President Ramo: Dear tired friends, as you put together a program for the ALI Annual Meeting, the program of work and then the program of people that you think the members would want to hear, it's always particularly interesting to figure out who should be the last speaker because, you know, people are tired. They're cranky. (*Laughter*)

They've heard from fabulous people, or sometimes they've heard from not so fabulous people, namely me. And so it's a little bit of a challenge. But this year, as I was thinking about it for actually unrelated reasons, I came upon the perfect person.

So the ALI is supposed to be about a third judges. Right? A third scholars, and a third lawyers in practice. And I found the woman who's a third, a third, a third. And that is, of course, the incredibly remarkable Margie Marshall.

I know that her biography is known to many of you, and some of it is in the Program. But I think that it is so completely amazing, when you look at the fact that she came here from South Africa at a time when that was not such a common thing to do. It says something about the quality of her intellect that she managed to find her way through both Harvard and Yale. I don't know how we missed you at the University of Chicago, Margie, but somehow we did. She had an enormously successful career as a lawyer in practice. She became the general counsel of Harvard to their great luck, was appointed the first woman Chief Justice of the Supreme Judicial Court of Massachusetts I think in 300 years, although that's hard for me to believe that that number could possibly be right, but it is. And while on the court, she had enormous impact really in the way that I think Roger Traynor did when he was Chief Justice of the California Supreme Court. Her opinions and her leadership showed the enormous national impact that a truly great chief justice of a state supreme court can have.

We are all waiting with great interest to see what our United States Supreme Court does in the case which Margie Marshall wrote an opinion on in 2003 [Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003)], and that is the equality that's required to

give all of the citizens of the state the right to marry. [See Obergefell v. Hodges, 135 S. Ct. 2584 (2015).]

In The American Law Institute, in spite of all the other things she does, when we need her to do something, like be the Treasurer, when you call and say, Margie, you know, you have hardly anything else to do. You're the senior fellow at Yale. You're in practice. You're doing stuff on the Harvard faculty. Wouldn't you like to be the Treasurer of The American Law Institute? And she says yes.

But I think what is most important about her are her personal qualities. She represents to me what justice should be in its deliverance, and that is she is a person who sees every person right inside them, no matter what they look like or, in my case, where they come from. She hears not just the legal arguments that are being put forth, but she understands the ramifications about what will happen when those arguments are decided.

And so it is my honor to introduce someone whom I am so proud to call a friend, Margie Marshall. (*Applause*)

Chief Justice Margaret H. Marshall (MA): What a fantastic introduction, President Ramo. I had planned to ask you to make a short introduction of me, but I have to say I loved every single word of that. (*Laughter*) I just wish that it had been about me. (*Laughter*)

It is wonderful for me to be with this particular group of people—tired, exhausted, and cranky as you all are—because, for me, the fact that law plays such a central role in our constitutional democracy means that the ALI, and the values and the inspirations for which it stands, has been extraordinarily helpful to me as I became a lawyer and then a judge and now a retired lady. It is wonderful to be here.

Preface

March 1968. I remember that month as if it were yesterday. I had arrived in Cambridge from South Africa to study as a doctoral student at Harvard. I walked up Massachusetts Avenue north of Harvard Square. The street was ugly, rundown, shabby. There was a biting cold

wind, and the temperature was below freezing. I picked my way through black grime—"that's snow," somebody said—as buses belched their way past me. How dirty it all looked. How noisy. And I felt achingly lonely and lost.

Two days before, I had left one of the most beautiful cities in the world, Cape Town, a glistening jewel at the tip of Africa, a mountain rising from the sapphire sea, gentle breezes, warm sunshine. Beautiful South Africa was my home.

But beautiful South Africa had a dark, a terrible, and a terrifying side. I had spent the preceding years leading a student movement that confronted the racism and brutality of apartheid, and I was not safe in South Africa. But this new place to which I had come provoked in me the most painful hopelessness I have ever felt.

