

# Accountability After Citizens United – Michael Waldman Opening Remarks

## Opening Remarks: Michael Waldman (Brennan Center for Justice)

**Michael Waldman:** Good morning, everyone. Welcome. First of all, welcome to this wonderful, wonderful space, the Greene Space of WNYC. I'm marveling, because my father was an on-air announcer for WYNC in the 1940s in the LaGuardia reading the funny papers to the city era. And it didn't look like this, and they did not have PowerPoint capability. So we're very excited to be here. I want to thank you all for coming here today to assess, debate, plot and think about the idea of accountability after *Citizens United*. We want to welcome also, not only those of you who came, some from near and far – the thinkers, the experts, the policymakers who work on this issue – but also those who are watching on the live webcast that is making this public all around the world.

And for those of you on the webcast, if you're watching, we know that means the royal wedding is over. We hope our servers don't crash with the traffic that will come from the wedding. We want to thank, for starters, some of the folks – only some – who were able to help us to make this possible. The Board of the Brennan Center for Justice and NYC School of Law, the Law School itself which has been such a tremendous partner for us in so many ways; the financial supporters of our work on money, politics and democracy, some of whom are here – the Open Society Foundation, the Wallace Global Fund, Rockefeller Brothers Fund, Rockefeller Family Fund, Nathan Cummings, Compton Foundation, and pro bono partners from the leading law firms all over the city and the country who have worked with us in the pitched legal battle that still rages all over to defend the existing campaign finance laws. And some of the folks who are here, who are part of that effort include the attorneys from O'Melveny & Myers and Davis Polk, Arnold & Porter.

And we should give a transcontinental shout out to our colleagues at Munger, Tolles & Olson who worked with us so hard and we hope so well on the recent case before the U.S. Supreme Court defending public financing in Arizona. I want to thank also my colleagues – many colleagues -- here at the Brennan Center who do this work, and in the middle of arguing the case, publishing a book and a few other things, managed to pull this conference together. And especially Ciara Torres-Spelliscy, who's right there, who has been such a pioneer for us on these cutting edge issues of accountability beyond the traditional campaign finance laws, a topic that is especially relevant.

You know, what we're talking about today and what so many of us work on day in and day out really is a topic at the heart of American history. It's at the heart of our country's two or more centuries of experimentation in how to make a self-governing democracy work. We all want a strong and robust democracy where one person, one vote is the source of power and legitimacy. And we all want a strong private economy of the kind that we see all over this city, and that has also brought prosperity and strength to so many of us. An economy where, inevitably, for better or worse, there will be concentrations of wealth and private power.

And it is a great debate, a great challenge to reconcile those two imperatives. And there's been contest and pushing and pulling and cycles of reform and scandal. And the result is rarely pretty and it is rarely simple. But we have drawn those lines throughout our history. And then, a year and a half ago or less – in January of 2010 – the five justices of the Supreme Court abruptly, in our view, erased one of those critical lines and redrew it somewhere far down the page. And we are now living in the era after *Citizens United* – very soon in that era, soon enough to see some of the outlines of what has happened.

Now some – at the time everybody was kind of running around and it was obviously a very big deal, and there was a great deal of concern, especially about the notion that corporations would be given the – and unions – but especially corporations and corporate managers would be given the same First Amendment rights and election spending as people – there was a lot of sturm and drang. But some people said, well, with a worldly shrug, it really isn't going to make that much of a difference; things aren't going to change very much.

Well, it's a year and a half later, and I guess I would suggest that just this once perhaps the Chicken Littles were on to something. Yes, *Citizens United* itself was not the only cause of the shift in the way campaigns have run and the way money has flowed through our elections. But it certainly was a green light for those who wanted to take advantage of an already porous legal landscape. And we were talking last night at dinner that, in a way, *Citizens United* is a simplified brand name for lots of Supreme Court decisions that opened up these floodgates.

And I suppose you could say the way Kleenex represents bathroom tissue *Citizens United* means those things to people. And we didn't see corporations buying ads in their own name, but we certainly saw a vast flood of new independent expenditures in our system, so much of it – perhaps unexpectedly so much of it – secret, without disclosure. Money talks, but now it doesn't have to leave its name.

And we saw as well that the traditional political remedies, the traditional Congressional, legislative remedies, public financing, campaign finance reform – even in this situation were not possible to pass the DISCLOSE Act, which was the most mutually agreed-upon consensus item in the whole field of campaign finance regulation. Previously could not pass the Congress, even though it mustered 59 votes in the Senate and did pass the House, let alone the Fair Elections Now Act, resuscitation of presidential public financing, and the other things that so many of us care so much about.

I do believe, having worked on this for more years than I care to admit, that we're in a very dangerous situation right now in our country. We are facing the prospect of a truly dystopian turn

in our political system. We face the prospect of years of politics going forward where the central role in our politics of candidates, of parties and of voters becomes overwhelmed by the flood of new money, by the flood of secret money, by people who are not accountable to anyone, but who nonetheless very often will have the same legislative or policy interests that we see in other contexts.

Al Hunt, the great former Wall Street Journal journalist wrote last year at the time of *Citizens United* in Bloomberg News, he said he thought that this would lead to Watergate-level scandals. And that may or may not be true. But unlike Watergate, it's going to be very hard for someone to pull the next Bob Woodward aside in the garage and whisper, follow the money; because it's very, very hard to follow the money.

