Stanford Law Review

Volume 74 May 2022

NOTE

Climate Protagonists? Strategic Misrepresentation and Corporate Resistance to Climate Legislation

Catherine Rocchi*

Abstract. Political resistance from industry has hindered climate legislation in the United States. Lobbying is one of the most important ways in which firms exert influence in Congress and other rulemaking bodies. Firms involved in the production and use of fossil fuels spend far more money on lobbying than do environmental organizations and the renewable energy sector. While firms enjoy wide latitude in their political activity, the Honest Leadership and Open Government Act of 2007 (HLOGA) requires limited disclosures. But opaque, industry-wide lobbying organizations make it difficult to hold individual firms accountable for their political actions.

This Note analyzes the lobbying activity of United States Climate Action Partnership (USCAP) member firms against cap-and-trade legislation in 2009-2010 and demonstrates the ways in which many companies strategically misrepresent their interests. Strategic misrepresentation permits firms to (1) overstate their support for politically feasible outcomes; (2) trade support for access; (3) shape policy-feedback effects; and (4) lobby through larger collectives in a manner that is untraceable and free from reputational risk. In the climate context, firms use strategic misrepresentation to weaken proposed regulations, delay legislation, and secure new allies in their efforts to expand oil and gas development. HLOGA does not prevent this behavior. Attempts to restrict lobbying must avoid two pitfalls: encroachments into First Amendment rights and the hydraulic nature of money in politics. These barriers may hinder contact disclosure and coalition disclosure requirements, but Congress can protect itself from lobbying by fortifying institutional sources of policy information.

* J.D. Candidate, Stanford Law School, 2022; M.S. Candidate, Stanford Emmett Interdisciplinary Program in Environment and Resources, 2022. This Note exists because of Hajin Kim, whose generosity with her time and insights is unmatched. Thank you to the Ferrante family and to Rachel Rubin for their support and company as I forged through my first draft. I thank Danny Cullenward for several rounds of incisive feedback and Nora Freeman Engstrom for her publication advice. Magdalene Zier provided an inspiring example. Finally, I am grateful to the kind and scrupulous editors of the *Stanford Law Review*, especially Caroline Zhang, Marty Berger, Jenny Jiao, Mariah Mastrodimos, Grace Rehaut, Namrata Verghese, Amir Wright, Henry Koller, and Samantha H. Noh.

Table of Contents

Introduction: Climate Change and Corporate Lobbying

Did we join some of these "shadow groups" to work against some of the early efforts [at climate action]? Yes, that's true. But there's nothing—there's nothing illegal about that.

—Keith McCoy, lobbyist for ExxonMobil[1]

Halting climate change calls for a clean-energy transition: a shift away from fossil fuels and toward renewable energy.[2] Industrialized nations suffer from a carbon lock-in that favors fossil fuels and hinders emerging green technology.[3] The market, left to its own devices, will not resolve the persistent and interlocking technological, institutional, and social forces that delay the energy transition.[4] U.S. presidents can take important climate-change mitigation steps through executive action,[5] but lasting change requires congressional legislation.

Political resistance from the fossil fuel industry has been a principal reason for the failure of climate legislation in the United States.[6] Both the right and the left call for less corporate involvement in policy decisions.[7] Yet firms exercise political influence in myriad ways: by "supporting think tanks,

1. Channel 4 News, *Revealed: ExxonMobil's Lobbying War on Climate Change Legislation*, YOUTUBE, at 01:05-01:21 (June 30, 2021), https://perma.cc/6SZ5-TCEF.

2. *See* Christian Downie, *Business Actors, Political Resistance, and Strategies for Policymakers*, 108 ENERGY POL'Y 583, 583 (2017).

3. *See generally* Gregory C. Unruh, *Understanding Carbon Lock-In*, 28 ENERGY POL'Y 817, 817 (2000) (articulating a "path-dependent process driven by technological and institutional increasing returns to scale" that undermines corrective policy responses to climate change).

4. *See id.* at 817-19.

5. *See, e.g.*, Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7624-25 (Feb. 1, 2021) (instructing executive agencies to address climate change in myriad ways, including by procuring a fleet of electric vehicles, pausing new oil and gas leases on federal lands, eliminating fossil fuel subsidies, and developing agency-specific climate action plans).