And there was much more about this new country that made me anxious. Shortly after my arrival in 1968, Dr. Martin Luther King, Jr., was assassinated. In South Africa, I had listened to a forbidden recording of a speech of his, with the volume turned low and with one ear listening for the footsteps of the dreaded secret police. Dr. King had spoken about rights, individual rights, guaranteed by a Constitution, and now Dr. King was assassinated. And parts of Los Angeles and Chicago and Capitol Hill burned through the night.

Three months after my arrival, Senator Robert F. Kennedy was assassinated. Senator Kennedy had visited South Africa in 1966, invited by my student organization, and I had traveled with him throughout my homeland. Senator Kennedy had brought a message to young South Africans from the United States—of equality before the law, of the dignity of all people. And I had come to his country, and he was now gunned down.

I had no legal training in South Africa, and I had not planned to attend law school in the United States. In fact, the very idea of being a lawyer had not entered my mind. In South Africa, law was an instrument of oppression. The rule of law was the rule of the powerful. And judges, even those who didn't support apartheid, were required to en-

force the increasingly draconian apartheid laws enacted by parliament. Nothing attracted me to the legal profession.

In my early years, I had traveled across this country from Nebraska to Tennessee, from Florida to Arkansas, speaking out against apartheid and calling for sanctions against South Africa. And as I did so, I came to understand, as I had not understood before, that law plays a unique role in this nation. I saw lawyers bring cases that gave meaning to the words of Dr. King and Senator Kennedy. Here great lawyers like William Coleman could challenge in court the vestiges of slavery and the rule of white supremacy. [See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954).] And Alexander Bickel and Floyd Abrams could ask a judge to order a President to allow a newspaper to publish government documents about Vietnam. [See New York Times Co. v. United States, 403 U.S. 713 (1971).] For the first time here in the United States, I understood that law need not be an instrument of dehumanization. Law could be a means to freedom, equality, and justice for all.

I became a lawyer. I became a citizen. And the United States became my beloved country.

Part one

"Justice," wrote James Madison, "is the end of government. It is the end of civil society." [James Madison, Federalist No. 51, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, INDEPENDENT J., Feb. 6, 1788. http://foundersquotes.com/quotes/justice-is-the-end-of-government-it-is-the-end-of-civil-society/ and http://www.constitution.org/fed/federa51.htm.] But how is justice secured *for all*, not just the powerful or the majority, but for the poor, the marginalized, the despised minorities?

Increasingly around the world, there is one answer. Justice—and with it a stable and prosperous society—is best obtained through a written charter with government that apportions public power, guarantees certain fundamental rights, and entrusts the ultimate protection of

those rights to judges. Judges, who, in the words of the Massachusetts Constitution, are "as free and impartial as the lot of humanity will admit." [MASS. CONST. pt. I, art. 29.] As free and impartial as the lot of humanity will admit.

For the longest time, the United States stood in splendid isolation in its adoption of this wholly new form of democracy—"a mighty invention," Justice Benjamin Kaplan called it. [The phrase is taken from an address by Justice Kaplan on the occasion of the 300th Anniversary of the Supreme Judicial Court. Kaplan, introduction to *The History of the Law in Massachusetts: The Supreme Judicial Court, 1692–1992*, edited by Russell K. Osgood (Boston: Supreme Judicial Court Historical Society, 1992), 4.] And John Adams, the drafter of the Massachusetts Constitution, doubted that any other nation would follow the American model of government. For over a century and a half, his were prophetic remarks.

But from the ashes of World War II, the rubble of communism, and the collapse of colonial and totalitarian regimes around the world, new constitutional democracies have taken hold. The ability of their judges to be impartial in their judgments and to be free, independent of political and popular pressure, will determine their ultimate success.

In 1999, a scant 30 years after my first cold March day in Cambridge, I was appointed Chief Justice of the Supreme Judicial Court of Massachusetts. I have lived the American promise. I have embraced its values with passion. I have had a love affair with my discovered profession, and I have an abiding faith in our legal system.

