

# Book Reviews

DARK MONEY, BY JANE MAYER

PLUTOCRATS UNITED, BY RICHARD L. HASEN

Reviewed by William R. Maurer

Note from the Editor:

This book review takes a critical look at two recent books that advocate campaign finance reform.

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• JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016), available at <http://www.amazon.com/Dark-Money-History-Billionaires-Radical/dp/0307970655>.

• Bill McKibben, *The Koch Brothers' New Brand*, NEW YORK REVIEW OF BOOKS (March 10, 2016), available at <http://www.nybooks.com/articles/2016/03/10/koch-brothers-new-brand/>.

• RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (2016), available at <http://www.amazon.com/Plutocrats-United-Campaign-Distortion-Elections/dp/0300212453>.

• Greg Sargent, *How to rid politics of its pollution by wealthy donors?*, WASHINGTON POST (Jan. 8, 2016), available at [https://www.washingtonpost.com/opinions/how-to-rid-politics-of-its-pollution-by-wealthy-donors/2016/01/06/74798932-a2a4-11e5-ad3f-991ce3374e23\\_story.html](https://www.washingtonpost.com/opinions/how-to-rid-politics-of-its-pollution-by-wealthy-donors/2016/01/06/74798932-a2a4-11e5-ad3f-991ce3374e23_story.html).

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Soviet Studies majors who graduated in 1990 do not get as much sympathy as they deserve. All those years spent working toward a goal, only to see the world change and make it irrelevant.

Jane Mayer and Richard Hasen must feel a little like those graduates. A big issue in the 2016 election was supposed to be the Koch Brothers and other purveyors of “dark money.” Except for Bernie Sanders including *Citizens United*<sup>1</sup> in his list of all things wrong with this country, however, the national discussion has instead been dominated by things like Donald Trump’s fingers and Hillary Clinton’s private server. Candidates favored by large contributors, such as Jeb Bush, failed, while candidates like Donald Trump and Bernie Sanders, who explicitly disclaimed large donations during the primaries, ran effective campaigns. Charles Koch himself is even speaking of holding his nose and supporting Hillary Clinton.<sup>2</sup> “Dark money” was not supposed to be an afterthought.

Nonetheless, Mayer’s *Dark Money: The Hidden History of the Billionaires Behind the Radical Right* and Hasen’s *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections*—both published in the thick of the 2016 election—are aimed directly at the issue.<sup>3</sup> One of these books is a valuable contribution that addresses the history of campaign finance law, the constitutional issues involved in regulating political spending, and the difficulty of creating policies that allow all Americans a voice while protecting free speech. The other is not.

Mayer’s is the book that is not.<sup>4</sup> It is an expansion of her 2010 article in the *New Yorker* about the Koch brothers and their funding of various conservative and libertarian causes and candidates.<sup>5</sup> That article ignited the Koch brothers’ obsession of modern liberals, which resulted in, among other things, Senator Harry Reid denouncing them by name 134 times on the floor of the Senate.<sup>6</sup>

1 Citizens United v. FEC, 558 U.S. 310 (2010).

2 Tom LoBianco, *Charles Koch: ‘Possible’ Clinton could be better than GOP nominee*, CNN.COM (April 24, 2016), available at <http://www.cnn.com/2016/04/24/politics/charles-koch-hillary-clinton-2016/index.html>.

3 JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016); RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (2016).

4 Full disclosure: some of the subjects of Mayer’s book have contributed to the firm for which I work, the Institute for Justice (IJ). Mayer mentions IJ a number of times in her book, although she is relatively gentle in her discussion of the firm. Regardless, my opinions here would be the same if none of her subjects had contributed to IJ or, for that matter, if she were writing about donors to progressive causes.

5 Jane Mayer, *Covert Operations*, THE NEW YORKER (Aug. 30, 2010), available at <http://www.newyorker.com/magazine/2010/08/30/covert-operations>.

6 David Rutz, *One-Trick Pony: All 134 Times Harry Reid Has Mentioned the Koch Brothers on the Senate Floor*, WASHINGTON FREE BEACON (April 11, 2014), available at <http://freebeacon.com/politics/one-trick-pony/>.