6. Downie, *supra* note 2, at 583.

7. Milton Friedman argued that corporate executives should conduct business to "make as much money as possible while conforming to the basic rules of the society . . . embodied in law and . . . in ethical custom." Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://perma.cc/73C2-3FFV. He believed that companies should not engage with social and political issues because doing so constituted a way for the minority to "attain by undemocratic procedures what [it] cannot attain by democratic procedures." *See id.* Progressive academic and former U.S. Secretary of Labor Robert Reich has similarly argued that in a system in which firms view their primary responsibility as a fiduciary one toward shareholders, they have a secondary responsibility to the rest of society to "respect the political process by staying out of it." *See* Robert B. Reich, Business & Society, *The New Meaning of Corporate Social Responsibility*, CAL. MGMT. REV., Winter 1998, at 8, 16.

creating front groups, funding Political Action Committees (PACs) and super PACs, financing foundations, . . . serving on advisory committees to government, and placing executives in administration roles."[8] Crucially, firms also use industry organizations (also called trade associations or business associations) to influence politics.[9] The American Petroleum Institute, for example, is a coalition that represents business interests across the oil and gas industry.[10] The U.S. Chamber of Commerce and the National Association of Manufacturers (NAM) represent such interests across broader swaths of the business community.[11]

Federal law grants firms and industry organizations wide latitude in exercising political influence. In *Citizens United v. FEC*, the Supreme Court held in a 5–4 decision that restricting corporate independent expenditures violates the First Amendment right to free speech.[12] Eight Justices agreed that the advent of the internet would render corporate political spending transparent and allow the public to "give proper weight to different speakers and messages."[13] Yet corporate donors are not required to disclose their political expenditures so long as they donate through a 501(c)(4) "social welfare" organization, such as a PAC, that engages in "issue advocacy" rather than "express advocacy" for a particular candidate.[14] While individual mega-donors

8. Thomas P. Lyon et al., *CSR Needs CPR: Corporate Sustainability and Politics*, CAL. MGMT. REV., Aug. 2018, at 5, 16; *see also* LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING 36 (2015).

9. Downie, *supra* note 2, at 585.

10. *See id.*; *About API*, AM. PETROL. INST., https://perma.cc/8HH9-PVQ5 (archived Mar. 24, 2022) ("API represents all segments of America's natural gas and oil industry . . . . Our nearly 600 members produce, process and distribute the majority of the nation's energy . . . .").

11. *See* Downie, *supra* note 2, at 585; *About the NAM*, NAT'L ASS'N MFRS., https://perma.cc/EQ8Y-P337 (archived Mar. 24, 2022) (noting that the NAM represents "14,000 member companies . . . in every industrial sector"); *Join the U.S. Chamber*, U.S. CHAMBER COM., https://perma.cc/M7RR-Y33F (archived Mar. 24, 2022) ("The U.S. Chamber of Commerce is the world's largest business organization representing companies of all sizes across every sector of the economy. Our members range from the small businesses and local chambers of commerce that line the Main Streets of America to leading industry associations and large corporations.").

12. *See* 558 U.S. 310, 337-39 (2010).

13. *Id.* at 370-71 ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.").

14. Lyon et al., *supra* note 8, at 10 ("What this means in practice is that the organization must not use the 'eight magic words' that appeared in a footnote in *Buckley v. Valeo* (1976): 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,' or any variations thereof. An ad saying, 'Crime is bad. Smith is soft on crime. Jones is tough on crime.' would not count as 'express advocacy' even though it strongly implies that one should support Jones."). Lyon and his co-authors were referring to *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam), *superseded in*

footnote continued on next page

are the most visible beneficiaries of the *Citizens United* decision,[15] firms may also give, and have given, massive quantities of unreported "dark money" to influence elections.[16]

While *Citizens United* suggested that the First Amendment likewise protects an individual's right to lobby,[17] lobbying expenditures are subject to some scrutiny under the Lobbying Disclosure Act of 1995, later amended by the Honest Leadership and Open Government Act of 2007 (HLOGA).[18] Under HLOGA, professional lobbyists must file quarterly reports describing their activities—including the amount spent on lobbying, the general issues lobbied, and the names of the lobbyists—with the Clerk of the House and the Secretary of the Senate.[19] OpenSecrets, a 501(c)(3) nonprofit organization, standardizes this data and makes it searchable by the public.[20]

HLOGA disclosures have a limited scope. The law defines lobbying as "any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client" concerning federal legislation, executive action, or a Senate-confirmed position.[21] Lobbyists contact legislators, monitor congressional hearings, and work to build political coalitions, among other

other part by statute, Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

15. DANIEL I. WEINER, BRENNAN CTR. FOR JUST., *CITIZENS UNITED* FIVE YEARS LATER 5 (2015).

16. Anna A. Mance & Dinsha Mistree, *The Bribery Double Standard: Leveraging the Foreign–Domestic Divide*, 74 STAN. L. REV. 163, 187-88 (2022). *See generally* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2016) (chronicling how a small number of plutocrats used their money to drown out their political adversaries).

17. *See Citizens United*, 558 U.S. at 369 ("Congress has no power to ban lobbying itself.").