But recently my confidence in the ability of our courts, our United States courts, to perform their constitutional role has been shaken. Pointed attacks by leading politicians and pundits on the constitutional role of judges to be free from political interference has reached a fever pitch. The massive influx of special-interest money into judicial selection and retention procedures has caused honest, good judges to be removed from the bench or to have others refuse to become judges, and coordinated, concerted constitutional challenges to the ethical

constraints on what judges and judicial candidates may say and do have combined to make a toxic mixture that undermines the central premise of our democracy. Most painful for me, the United States Supreme Court has made a bad situation far, far worse.

Part two

"[T]he health of the entire legal system—both state and federal—depends on a strong state judiciary." Those are not my words, but those of Justice Sandra Day O'Connor. [See SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 142 (2003).] Numbers elucidate her point, at least in part. In 2012, the last year for which we have comparative data, if you took all the cases filed in every federal district court in the United States—that is in every federal trial court—there were 499,277. (The federal number excludes bankruptcy and patent and other specialized courts.) And if you took all of the cases filed in state courts across our country, all of the trial courts, excluding traffic offenses, how many were there? Forty-four million. Forty-four million. As justice goes in our state courts, so goes justice in our nation.

I need hardly tell this audience that state-court judges, no less than their federal colleagues, must be independent, free from outside influence, and free of popular prejudice or special interest to fulfill their constitutional roles. But two recent decisions of the United States Supreme Court, Republican Party of Minnesota against White [536 U.S. 765 (2002)], decided in 2002, and *Citizens United* [v. Federal Election Commission, 558 U.S. 310 (2010)], decided in 2010, have paved the way for judicial electioneering that threatens that independence.

At issue in *White* was whether a Minnesota canon of judicial conduct prohibiting judicial candidates for judicial office from announcing their "'views on disputed legal or political issues'" violated the Constitution. [536 U.S. at 768.] The Supreme Court held, in essence, that the First Amendment rights of judicial candidates to make clear their personal views, their personal views on legal matters that could come be-

fore them, trumped the state's interest in preserving the impartiality of the judiciary restricting such statements. [Id. at 788.]

In my view, the ruling is an abomination. The Court gave short shrift to the very notion that judges must be or even can be impartial. A litigant in a case who takes a legal position against one previously announced by the judge "is likely to lose." Those are Justice Scalia's words, "likely to lose." [Id. at 776.] But so long as any party taking that position is likely to lose, the judge is applying the law evenhandedly. [Id. at 777.]

I could not disagree more. In my experience, judges (other than the most driven ideologues) try their best to place aside, and succeed in placing aside, their personal views, announced or not, when deciding what the law impartially applied requires. It troubles me deeply that our nation's highest court has held otherwise.

But worse was still to come. Lower federal courts have relied on *White*'s First Amendment analysis to strike down other rules of judicial ethics aimed at ensuring the integrity of our courts. Rules that prohibit judges and judicial candidates from promising in advance to decide certain cases in certain ways, or rules restricting judicial candidates from engaging in partisan political politics have been held unconstitutional.

Implicit in our constitutional compact is the guarantee that judges will give each person a fair hearing, will consider only the evidence presented in court, and will not look outside the court in order to reach a decision. *White* and its progeny strain this compact to its limits. The result? In many jurisdictions, judicial candidates now ardently commit themselves to rule a certain way on issues that will come before them. They publish deliberately misleading statements, attack ads, and slur campaigns about their judicial opponents. And a judge who can send a litigant to jail for lying may have become a judge by doing no less in his or her political campaign.

As for *Citizens United*, it poured oil onto the fires already burning in state judiciaries across the country. Almost all of the commentary

has focused on the impact of that decision on presidential and congressional races. But the less heralded consequences for judicial elections are even more troubling, as Justice Stevens noted in his dissent. "[T]oday," he wrote, the Court "unleashes the floodgates of corporate and union general treasury spending" on judicial elections. "States," he said, "may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems." [558 U.S. at 460 (Stevens, J., concurring in part and dissenting in part).]