Mayer's title telegraphs what the book will be: too long, not entirely accurate, and filled with clichés. There may be a good book to be written about the history of money in American politics, but this is not it. Instead, this book is simply a sustained attack on the political spenders on the right. She excoriates leading conservative and libertarian donors, including not just the Kochs, but Richard Mellon Scaife, the Bradley family, John M. Olin, and others. To Mayer, there is nothing good to be said about these people; no lawsuit against them goes unmentioned, no family feud unexamined, and no intemperate word unquoted (typically out of context). In Mayer's view, any good work they have done is simply to provide cover for their actual, dark agenda. Nothing is too petty for Mayer: she reports that David Koch's former doorman does not like him.<sup>7</sup>

Her big "hidden history" reveal is that the Koch brothers' father did business in Germany in the 1930's; specifically, the company he owned built an oil refinery in Hamburg in 1934, and the Nazis used oil from the refinery during World War II (long after Fred Koch had left Germany).<sup>8</sup> However, many companies, including Bayer, Siemens, Mercedes, Ford, and General Motors, did more business in Nazi Germany for far longer than the elder Koch.<sup>9</sup> Nonetheless, for Mayer, the refinery is proof of the Kochs' place among the Boys in the Bund; she hints that the refinery links the funding of libertarian and conservative causes to National Socialism. She even goes on to suggest that Charles Koch learned fascistic tendencies from his German governess, who, Mayer relays from an anonymous source, was purportedly strict with his toilet training.<sup>10</sup>

Mayer only makes bizarre insinuations like this against the donors of the right—she never mentions labor unions' spending and she glosses over progressive donors. Her explanation for not investigating the potty training or apartment-building staff of George Soros et al. is that, to her, the progressives' political spending is altruistic while the billionaires of the "radical right" are motivated, not by a belief in the benefits of free markets and individual liberty, but by greed. According to Mayer, the true goal of those funding conservative and libertarian causes is to remove environmental restrictions and lower taxes, so that they may pollute at will, not pay their fair share, and earn even more money (perhaps in which to swim, Scrooge McDuck-style).<sup>11</sup>

Putting aside the question of whether the spending of Soros, Tom Steyer, and other progressives is entirely unrelated to their financial interests, Mayer's reasoning is unpersuasive. Taxi companies can tell you that if you really want to make money off of

government policy, the way to do it is not to unleash the chaos of unregulated markets, but to prevail on legislators to grant you a monopoly or at least create insurmountable barriers to entry for your competitors. As then-Chief Judge Deanell R. Tacha of the Tenth Circuit noted, "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."<sup>12</sup> This is undoubtedly true for the ever-expanding federal government as well. In contrast, unregulated markets can destroy as well as create, a lesson learned by slide-rule manufacturers, buggy whip makers, and Netscape. Government protection leaves existing businesses exactly where they are, like ants in amber. If the purpose of the political spending of the Kochs or other pro-free market donors is to make money, unleashing an uncontrollable and unpredictable force like the market is a spectacularly misguided way to accomplish that.

Gaps in logic aside, Mayer's book has other problems. She is sloppy with facts, for instance, claiming that *Citizens United* undid a law that had stood for a century.<sup>13</sup> In fact, Congress passed the law the Court struck down in *Citizens United* in 1947.<sup>14</sup> Her original research seems to be obtaining a few private histories (Mayer consistently confuses "not public" with "secret") and some interviews, but, for the most part, her book largely relies on the work of ideologically simpatico organizations and writers (who will no doubt reference *Dark Money* in their work, thus creating a citation ouroboros). Her writing style is tedious. People are rarely just "conservative"; they are "ultra" or "staunchly" so. She adds "right-wing" or "extremist" to the name of almost every right-of-center figure or organization. A memo is not just a memo: it is a "seething memo."<sup>15</sup> People who head up energy companies are not executives, but "magnates."<sup>16</sup> You get the seething picture.