18. HLOGA, Pub. L. No. 110-81, 121 Stat. 735 (codified as amended in scattered sections of the U.S. Code). The Lobbying Disclosure Act repealed and succeeded the weaker Federal Regulation of Lobbying Act, which was part of the Legislative Reorganization Act of 1946. JACOB R. STRAUS, CONG. RSCH. SERV., R40245, LOBBYING REGISTRATION AND DISCLOSURE: BEFORE AND AFTER THE ENACTMENT OF THE HONEST LEADERSHIP AND OPEN GOVERNMENT ACT OF 2007, at 1 (2011), https://perma.cc/P86Q-HXU3. In 2007, HLOGA amended the Lobbying Disclosure Act to require additional and more frequent disclosures of lobbying activity. *Id.* at 5. The amendments shortened the reporting period and lowered the threshold for filing disclosure reports: Lobbyists must now file reports on a quarterly (instead of semiannual) basis if their lobbying expenses exceed $10,000 (formerly $20,000). *Id.* at 5-6. HLOGA also mandated, for the first time, that the Clerk of the House and the Secretary of the Senate make lobbyists' registration and disclosure forms available on the internet. *Id.* at 5.

19. *See* STRAUS, *supra* note 18, at 4; 2 U.S.C. § 1604(b)(2)(c).

20. *See Lobbying Data Summary*, OPENSECRETS, https://perma.cc/CM77-Q7GJ (last updated Jan. 24, 2022).

21. 2 U.S.C. § 1602(8)(A).

things.[22] More resource-intensive tasks might include testifying in Congress, cultivating media relationships, attending political fundraisers, and drafting legislation.[23] HLOGA requires disclosure only of direct lobbying—not lobbying-adjacent activities like grassroots mobilization, media relations, and public relations.[24] Nevertheless, HLOGA-mandated disclosures have provided enough quantitative data for various studies that examine the impact of industry lobbying on climate legislation.[25]

Corporate engagement in politics is not a new revelation. This Note, however, is the first to weave together political-science literature and legal doctrine into a comprehensive picture of an insidious and widespread lobbying phenomenon: the duplicitous advocacy by firms both for and against climate legislation, enabled by opaque membership in trade associations. This Note identifies the legal roots of strategic misrepresentation, illustrates its impact on our federal government's capacity to act on climate change, and offers a menu of solutions that would allow Congress to protect itself from deceit. Upending the assumption that accommodating industry preferences is key to successful climate legislation,[26] this Note highlights the way in which the same firms that designed a climate bill caused that bill to languish in Congress. This reading of the legislative debacle in 2009-2010 is both informative and actionable. A unified Congress and the Biden Administration have a unique political window to take decisive action against climate change. Permitting strategic misrepresentation to continue unchecked could prove fatal to these efforts and other policy campaigns.

Part I of this Note reviews political-science literature to contextualize the problem of strategic misrepresentation. The shortcomings in this body of scholarship, I argue, arise from the public's inability to account for the lobbying resources that firms funnel through industry organizations. A lack of transparency makes it difficult to hold individual firms accountable for their political actions. Part II analyzes the lobbying activity of U.S. Climate Action Partnership (USCAP) member firms against cap-and-trade legislation in 2009-2010, demonstrating how many firms exploit legal loopholes to strategically misrepresent their interest in climate legislation. Firms use gaps in federal lobbying regulation to (1) overstate their support for politically feasible

22. *See* DRUTMAN, *supra* note 8, at 79-83.

23. *See id.* at 81-82, 82 fig.4.2.

24. *See id.* at 14.

25. *See, e.g.*, *infra* text accompanying notes 42-43.

26. *See, e.g.*, Kyle C. Meng & Ashwin Rode, *The Social Cost of Lobbying over Climate Policy*, 9 NATURE CLIMATE CHANGE 472, 475 (2019) (suggesting that the Waxman–Markey bill would have been more likely to pass had legislators allocated more free permits to polluting companies).

outcomes; (2) trade support for access; (3) shape policy-feedback effects; and (4) lobby through larger collectives in a manner that is untraceable and free from reputational risks. In the climate context, strategic misrepresentation enables firms to simultaneously weaken proposed regulations, delay legislation, and secure new allies in their efforts to expand oil and gas development. Part III proposes ways to reform our federal lobbying regime to block strategic misrepresentation and advance climate. Recent First Amendment jurisprudence threatens the strengthened disclosure requirements that could otherwise circumvent strategic misrepresentation. While voluntary disclosures and third-party rating systems may act as stopgap measures, lawmakers also have an opportunity to wean Congress from industry information altogether.

