authoritative answer possible.

The Justices responded, “We cannot answer the questions presented in this form.” Today, we would say they were not presented as cases or controversies; they, in the old days, would have said it exceeds the judicial power. They responded, “It is a forbidden advisory opinion that you ask of us.”

Almost 200 years later, in the late spring of 1974, the Senate was debating a campaign-finance bill in the wake of the Watergate scandals. President Nixon would resign in August. These were conversations in the Senate in June 1974. The Senate had in front of it a bill that would substantially limit the ability both to contribute to particular candidates and to make independent expenditures on behalf of particular issues or candidates.

There are some obvious constitutional questions if you limit contributions and expenditures for political campaigns. Senator James Buckley of New York was concerned not only about those questions, but concerned about the ability to get the bill passed. Because of the hesitation many of the Senators were having about those questions, he proposed an amendment.

The amendment provided, and it was almost immediately accepted, that anyone eligible to vote for President could challenge any provision of what would become the Campaign Finance Act of 1974 [the Federal Election Campaign Act Amendments of 1974,

Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of the U.S. Code), partially invalidated by *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam)] on any constitutional ground. With that amendment added, the act passed, was signed into law. Senator Buckley promptly brought suit (*laughter*) as an individual eligible to vote for President in the case called *Buckley v. Valeo*.

The amendment provided not only this broad grant of standing but also an accelerated procedure for the case to be heard. The suit was filed in the District Court for the District of Columbia. The district court certified directly to the United States Supreme Court 22 questions, without deciding any of them. The United States Supreme Court accepted the certified questions. It heard argument November 1975 and issued a per curiam decision at the end of January in 1976, answering I think only 21 of the 22 questions. I couldn't find the answer to question 7(e) when I read the opinion. (*Laughter*)

In intent and consequence, I regard Senator Buckley's amendment and lawsuit as the equivalent of the letter sent by Thomas Jefferson to the Supreme Court. It was a request for advice. The Supreme Court gave the advice. It gave it in a hurried manner. It gave it in all of the circumstances one has counseled against over and over again in the legal-process school. What judges are good at is answering discrete questions with real-world problems with lawyers who have argued back and forth. The Supreme Court is particularly good at answering questions that have been percolating through the lower courts. Lower courts might have given different answers, and the Supreme Court is educated by those answers.

Here we have, in a very, very short compass, a time of not quite three months from argument to final opinion. They hurried to get the opinion out in time for the election season of 1976. They answered questions that the Court in 1793 would certainly not have answered if they had been posed in a letter, for example, from the Senate majority leader. We are today bearing the cost of that hurried procedure and of the answers the Court provided.

Substantively, *Buckley v. Valeo* was a break from the past in that the Court invented a distinction under the First Amendment between contributions to candidates, which could be limited, and independent expenditures that could not be limited. This was a new distinction and, I have to say, a largely unworkable distinction.

Let me compare *Baker v. Carr* and *Buckley v. Valeo* in several respects, so you can see why while *Baker v. Carr* was probably an appropriate exercise of judicial power, *Buckley v. Valeo* was the farthest thing from it.

First, both cases dealt with important real-world problems. In *Baker v. Carr*, it was the malapportionment of the state legislatures and to some degree of the national Congress. In *Buckley v. Valeo*, it was campaign finance that had produced, among other things, some of the abuses in Watergate.

The great difference, however, is that in *Baker v. Carr*, the problem could not be solved realistically by any other body than the United States Supreme Court. In *Buckley v. Valeo*, the problem had already been solved. It had been solved by Congress. But the Supreme Court did not like the solution, so it re-solved the problem.

Second, there had been a long lead-up to *Baker v. Carr*, as I have described to you, both in the sense of the steady migration and in the Supreme Court's prior acquaintance with the problem. There was essentially no lead-up to *Buckley v. Valeo*.

Third, there was a fair amount of political sophistication on the Court that decided *Baker v. Carr*. I mentioned Chief Justice Warren and Justice Black. There was virtually none of that real-world I-ran-for-office political sophistication on the Court by 1976. The only member of that Court who had ever run for political office was Justice Powell, who had served on the Richmond school board. All of the rest of them were, I will say it this way, political naives, and their naïveté showed in the distinction they drew.

The distinction between political contributions to candidates that, in their view, showed the possibility of undue influence and

corruption, and independent expenditures not coordinated with the candidates that, in their view, did not carry with it the same dangers of corruption or appearance of corruption or undue influence, has proved in practice to be largely, I might say entirely, unworkable. I think any practicing politician could have told them that. We are now living in a world still where we are forced to live with that distinction, unrealistic as it is. To the degree that there is any pressure to abolish the distinction, the pressure is coming from those Justices on the Court who would seek to have no limitations on contributions, just as we now have no limitation on expenditures.

So I would call the Court in 1976, at the time *Buckley* was decided, politically naive. I hesitate to attach the same label to the current Court as it elaborates on what *Buckley v. Valeo* began.