One favorite rhetorical trick is to introduce a conservative and then quote a progressive who has said bad things about them, as if this provides proof of whatever accusation Mayer levels. For instance, while discussing Jim DeMint, the former Senator and now president of the Heritage Foundation, Mayer writes, "He understood how to sell, and what he was pitching that night was an approach to politics that according to historian Sean Wilentz

7 Mayer, *supra* note 3, at 53. This leads to the unintentionally humorous index reference of "Koch, David, cheapness of," referring to one of the largest donors to philanthropic causes in America. *Id.* at 438. Mayer also seems to have forgotten the old saying that no man is a hero to his valet.

8 *Id.* at 29.

9 S. Jonathon Wiesen, *German Industry and the Third Reich: Fifty Years of Forgetting and Remembering*, DIMENSIONS: A JOURNAL OF HOLOCAUST STUDIES, Vol. 13, No. 2 (1999), available at [http://archive.adl.org/braun/dim\\_13\\_2\\_forgetting.html#.VyznPkkrKM8](http://archive.adl.org/braun/dim_13_2_forgetting.html#.VyznPkkrKM8).

10 Mayer, *supra* note 3, at 32-33.

11 *Id.* at 209-10.

12 *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004).

13 Mayer, *supra* note 3, at 227.

14 Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. 421, 458-59 (2008); Labor Management Relations Act, 1947, 61 Stat. 159 (codified at 2 U.S.C. § 251 (1946)). Congressional Republicans had introduced the bill to decrease the political power of labor unions. President Truman vetoed the bill, in part, because of the harm it caused to free speech, but Congress overrode his veto. When labor unions later challenged the law, the U.S. Supreme Court sidestepped the constitutional issues twice. Liberal Justices such as Black, Douglas, Warren, and Murphy would have reached the constitutional question and struck the law down. Hayward, *supra* note 14, at 461-63 (citing *U.S. v. CIO*, 335 U.S. 106 (1948); *U.S. v. Int'l Union United Auto., Aircraft & Agric. Implement Workers*, 352 U.S. 567 (1957)). Mayer mentions none of this history, instead preferring to inaccurately portray *Citizens United* as some out-of-the-blue break from 100 years of uniform jurisprudence upholding the law's constitutionality.

15 Mayer, *supra* note 3, at 73.

16 *Id.* at 15.

would have been recognizable to DeMint's forebears from the Palmetto State as akin to the radical nullification of federal power advocated in the 1820s by Confederate secessionist John C. Calhoun.<sup>17</sup> Mayer could have written, "Jim DeMint sounds like a Confederate, the Confederates supported secession, so Jim DeMint supports secession," but to say it that straightforwardly sounds idiotic. Instead, she produces a mess of a sentence that manages to affirm the consequent and argue from authority—two logical fallacies unseparated by a period.

Mayer does not write to persuade. She writes to produce vigorous head-nods from people who have "Corporations Are Not People" bumperstickers on their cars. Reading her book is like being trapped in a malfunctioning elevator with a Red Sox fan who is obsessed with Derek Jeter—it will only be bearable if you also hate the Yankees.

After being subjected to Mayer's *Daily Kos*-comments-section writing style, reading Professor Richard Hasen's discussion of the same topic is refreshing. Hasen thinks seriously about money in politics and weighs the goals of reform with the benefits of the First Amendment (even if the former usually ends up weighing more than the latter). *Plutocrats United* gives a good account of the modern history of campaign finance laws and court decisions, and discusses, in a fairly even-handed way, arguments from both sides about the role of money in campaigns. Hasen criticizes donors of the right and the left; he does not mention German nannies or disgruntled doormen. His book is also well-written, which is usually not the case with books by academics about complex topics.

Hasen is pro-regulation, but he does not buy into the more simplistic arguments of reformers. For instance, he rejects the idea that money buys elections<sup>18</sup> and places a large share of the blame for corruption in government on the shoulders of lobbyists, not campaign donors.<sup>19</sup> He also rejects expansively written constitutional amendments to undo *Citizens United* as threats to free expression.<sup>20</sup>

Part of Hasen's unorthodox approach comes from the fact that he is highly critical of the focus of much of the reform movement's efforts. As opposed to reformers and judges intent on rooting out corruption, Hasen has a different, loftier goal: using campaign finance laws to create equality in the political system among all economic levels of American society. He calls this "equality of inputs," which he defines as a "system in which each voter has roughly equal political power in the electoral or policymaking process."<sup>21</sup> In essence, he believes that the government should use campaign finance laws to make members of the 99% as politically influential as members of the 1% (to use the terms of Occupy Wall Street). This includes not only helping the poor participate in politics, but limiting the influence of the rich. He urges the Supreme Court to overturn decisions dating back

<sup>17</sup> *Id.* at 19.