I. Literature Review: Analyses of Climate Lobbying

According to well-established governing-network theory, public opinion has little influence over policy decisions.[27] Rather, organizations drive public policy through lobbying.[28] Indeed, some studies suggest that lobbying affects policy outcomes more than political campaign contributions.[29] Many firms avoid donating to political campaigns, a dangerous game that renders them vulnerable to consumer reprisals.[30] Rather, Heather Gerken writes, "corporations do much better by investing their resources in lobbying, where their influence is both outsized and hidden from view. That's where the smart corporate money goes."[31] HLOGA data also suggests that firms prioritize

27. *See* MATT GROSSMANN, ARTISTS OF THE POSSIBLE: GOVERNING NETWORKS AND AMERICAN POLICY CHANGE SINCE 1945, at 21-22 (2014); Robert J. Brulle, *The Climate Lobby: A Sectoral Analysis of Lobbying Spending on Climate Change in the USA, 2000 to 2016*, 149 CLIMATIC CHANGE 289, 292 (2018) (explaining that lobbyists influence governing networks in various ways, including by monitoring congressional activities and providing information that influences decisionmakers' perceptions of policy issues).

28. *See* Brulle, *supra* note 27, at 292.

29. *See* Stephen Ansolabehere, James M. Snyder Jr. & Micky Tripathi, *Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobby Disclosure Act*, 4 BUS. & POL. 131, 133 (2002) (positing that PAC contributions act as mechanisms for interest groups to gain access to legislators so that interest groups can engage in lobbying).

30. Target, for example, faced boycotts after supporting a candidate who opposed same-sex marriage. Andrea Chang, *Target, Gay Rights Supporters at Odds over How to Settle Dispute*, L.A. TIMES (Apr. 8, 2011, 12:00 AM PT), https://perma.cc/JD93-AG2K; Andrew Stern, *Target Corp Targeted for Political Donation*, REUTERS (Aug. 3, 2010, 12:12 PM), https://perma.cc/E7WF-NZ72.

31. Heather K. Gerken, Boden Lecture, *The Real Problem with* Citizens United*: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903, 910 (2014).

lobbying over other political activities. Companies typically spend five times more on lobbying than on PAC contributions in any given year.[32]

The most effective lobbying efforts share two characteristics. First, many firms hire expensive "revolving door" lobbyists—those individuals who previously served as agency officials, congressional chiefs of staff, or even members of the Senate or House of Representatives.[33] Revolving door lobbyists often have longstanding relationships with key decisionmakers, some of whom were once lobbyists themselves.[34]

Second, the most effective lobbyists saturate the "intellectual environment" of policymakers and their staff.[35] By shaping legislators' perceptions of an issue, lobbyists ensure that when policymakers are asked to make a decision, "certain arguments and frames will come to mind quicker than others, and certain ideas and solutions will have been pre-legitimated by a wide range of trusted experts."[36] At the extreme end of intellectual saturation, some lobbyists provide decisionmakers with prepackaged legislation.[37] These "legislative subsidies" ensure that bills favorable to industry receive more attention and move rapidly through the policymaking process.[38] Gerken and Tausanovitch call this phenomenon the "fast food" option.[39] The temptation to

32. Magali Delmas, Jinghui Lim & Nicholas Nairn-Birch, *Corporate Environmental Performance and Lobbying*, 2 ACAD. MGMT. DISCOVERIES 175, 177-78 (2016).

33. *See Revolving Door: Methodology*, OPENSECRETS, https://perma.cc/2YY8-XRQJ (archived Mar. 24, 2022); ALEXANDER C. FURNAS & TIMOTHY M. LAPIRA, NEW AM., CONGRESSIONAL BRAIN DRAIN: LEGISLATIVE CAPACITY IN THE 21ST CENTURY 46 (2020), https://perma.cc/W2RB-WHGZ (explaining how "exorbitant" K Street salaries lure congressional staff).

34. *See Revolving Door: Methodology*, *supra* note 33.

35. DRUTMAN, *supra* note 8, at 36; *id.* at 23-24 (explaining that lobbying works best when information on one side of an issue overwhelms that on the other side).

36. *Id.* at 36.

37. Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbing: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 ELECTION L.J. 75, 80-81 (2014). The American Legislative Exchange Council famously and effectively uses this tactic to push conservative model bills through state legislatures. The American Legislative Exchange Council (ALEC) introduced nearly fifty model bills in 2020. *2020 ALEC Bills*, ALEC EXPOSED, https://perma.cc/LTM4-F925 (archived Mar. 24, 2022). Bills with language drawn directly from ALEC model bills appeared in thirty-four states in the 2011-2012 legislative session. Molly Jackman, *ALEC's Influence over Lawmaking in State Legislatures*, BROOKINGS (Dec. 6, 2013), https://perma.cc/9RP4-FCV9.

38. *See generally* Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 69 (2006) (examining lobbying under a "legislative subsidy" theory rather than exchange or persuasion theories).