So how do we escape this dystopian future? How do we steer it toward, back toward the great place in America's history where we fight about these things and we come to a consensus about how to build a democracy while recognizing the role of private money? We all have to recognize that even before *Citizens United* so many of the traditional remedies were not working. So many of the traditional ideas were frankly stagnant. So many of the traditional longstanding constitutional doctrines had lost their luster. We have to do what Abraham Lincoln encouraged our countrymen to do during the Civil War. He said, "As our case is new, we must think anew and act anew. We must disenthrall ourselves. And then we shall save our country." That's what we're all here to do – to think anew; to disenthrall ourselves; and to act anew.

Now we began at the Brennan Center this process, right after *Citizens United*. As you know, we're deeply involved, and have been since the organization's beginning, with these core constitutional issues of money and politics. We litigated the *McConnell* case, upholding McCain-Feingold. As I mentioned last night, we got our start arguing that *Buckley v. Valeo* should be overturned. And 15 years later we succeeded. We persuaded one justice. The good news is we persuaded one justice of that position; the bad news, it's Justice Thomas. We're not on that anymore.

And we, as I mentioned, leapt into the lead legal defense of campaign finance laws all over the country in the wake of *Citizens United*, including this *McComish* case. But we also have helped, we hope, to catalyze a long-term jurisprudential movement toward a better constitutional theory to allow these democratic experiments to occur. In March, we convened a conference of what *The New York Times* called the "A list of first amendment scholars." We have that on our wall, because we think it's true but also funny and to ask, how can we have a different vision of the First Amendment that puts voters at the center, and their rights, and their ability to hear real debate at the center of our constitutional understanding.

And just last night, many of you were here, we were proud to release the product of that first conference, which I will hold up. You should take your copy if you don't have it. "*Money, Politics and the Constitution*" edited by our colleague Monica Youn, who is beginning on Monday as the first Brennan Center Constitutional Fellow at NYU School of Law. And it's a really remarkable collection of essays from many of the most creative constitutional thinkers in the country, part of this movement. Not all in lock step agreement, but part of a broad movement,

and we hope very much moving from conference to papers to briefs to arguments and we hope to the law of the land.

Just as those who pushed for *Citizens United* over many decades waged what a previous chair of the Federal Election Commission, Brad Smith, called “long-term ideological combat.” We see ourselves as engaged in long-term ideological combat on behalf of democracy and the Constitution. And that’s our constitutional work. But as you all know, there are things to do in the here and now, pressure points that we all can look at; pressure points that we should all seek to use to bring back accountability wherever we can into our political system; to take this new world of significant new, powerful corporate managers -- the very corporations who Theodore Roosevelt, in talking about this issue a century ago, reminded us that we called into existence -- to bring some accountability through other means to our political system.

And it’s very, very exciting to have all of you here to talk about those pressure points, to talk about this immediate possibility of thoughtful action. And we all know that there’s actually a lot going on. There’s actually tremendous ferment already happening in this context. Just in the past few weeks we saw the SEC issuing a No Action Letter allowing the shareholders at Home Depot to ask the company for greater transparency and accountability in political spending.

We saw last week a leak from the Obama Administration that it was contemplating an executive order to require that government contractors make disclosure and import transparency into their political spending. And having spent 14 years in Washington temporarily, I know that a leak can be the high, it’s practically up there with being in the Congressional Register sometimes, that’s action.

We are compelled to note that a few days ago Congressman Van Hollen sued the FEC, asking for greater clarity in where the money in politics comes from. And here in New York, Governor Cuomo, in his State of the State, at a time when federal efforts for public financing don’t appear very likely, has made a push for public financing and small donor public financing in New York -- a real priority for his administration. These are all pressure points. There are many more across the country. And we’re going to be hearing about them all day today. So the first panel, we will be talking about shareholders whose money is now newly able to be used in the political process. What are their rights? What role can they play in accountability and transparency?

The second panel will talk about the regulatory pressure points – agencies from the FEC to the Securities and Exchange Commission to the IRS to state corporate law authorities and state governments. What should we and could we be doing there to make sure that there’s greater transparency, greater accountability? The final panel looks at a new twist in the constitutional arguments that were sort of let loose by the opinion in *Citizens United*. Justice Kennedy – if you read it closely – really identified the associational rights of the citizens in the corporation as the root of the First Amendment basis of their ability to spend. Well, what are the tensions between the rights of individuals and the rights of associations? Can we go deeper to learn more about what we could do in terms of constitutional doctrine and litigation?

There’s so much more. We’ll be hearing from the business community. We’ll be hearing from regulators. And it is really important, as we address these issues – because there’s so much

anger, so much concern about this turn in our politics and about this decision – that we undertake not a populist spasm of fury at corporations, not a shallow and evanescent decrying of the role of business in our politics which might make us feel good for an hour or two on the web but not really find ways to bring new accountability into the system. What we need is a sober, fact-based, balanced, legally sound, constitutionally rock solid and energized push for accountability in all the ways we can do it. And that is what we're thrilled to have you all here to do.

And to begin the discussion, we are really, really privileged to have with us the Chair of the Federal Election Commission, Cynthia Bauerly, so many of you do know her. She is a native of St. Cloud, Minnesota; was a top Honors graduate of Indiana University Law School where she also received a Masters in Public Policy in Concordia College. As a daughter of St. Cloud, Minnesota she has experienced New York in its undistilled essence as the Legislative Director for Senator Chuck Schumer, a neighbor of so many of us in Park Slope, Brooklyn and a friend of the Brennan Center. She was his Legislative Director and was a Counsel on the Senate Rules Committee and the Senate Judiciary Committee. She is a very well-regarded and talented expert and attorney.

And we all know that being Chair of the FEC is never a very easy job. It was not designed to be an easy job. It was, some of us believe, an agency not designed to work as well as we would hope. But even now it's harder than ever. And we are deeply appreciative, Chair Bauerly, for you being here with us today.