<sup>18</sup> Hasen, *supra* note 3, at 41-44.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.* at 165-68.

<sup>21</sup> *Id.* at 73.

to *Buckley v. Valeo*<sup>22</sup> that rejected "equality" as a weighty enough (or even legitimate) governmental goal to justify restrictions on political activity. He celebrates a concurrence by Second Circuit Judge Guido Calabresi that explicitly called for reshaping campaign finance jurisprudence to recognize equality as a legitimate, indeed overwhelming, governmental interest, so that those who do not have access to the pliable politicians are not left out of political decisionmaking.<sup>23</sup>

Hasen also presents a number of policy proposals to achieve this result. In order to achieve his "equality of inputs,"—often described by others as "leveling the playing field"—he puts forth a series of public policy proposals designed to achieve equality.<sup>24</sup> Here is where Hasen rejoins the other players on the reform bench, as all of his policy proposals have been pushed for decades by reformers concerned with corruption: contribution and spending limits, more disclosure, and public (that is, taxpayer) financing of campaigns.<sup>25</sup> In other words, while Hasen would like to think he is driving to a new destination, he is using very well-traveled roads to get there.

Hasen is attempting to redefine the entire thrust of campaign finance jurisprudence, so he, to his credit, also attempts to preemptively address and answer objections to these proposals from those opposed to further regulation. Specifically, he responds to the objection that, if implemented, his policies would insulate incumbents from challenge,<sup>26</sup> give the media an outsized voice in the political debate,<sup>27</sup> and increase political polarization.<sup>28</sup> He has varying degrees of success here—his argument about the press essentially can be paraphrased as, "Yes, the press will have greater opportunities to influence politics, but they are important and people get nervous if you start restricting the press, so the press gets to exert undue influence, but nobody else." On the other hand, he argues persuasively that American politics is already extremely polarized and giving people more of an opportunity to participate in political campaigns may, in fact, alleviate some of that polarization.

These are important questions. However, there are more fundamental issues with Hasen's proposal that he does not examine and his book would have benefitted from his wrestling with them as well. In particular, he never articulates what he ultimately hopes to achieve, how equality will be measured (and by whom), and whether restrictions on political activity can ever succeed in reducing inequality in the modern bureaucratic welfare state.

<sup>22</sup> 424 U.S. 1 (1976).

<sup>23</sup> Hasen, *supra* note 3, at 77 (citing *Ognibene v. Parkes*, 671 F.3d 174, 198-99 (2d Cir. 2011) (Calabresi, J., concurring)).

<sup>24</sup> Even fuller disclosure: Hasen spends a great deal of time critiquing the outcome of a case in which I was the lead counsel for the victorious party. *Id.* at 84-85 (discussing *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011)). Hasen points to *Arizona Free Enterprise* as an example of exactly the kind of decision the Supreme Court should not make if it cares about political equality. *Id.* at 84-89.

<sup>25</sup> *Id.* at 94.

<sup>26</sup> *Id.* at 173.

<sup>27</sup> *Id.* at 124.

<sup>28</sup> *Id.* at 157.

Hasen spends a great deal of time discussing what “equality of inputs” consists of, but he never describes what it is supposed to achieve. Will it result in different policies? What will they be? Whom will they affect? Many reformers openly admit that they view campaign finance reform as just a means to minimize the influence of people with whom they disagree.<sup>29</sup> The language of removing obstacles from a progressive future is omnipresent among those who wish to “level the playing field”—if we only got rid of money in politics, we could pass Medicare for all, break up the big banks, close down the coal industry, etc. If this is what “leveling the playing field” is, it is just a nice way to describe an effort by progressives to implement their chosen policy preferences by muting their ideological opponents (ironically, proponents of such suppression of ideas typically describe the result as “democracy”). Unfortunately, Hasen does not tell us if his “equality” goal is different from theirs and, if it is not, “equality of inputs” would also seem to be exactly the type of governmental control of political discourse that the First Amendment was designed to prevent.