39. Gerken & Tausanovitch, *supra* note 37, at 80-81 ("[L]obbyists provide McLegislation, McTalking Points, and the McResearch neatly packaged in a nice bag, along with the equivalent of a Happy Meal toy—polling results that tell[] legislators that the bill in question is a safe choice.").

adopt "McLegislation" from interest groups is even stronger for climate change and other complex regulatory issues for which publicly available information is difficult to digest.[40] Fast-food legislative subsidies encourage legislators to work on behalf of interests that can afford teams of professional lobbyists.[41]

Which interests best achieve intellectual saturation? Lee Drutman introduced the "countervailing power" ratio: a comparison between (1) the overall lobbying spending of businesses and trade organizations; and (2) that of diffuse interest groups and labor unions.[42] In other words, the countervailing power ratio measures the relative influence of different sectors in the policy arena. Unsurprisingly, Drutman found that corporate lobbying influence dwarfed that of labor unions and diffuse interest groups.[43] This trend extends to the climate space. Robert Brulle found that firms involved in the production or use of fossil fuels and the trade associations they fund outspent environmental organizations and the renewable energy sector by an average ratio of approximately 10:1 between 2000 and 2016.[44] Brulle's analysis demonstrates the obvious: Fossil fuel interests and heavy industry are better resourced than their renewable energy and nonprofit counterparts. This skewed countervailing power ratio, Brulle suggests, may mean that intrasector differences among firms do more to shape climate policy than the efforts of environmental organizations and the renewable energy sector.[45]

Other factors exacerbate this skewed countervailing power ratio.[46] For example, Sung Eun Kim, Johannes Urpelainen, and Joonseok Yang emphasize the importance of distinguishing between individual and collective lobbying.[47] Firms lobby in tandem only where their interests align against regulation.

Within the utility sector, for example, firms that benefit from greenhouse-gas regulations (utilities that already use renewables and natural gas) exhibit different lobbying behavior from those that stand at a competitive

40. *See id.* at 81 (explaining that, regarding complex issues, "[p]olicymakers need to know how a proposed change will interact with the complex institutional landscape they seek to regulate").

41. *See id.*

42. DRUTMAN, *supra* note 8, at 13-14, 14 fig.1.5.

43. *Id.* (finding that, between 2001 and 2008, the countervailing power ratio ranged from 21:1 to 35:1 in favor of firms and trade organizations).

44. Brulle, *supra* note 27, at 297-98.

45. *Id.* at 298.

46. *See, e.g.*, Sung Eun Kim, Johannes Urpelainen & Joonseok Yang, *Electric Utilities and American Climate Policy: Lobbying by Expected Winners and Losers*, 36 J. PUB. POL. 251, 272 (2016) (examining the lobbying behavior of electric utilities with respect to climate legislation in the 111th Congress).

47. *Id.* at 253-54.

disadvantage in a regulated context (utilities that use coal).[48] Kim et al. argue that pro-regulation firms lobby independently to shape specific, self-serving details of the desired legislation.[49] Firms opposed to regulation, on the other hand, tend to collaborate to stop climate legislation.[50] The opponents of climate legislation have a common economic interest.[51] Moreover, the concentration of resources in a few energy supermajors is conducive to collective action.[52] "The economies of scale that favour the burning of coal in large units also facilitate collective action," Kim et al. write.[53] "[A] small number of large coal users can easily overcome obstacles to collective action and mobilise effectively to combat federal climate legislation."[54] Therefore, opposing climate legislation is more amenable to collective lobbying than supporting such legislation.

Christian Downie's interview-based investigation into energy-industry lobbying practices provides additional, qualitative support for the theory that antiregulatory industries disproportionately funnel lobbying money through industry associations.[55] Through seventy-one interviews, including conversations with senior executives and lobbyists from energy firms and industry associations, Downie learned that the Chamber of Commerce and the NAM led the opposition to Obama's Clean Power Plan by establishing the Partnership for a Better Energy Future.[56] This third organization had the mandate to lead the "business and industrial community in support of a unified strategy and message in response to the Administration's greenhouse gas . . .

48. *Id.*

49. *See id.* at 265, 270-72 (finding that "expected winners are more likely to engage in individual lobbying than other utilities" and have "specific requests" regarding legislation). Utilities such as Exelon and PSE&G, for example, which had made major investments in renewable energy, advocated for a package of complementary policy solutions in the 2009 climate bill, including both cap and trade and a renewable portfolio standard. Progress Energy, a major natural gas user, emphasized the costs of reducing carbon emissions when it endorsed the same bill. *Id.* at 271-72.

50. *See id.* at 269-70 (relying on anecdotal evidence to suggest that the opponents of federal climate policy lobbied through trade organizations such as the American Coalition for Clean Coal Electricity and the Chamber of Commerce). For more on collective-action theory, see generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (explaining the challenges inherent in providing public goods).

51. *See* Kim et al., *supra* note 46, at 269-70.

52. "Supermajors" refers to the world's largest oil and gas companies. Tom Bergin, *Oil Majors' Output Growth Hinges on Strategy Shift*, REUTERS (Aug. 1, 2008, 6:28 AM), https://perma.cc/PW5Q-XYGV.

