Counterresponse

To the Editor:

In his response to my letter in the October *Bar Journal*, former SBM President Brian Einhorn expressed doubts that unilaterally mandating public campaign financing in judicial elections would be legally feasible. He may be right, and that is because the United States Supreme Court has been part of the problem.

The problem is that, with the cost of being elected to office greatly exceeding the salary earned once in office, campaign financing in this country has become a corrupt system of legalized bribery. Most of the campaign money comes from business interests, and this money is contributed to candidates for political offices for three purposes.

The first purpose is to enact proposed laws and regulations that enable these business interests to make more money. The second is to defeat proposed laws and regulations that will cost them money. The third is to enable them to obtain government contracts and subsidies. The public interest never enters into the equation.

With judicial elections, business interests seek to buy state supreme court candidates so they will set forth broad rules in deciding cases that protect or improve the bottom lines of these interests. Protecting the public is no concern here. At the local level, there can be a corrupt pay-to-play system. Lawyers contribute to a trial judge's campaign, and the judge in turn gives these lawyers court appointments to represent indigent defendants in criminal cases. This can work to the client's detriment if the judge has a pro-prosecution bias and the lawyer fails to mount a vigorous defense from fear of losing out on future appointments.

Allowing candidates to opt out from a public financing system would defeat its purpose, for those who do so could spend far more money than publicly funded candidates, sometimes to the point of making a race uncompetitive.

What makes the Supreme Court part of the problem is that it sometimes decides cases on the basis of dishonest premises.

One example, first seen in the 1976 case of *Buckley v Valeo*,[1] is the Court's holding that money is "speech." That is a lie. Money is a means of economic exchange. Speech is a communication of thoughts, ideas, emotions, observations, and such. There is no overlap between the two. The Court's dishonest definition of money as speech was a basis for the legal travesties of *Citizens United v Federal Election Commission*[2] and *McCutcheon v Federal Election Commission*,[3] which have put corruption on steroids.

Another example, which first appeared in the 1886 case of *Santa Clara County v Southern Pacific Railroad*,[4] is the holding that a corporation is a "person." That is another lie. A corporation is an artificially created business entity whose sole purpose is to make money. A person is a living, breathing human being. Again, there is no overlap between the two. This dishonest definition has been the basis for such cases as *Citizens United* and *Burwell v Hobby Lobby Stores, Incorporated*,[5] where the Court's 5–4 majority reached the absurd conclusion that a for-profit corporation can have religious beliefs.

When the Supreme Court decides cases on dishonest premises, there are two possible remedies, each of which can take decades to achieve.

One is amending the U.S. Constitution, a long and difficult process. Voting is a fundamental right, but in the 1874 case of *Minor v Happersett*,[6] the Court unanimously ruled that voting is not an inherent right of citizenship protected by the Equal Protection Clause of the 14th Amendment, thereby denying women the right to vote. It took enactment of the 19th Amendment in 1920 to guarantee women the right to vote. The Court belatedly reversed itself on this issue in the 1960s by ruling that voting is a fundamental right covered by the Equal Protection Clause. In a dissent in the 1964 case of *Reynolds v Sims*,[7] Justice John Marshall Harlan put *Minor* on a list of past voting decisions no longer followed by the Court.

In September, Senate Joint Resolution 19—the proposed Democracy for All amendment—reached the Senate floor. While it didn't state that money isn't speech and a corporation isn't a person, it proposed to give the federal and state governments the power to regulate and limit campaign spending, as well as ban corporate campaign spending. The proposed amendment was killed, for now, by a party-line filibuster, with all 54 Democrats present voting in favor, six votes short of cloture, and all 42 Republicans present opposed. This issue won't be going away.

The second possible remedy is for a future Supreme Court majority to honestly decide the issue at hand. As an example, in the 1896 case of *Plessy v Ferguson*,[8] the Court ruled by 7–1 that racist Jim Crow segregation laws created a situation that was "separate but equal." That was yet another lie. In practice, racially segregated educational facilities and public accommodations, for example, were certainly separate and definitely far from equal. This despicable ruling was reversed in 1954 in the landmark case of *Brown v Board of Education*.[9]

With the cost of being elected to office greatly exceeding the salary earned once in office, campaign financing in this country has become a corrupt system of legalized bribery.

In asking that an appointed judiciary be considered, Einhorn said that in 2012 the Michigan Judicial Selection Task Force suggested that in such a situation a nonpartisan advisory screening commission vet and recommend five or six candidates to fill a vacancy.[10] He failed to mention that the governor would appoint this commission of 12 to 15 members, and misstated the number of recommended finalists, which was three to five. Einhorn admitted the proposal is "not perfect." That was an understatement.

It is easy to see how this proposed arrangement would be window dressing for gubernatorial patronage. Let's say a vacancy opened up on the Michigan Supreme Court and the governor had a particular candidate in mind. This candidate would then apply for the vacancy. Since the governor appointed the commission members, he or she would have no trouble communicating this choice to them, either directly or through intermediaries. Therefore, unless the governor is foolish enough to pick someone who is grossly unqualified, his or her choice would almost always make the cut. The fix would be on, and this process would be a futile waste of time for the other candidates, no matter how well qualified they may be. To conclude this charade, the governor would then appoint the candidate he or she wanted in the first place.

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ENDNOTES

1. *Buckley v Valeo*, 424 US 1; 96 S Ct 612; 46 L Ed 2d 659 (1976).
2. *Citizens United v FEC*, 558 US 310; 130 S Ct 876; 175 L Ed 2d 753 (2010).
3. *McCutcheon v FEC*, 572 US ___; 134 S Ct 1434; 188 L Ed 2d 468 (2014).
4. *Santa Clara Co v Southern Pacific R*, 118 US 394; 6 S Ct 1132; 30 L Ed 118 (1886).
5. *Burwell v Hobby Lobby Stores, Inc*, 573 US ___; 134 S Ct 2751; 189 L Ed 2d 675 (2014).
6. *Minor v Happersett*, 88 US 162; 22 L Ed 627 (1874).
7. *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964).
8. *Plessy v Ferguson*, 163 US 537; 16 S Ct 1138; 41 L Ed 256 (1896).
9. *Brown v Bd of Ed*, 347 US 483; 74 S Ct 686; 98 L Ed 873 (1954).
10. See Michigan Judicial Selection Task Force, *Report and Recommendations* (April 2012), available at <http://jstf.files.wordpress.com/2012/04/jstf_report.pdf> (accessed October 21, 2014).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

NOTICE OF AMENDMENTS AND PROPOSED AMENDMENTS TO LOCAL RULES

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