Hasen also starts with the assumption that unrestricted money is “distorting” the political process, which then becomes far too “skewed” towards the wealthy. But what does an undistorted and unskewed political process look like? Given that there are no Platonically correct political outcomes, and therefore no way to identify when politics are not “skewed,” this ephemeral and unreachable goal could be used to justify restrictions on any policy that threatens the vision of the political good of those in charge. In other words, an amorphous goal lends itself to further restrictions on speech, as politicians will likely continue to believe that politics is skewed whenever someone disagrees with them.

Finally, Hasen does not address a foundational problem with campaign finance regulations (although, to be fair, no other reformers address it either, at least to my knowledge). Hasen is rightly concerned with large, wealthy interests manipulating the political process to steer benefits to themselves and burdens to their competitors. But so long as the government can distribute significant benefits and burdens, people will always attempt to influence those decisions to come out in their favor. At its heart, campaign finance reform is just a means to prevent the modern intrusive, massive, bureaucratic state from sliding into “pay-to-play” corruption and, eventually, the plutocracy Hasen fears. But if a politician does not have strong, internal ethical standards, the desire to reward her friends and punish her enemies will always be there, regardless of what laws are on the books—unless, of course, the structure of government prevents her from doing so. If politicians cannot hand out favors and burdens, then there is little point in spending money to get them to do so. A government that acts within its constitutional limitations should be far less susceptible to corruption or distortion than one that is unlimited and unchecked.

Unfortunately, constitutional boundaries require a judiciary willing to enforce them, and here judges have contributed far

more to corruption and inequality than any of the donors with which Mayer and Hasen concern themselves. You will recall Hasen’s celebration of Judge Calabresi’s concurrence arguing for an emphasis on equality in campaign finance jurisprudence. Yet when Judge Calabresi was presented with a case in which the laws of Connecticut were blatantly manipulated to favor dentists at the expense of unlicensed teeth-whiteners, he let the law stand.<sup>30</sup> In *Sensational Smiles v. Mullin*, a state board passed a rule that only dentists could shine an LED light at the mouth of a customer during a teeth-whitening procedure, even though dentists are not trained to use the lights or even practice teeth-whitening. It was fairly obvious that the rule was designed to drive teeth-whiteners out of business. Judge Calabresi nonetheless brushed away this corruption of the political process with these words: “Much of what states do is favor certain groups over others on economic grounds. We call this politics. Whether the results are wise or terrible is not for us to say, as favoritism of this sort is certainly rational in the constitutional sense.”<sup>31</sup>

Judge Calabresi is willing to sacrifice the people’s ability to engage in peaceful political activity that requires money in order to combat inequality, but he is not willing to recognize restrictions on governmental actions extant in the Constitution to achieve the same result. Put another way, Calabresi (and perhaps Hasen as well) would prefer an unbounded government combined with judicial abdication to a robust First Amendment. The Connecticut case creates a much bigger incentive for powerful interests to skew the political process than anything produced by *Citizens United*. Ultimately, Judge Calabresi and Professor Hasen can have a system where the rich and powerful cannot manipulate policy to benefit themselves or they can have a big government. History and human nature suggest that they cannot have both.

As noted above, Hasen’s book is an important contribution to this field and is highly recommended. One hopes that with his future writings he begins to wrestle with the fact that campaign finance laws deal only with symptoms like corruption and inequality, and not the disease, which is a government that is too big and does too much.

29 See, e.g., Ron Fein, *Why We Need a Constitutional Amendment to Overturn Citizens United*, HUFFINGTON POST (Dec. 22, 2014), available at [http://www.huffingtonpost.com/ron-fein/why-campaign-finance-matt\\_b\\_6028354.html](http://www.huffingtonpost.com/ron-fein/why-campaign-finance-matt_b_6028354.html) (listing the minimum wage, the carried interest rule, and global warming as policies whose implementation is being prevented by “narrow corporate interests and high rollers”).

30 *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 288 (2d Cir. 2015).

31 *Id.* at 287.