53. Kim et al., *supra* note 46, at 260.

54. *Id.*

55. *See generally* Downie, *supra* note 2, at 585.

56. *Id.* at 585-87.

regulatory agenda."[57] Renewable energy firms, in contrast, could not rely on the most powerful industry organizations for support.[58] During policy contests concerning solar subsidies and net metering, the Chamber of Commerce, the NAM, and the Business Roundtable sided with incumbent industries rather than the solar industry.[59] Downie's findings, paired with Kim et al.'s theory of collective lobbying, suggest that analyses that do not consider the impact of collective lobbying through industry organizations underestimate the expenditures and influence of firms opposed to climate legislation.

For example, Magali Delmas, Jinghui Lim, and Nicholas Nairn-Birch discovered a U-shaped relationship between the carbon emissions and climate-lobbying expenditures of 1,141 firms.[60] In other words, their study suggests that firms with very low or very high emissions invested heavily in lobbying on climate legislation, while moderately emitting firms spent relatively little. Delmas et al.'s finding challenges the traditional narrative that businesses predominantly attempt to influence policy where it poses a threat to them.[61] Their results indicate that environmental policy is politically salient for both "dirty" and "clean" firms.[62]

But the Delmas et al. study paints a misleading picture of the relative lobbying influence of firms that stand to benefit from climate legislation and those that oppose regulation. The study concedes that

> a considerable amount of political spending occurs through industry trade associations, such as the U.S. Chamber of Commerce or the American Petroleum Institute. Although such trade associations are required to report their lobbying

57. *Id.* at 587 (quoting the Partnership's now-deleted website).

58. Two policy contests illustrate the industry organizations' alignment with fossil fuel interests and against renewable energy companies. The first is the Investment Tax Credit, which "reduces federal income taxes by 30 per cent for capital investments in solar systems on residential and commercial properties" and "is one of the reasons that the US solar industry has grown by more than $14 billion" in the decade following its enactment in 2006. *Id.* at 588. Second, many state-level contests developed around "net metering"—the rules governing interactions between distributed solar generation and the electricity grid. *See id.* The most powerful business associations sided with incumbent industries and lobbied against both solar subsidies. *See id.*

59. *Id.*; *see supra* note 58.

60. *See* Delmas et al., *supra* note 32, at 187 & fig.3.

61. *See id.* at 176-77.

62. *Id.* at 177. Delmas et al. define "dirty" firms as those that follow a compliance-oriented strategy and have an interest in keeping environmental standards as low as possible. *See id.* at 178-79. "Clean" firms, on the other hand, are those that can obtain private benefits from strict environmental regulation, which "can engender barriers to entry and other sources of competitive advantage." *Id.* "Middle-of-the-road" performers have neither poor nor exemplary environmental performance and have a smaller stake in environmental policy outcomes. *See id.*

> spending, they are not required to disclose each member-firm's contribution to the trade association's lobbying budget and strategy.[63]

This opacity means that Delmas et al.'s study did not account for lobbying resources funneled through industry organizations. If Kim et al. and Downie are correct that fossil fuel–dependent firms hoping to block climate legislation are more likely to lobby collectively (through industry associations) than their renewable energy counterparts, then Delmas et al.'s analysis systematically underestimates the lobbying activity of "dirty" firms—and the influence of that lobbying on climate legislation.

Although scholars may fail to incorporate HLOGA data gaps into their analyses, the opportunity arising from a weak mandatory disclosure scheme is not lost on firms. The next Part demonstrates how several companies took advantage of the industry-association loophole to strategically misrepresent their interest in a federal cap-and-trade legislation during the 2009-2010 session—thereby misleading policymakers and civil society, watering down proposed policies, and stopping climate legislation in its tracks.

II. USCAP: A Case Study on Strategic Misrepresentation

> *Our lobbying efforts are fully compliant with all laws and are publicly disclosed on a quarterly basis.*
>
> —ExxonMobil, in response to lobbyist Keith McCoy's statements[64]

The major shortcoming of mandated HLOGA disclosures—the public's inability to trace industry-association spending to individual firms—poses two problems. First, it precludes accurate estimates of firm-specific lobbying expenditures, thereby preventing policymakers from evaluating individual firms' influence in the policy arena. Second, and more importantly, it allows firms to strategically misrepresent their interests to policymakers and the public. The lobbying activities of firms in USCAP (U.S. Climate Action Partnership) illustrate the latter issue.

USCAP was a coalition of Fortune 500 companies and environmental nonprofits that advocated for climate legislation to expedite the clean-energy transition.[65] Corporate USCAP members included several energy supermajors—British Petroleum (BP) America, ConocoPhillips, Duke Energy, and Shell—utilities such as Exelon and PG&E, and the major automobile manufacturers General Motors, Ford Motor Company, and the Chrysler

63. *Id.* at 189 (citation omitted).