Finally, let's come back to the principles that underlie the two cases. The principle in *Baker v. Carr*, one person, one vote, is probably the most important principle of a democracy. It is a true principle, one that Chief Justice Warren regarded so highly that he wrote in his autobiography that he regarded *Baker v. Carr* as the most important case decided during his tenure as Chief Justice.

Well, that sounds right until you remember that the Court also decided *Brown v. Board of Education* [347 U.S. 483 (1954)] during his tenure, (*laughter*) but as a political matter he regarded one person, one vote, as such an important core democratic principle that he could describe it as more important than *Brown*.

What is the principle in *Buckley v. Valeo*? What is the simplification—the principle—that we necessarily end up with, with the judge-made law that justifies *Buckley v. Valeo*? I can hardly call it a principle. I will call it a principle in quotations. It is: “Money equals speech.”

Now of course that is wrong. We all know money does not equal speech. Money influences speech. In fact, it often influences speech to a great degree. It gives unequal influence in speech. But to say money is speech is a profound and distorting simplification.

Buckley v. Valeo made room only for that single “principle.” It put to one side, as not worthy of consideration, principles that we also instinctively understand as relevant to fair politics.

I am thinking of that book about everything I need to learn about the world I learned in kindergarten [ROBERT FULGHUM, *ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN* (1986)]. Don’t go back so far. Go back to the fourth grade, when the teacher says anyone wishing to run for president of the class may use construction paper of a certain size and may spend no more than \$1.50 on materials.

Now is that fair? We think so.

Of course I recognize that there are lots of problems if the only thing we have in our campaign-finance law is a notion of equality of resources. That cannot be a completely governing principle either, but it should not be irrelevant. The Court has treated it as irrelevant.

How about another “principle” that the Court has more recently embraced? The Court has told us that “corporations are people.” That is the foundation idea for *Citizens United*. The Court tells us just as people cannot be limited in their independent expenditures, corporations, because they are people, cannot be limited constitutionally in their independent expenditures.

That, of course, is another false principle. Corporations are not people. They are artificial persons. We have a sophisticated vocabulary to discuss the ways in which they are treated as if they were people, but they are artificial creations.

Think for just a moment about this constitutional “principle” that the Court has given us—that because corporations are people their independent expenditures of money on campaign finance cannot be limited.

Pretend you are a legislator in Delaware, and ignore the politics for the moment. You are drafting a new set of corporate charter laws, and want to provide from here forward that any Delaware for-profit corporation is forbidden to give money to political campaigns. Is that an unconstitutional statute for Delaware corporations? I think

absolutely not. A corporation is an artificial creation by the State of Delaware for particular purposes, and there is nothing that the State of Delaware is doing wrong to say that a for-profit corporation is not allowed to give money to political campaigns.

So where has this come from? Again, it is a radical distortion, like the idea that money is speech. Corporations are people.

Another principle that has been put to one side is the Brandeis principle that we saw in *New State Ice [Co.] v. Liebmann* [285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)], that the states are laboratories for democracy.

The Court has consistently, in recent years, insisted that the state campaign-finance law must conform to the federal First Amendment campaign-finance law that the Court has articulated. I will give you only two examples. First, there was an Arizona statute that tried to give some implementation of the equality principle, such that there would be matching funds for certain candidates if the other side was outspending to too great a degree. The Court struck it down in 2011. [*Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).]

Second, in 2012, Montana had its limitation on corporate expenditures in local elections struck down [*Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam)]. Not only has the Court given us these quasi principles, it has also forbidden the states from acting in their traditional function as laboratories for democracy to give us a different vision as to how to achieve a fair democracy.

There is no obviously right answer to campaign finance. The right answer, as best we can come to it, or the cluster of permissibly right answers, as best we can come to them, are necessarily going to be answers based on some form of competing ideas, practicality, expedience, and compromise. That is to say, the right answers are the kind we get from legislatures rather than courts.

I will say it a little more cautiously than Justice Brandeis was alleged to have said it. I will say that a society with a high concentration

of wealth is a society that will have difficulty in maintaining its democracy. I will say, further, that a society that goes out of its way to allow the wealthy to have a greatly disproportionate influence on its politics will have even greater difficulty in maintaining its democracy.

I hope that we can eventually come to a better solution, but the Court has constitutionalized its solution under the First Amendment. This means, unfortunately, that the body to which we must look for a solution is the very body that has created the problem.

Thank you. (*Applause*)

President Ramo: Let me just say that my hopes, which were high, have been exceeded. I should have known, Willy, the high level at which you were going to speak to us when I saw that both your wife and the father-in-law of your daughter came to listen to you, (*laughter*) which should have said something to me.

I am reminded by putting together Gerhard's comments and yours, Willy, that we are, after all, a law-reform organization, and sometimes I think, Ricky, we need to have a discussion about how we might be more productive in at least having discussions in the area of campaign finance, because there is nothing I agree more key to the success of our democracy than looking at that in a serious way.

So having said that, let us adjourn and continue to talk about the first peoples that were here. Thank you. (*Applause*)