The backlash against *Citizens United* has been as fierce as the opinion itself was radical, and perhaps that is a hopeful sign. What is clear is that *Citizens United* is bad for the health of state judiciaries that elect their judges, which are already awash in a torrent of special-interest money. There is now clear evidence that the decisions of individual judges are, indeed, influenced by their campaign contributors.

Part three

"Judges are not politicians, even when they come to the bench by way of the ballot. And a State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money." [135 S. Ct. at 1662.] The author of those words? Chief Justice John Roberts, Jr., writing in Williams-Yulee against the Florida Bar [135 S. Ct. 1656 (2015)], a decision issued three weeks ago today. The Court held that a state may prohibit judges running for judicial office from soliciting money directly from contributors. "[P]ublic perception of judicial integrity is 'a state interest of the highest order,'" the Chief Justice wrote. [Id. at 1666.] "Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity," he explained. [Id.]

Chief Justice Roberts was not on the Court when *White* was decided in 2002. The author of that opinion, Justice Scalia, excoriated the

Yulee decision. He called the Florida judicial ethics rule a "wildly disproportionate restriction upon speech." [Id. at 1676 (Scalia, J., dissenting).] The Court's ruling, he fulminated, "flattens one settled First Amendment principle after another." [Id.]

My hope is that *Yulee* marks the beginning of the dismantling of the grave harm these decisions have had to state judiciaries and have had on our constitutional democracy. James Madison, John Adams, and Thomas Jefferson have raised a toast to the Chief Justice, and the faith of this immigrant in our constitutional democracy, while shaken, has not been destroyed.

Coda

In 2003, the Supreme Judicial Court ruled in Goodridge v. the Department of Public Health [798 N.E.2d 941 (Mass. 2003)] that the Massachusetts Constitution does not permit the state to deny citizens the right to same-sex marriage.

On Tuesday, April the 28th, 2015, I am seated in the Supreme Court of the United States as the Justices hear argument in Obergefell v. Hodges [135 S. Ct. 2584 (2015)], the case involving same-sex marriage. Five of the Justices were nominated by a Republican President, four by a Democratic President. Six are Roman Catholic, and three are Jewish. The youngest Justice is 55 years old. The public's views on same-sex marriage are influenced profoundly by age, religion, and party affiliation. Will this determine how the Justices rule in that case?

The United States is my beloved country. Our constitutional democracy is my central passion. And the success of our constitutional experiment demands that judges be "as free and impartial as the lot of humanity will admit." I await the Court's decision.

Thank you.

(*Chief Justice Marshall received a standing ovation.*)

President Ramo: Margie, I sometimes wonder if there was one thing about Great Britain that we too quickly put away because we

wanted to make sure that we didn't have royalty, and that was the ability to call someone by a special word that indicated our deepest appreciation for what they were as a human being in the society. You said that you were a retired lady. I would just say that I would like to call you a lady of liberty. And if I had the ability to confer such a title on you, I would do it today.

What you have said to us is important in every way, and I have sometimes said to our membership—and I will again today—we all sit here as the elite of a profession in a remarkable democracy. And we work on legal things. But I hoped you listened to the lady of liberty, Margie Marshall, and will leave this room and understand that your obligations, because we have all been so lucky as to be in this profession, extend beyond the courtrooms, beyond your office walls, and beyond your usual courses at universities. We have the obligation to explain to every American citizen we encounter the importance of voting, the importance of understanding our Constitution in a serious way, not in a made-up way, and that we step away from rigid partisanship that's been so divisive, maybe by remembering the first part of the career of someone that Justice Marshall mentioned.

When John Adams defended in Boston that British soldier who was accused of murder and was successful, they didn't say to him you can't be a part of the revolutionary movement anymore, did they?

Thank you. (*Applause*)