64. Channel 4 News, *supra* note 1, at 04:09-04:15.

65. *See* U.S. CLIMATE ACTION P'SHIP, A BLUEPRINT FOR LEGISLATIVE ACTION: CONSENSUS RECOMMENDATIONS FOR U.S. CLIMATE PROTECTION LEGISLATION 2, 25 (2009), https://perma.cc/D9A6-TLQ2.

Group.[66] Big Greens, including the Environmental Defense Fund and the Natural Resources Defense Council, joined those corporate partners to engage in a protracted bargaining process that culminated in the 2009 USCAP Blueprint for Legislative Action.[67] The Blueprint outlined an economy-wide cap-and-trade policy as well as standards regulating coal combustion, transportation, and energy efficiency in buildings.[68] From an outside perspective, the coalition appeared to be a "Baptist and bootlegger" partnership in which moral environmentalists joined forces with industry partners seeking regulatory certainty to break the business veto on climate legislation.[69]

USCAP advocacy led some scholars to believe that the United States had reached a "tipping point" in corporate support for climate legislation.[70] Indeed, the apparently pro-regulation position of corporate USCAP members contrasted with their political activity in the 1980s and 1990s. In these decades, over fifty companies and industry associations formed an anti-climate lobby, the Global Climate Coalition, that sowed doubt about the science of global warming and misconstrued the economic risks of limiting greenhouse-gas emissions.[71] Global Climate Coalition members included Chrysler, Dow Chemical, Duke Energy, DuPont, Ford, General Motors, and Shell—all of which later participated in USCAP.[72]

---

66. *Id.* at 25.

67. *See id.*; Theda Skocpol, Naming the Problem: What It Will Take to Counter Extremism and Engage Americans in the Fight Against Global Warming 2 (2013), https://perma.cc/UAB2-MWVY (describing the USCAP Blueprint as "meticulously negotiated").

68. *See* U.S. CLIMATE ACTION P'SHIP, *supra* note 65, at 6; *see also id.* at 7-24.

69. *See* Irja Vormedal, *From Foe to Friend? Business, the Tipping Point and U.S. Climate Politics*, BUS. & POL., October 2011, at 1, 4-6. In the "Baptist and bootlegger" analogy, the former party favors prohibition of alcohol for moral or religious reasons and the latter favors the same prohibition because of the profits from selling illegal liquor. *Id.* at 6.

70. *See, e.g., id.* at 16; *see also id.* at 5 (defining a "tipping point" as when "a clearly identifiable and prevailing group of corporations and/or business lobbies—large enough to make a political difference—have begun to exercise support and push for regulatory change").

71. *See id.* at 8-9. For example, the Global Climate Coalition was the architect of the Byrd–Hagel resolution that doomed Senate ratification of the Kyoto Protocol. *See id.* at 9 & n.37. The resolution stated that

> the United States should not be a signatory to any protocol . . . at negotiations in Kyoto in December 1997, or thereafter, which would . . . mandate new commitments to limit or reduce greenhouse gas emissions . . . unless the protocol or other agreement also mandates new specific schedule commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period, or . . . would result in serious harm to the economy of the United States.

Byrd–Hagel Resolution, S. Res. 98, 105th Cong. (1998).

72. *Compare Global Climate Coalition (GCC)*, DESMOG, https://perma.cc/59L2-QR5M (archived Mar. 25, 2022) (listing Global Climate Coalition members), *with* U.S. CLIMATE ACTION P'SHIP, *supra* note 65, at 25 (listing USCAP members).

Under the USCAP banner, these firms worked with the House Energy and Commerce Committee to develop the Waxman–Markey bill—a proposed cap-and-trade policy[73] that was the closest the United States had come to economy-wide federal climate action.[74] In May 2009, when the House Energy and Commerce Committee reached a compromise, Representative Henry Waxman publicly thanked USCAP members for their leadership: "[W]e used [the Blueprint] as a model for our legislation. I believe that the only hope we have to get legislation passed is to show a consensus of American business and environmentalists."[75] Business members of the USCAP coalition drew praise for their advocacy.[76] The USCAP Blueprint was a textbook fast-food legislative subsidy.

Journalists and leftist environmental organizations criticized both the USCAP Blueprint and the Waxman-Markey bill for provisions that were favorable to industry and undermined the proposed legislation's capacity to curb greenhouse-gas emissions.[77] These loopholes included a permissive policy

73. Vormedal, *supra* note 69, at 16, 20-22. Under a cap-and-trade system, a government creates a market for greenhouse-gas emissions by setting an emissions cap and issuing a quantity of emission "allowances" consistent with that cap. Cap-and-trade policymakers face many design choices, including the scope of emissions sources covered by the policy, the emissions-reduction target, the method of allocating allowances, the length of compliance periods, and the use of offsets and banking. *See Cap and Trade Basics*, CTR. FOR CLIMATE & ENERGY SOLS., https://perma.cc/PD95-XAV4 (archived Mar. 25, 2022). California has implemented a cap-and-trade program with mixed success. Lisa Song, *Cap and Trade Is Supposed to Solve Climate Change, but Oil and Gas Company Emissions Are Up*, PROPUBLICA (Nov. 15, 2019, 5:00 A.M. EST), https://perma.cc/2Z2L-2DJQ (explaining how carbon emissions from California's oil and gas industry continued to rise under cap and trade).

74. Kim et al., *supra* note 46, at 251; *see also* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

75. Vormedal, *supra* note 69, at 20-21, 21 n.93 (quoting ERIC POOLEY, THE CLIMATE WAR: TRUE BELIEVERS, POWER BROKERS, AND THE FIGHT TO SAVE THE EARTH 375 (2010)). In his first hearing as chair of the House Energy and Commerce Committee on January 15, 2009, Waxman invited USCAP CEOs to present the Blueprint. *Id.* at 20. In March of that year, he invited Jim Rogers of Duke Energy and Fred Krupp of the Environmental Defense Fund to travel to Washington to comment on the draft bill. *Id.*

76. *See, e.g.*, Press Release, Nat. Res. Def. Council, Major Businesses and Environmental Leaders Unite to Call for Swift Action on Global Climate Change (Jan. 22, 2007), https://perma.cc/6FMX-47MB (praising the "unprecedented alliance" that calls for "the federal government to quickly enact strong national legislation to achieve significant reductions of greenhouse gas emissions").

77. *See, e.g.*, Todd Darling, *Carbon Smoke and Mirrors*, L.A. TIMES (June 25, 2009, 12:00 AM PT), https://perma.cc/MD8Q-9NG9 (arguing that the 85% free allowances under Waxman–Markey mirrored a European system that failed to limit pollution); Kate Sheppard, *Business/Enviro Alliance Unveils Climate Plan, Attracts Critics*, GRIST (Jan. 16, 2009), https://perma.cc/G4J9-D7VN ("While we welcome corporate engagement in the climate policy debate, the [Blueprint] proposal released today by the U.S. Climate Action Partnership is deeply flawed and must not be the basis for domestic policy to

footnote continued on next page

toward carbon offsets, many free (as opposed to auctioned) cap-and-trade allowances, and weak emission-reduction targets.[78]

According to political scientist Theda Skocpol, the Blueprint's inadequacy was a product of asymmetries in bargaining power that characterized USCAP negotiations.[79] Big Green partners had to adhere to the commitments made in the internal negotiation progress, lest the deal and coalition fall apart.[80] Such a collapse would have been devastating for leaders like the Environmental Defense Fund's Fred Krupp, whose career is premised on the idea that bargains with business are key to protecting the environment.[81] Corporate USCAP members, in contrast, could design permissive cap-and-trade legislation while simultaneously funding industry associations that lobbied against the insider bargain once it was presented to Congress and the American public.[82]

This behavior suggests that USCAP firms did not actually prefer market-based regulation over the status quo.[83] Rather, Jacob Grumbach argues, industry stakeholders that joined USCAP primarily mobilized to prevent any climate legislation at all.[84] Grumbach uses qualitative data from businesses' political activities to show that, in many cases, USCAP participants financed industry groups that attempted to derail the Waxman–Markey legislative push.[85]

---

address global warming. . . . Put simply, the proposal would reward corporate polluters with hundreds of billions of dollars of giveaways, and its near-term pollution reduction targets are far weaker than what scientists have called for. . . . This is a dead-end approach that policymakers should reject." (quoting Friends of the Earth president Brent Blackwelder)).

78. *See* Sheppard, *supra* note 77.

79. *See* Skocpol, *supra* note 67, at 47-48.

80. *See id.* ("USCAP's inherent asymmetry was grounded in the modus operandi of business organizations versus nonprofit advocacy groups—and the asymmetry is also attributable to the greater investment of environmental groups in pushing cap and trade legislation of some sort over the top. When one side has fewer options for maneuver, and also needs a bargain to succeed more than the other, the needy, inflexible side will surely give more, and do so again and again.").

81. *Id.* at 48; *see also* Frederic D. Krupp, Opinion, *New Environmentalism Factors in Economic Needs*, WALL ST. J. (Nov. 20, 1986, 11:59 PM ET), https://perma.cc/JP8D-RU9M (promoting the inevitable "third stage" of environmentalism, a business-oriented strategy that considers "[g]rowth, jobs, taxpayer and stockholder interests," among others); Fred Krupp, Opinion, *Fourth Wave Environmentalism Fully Embraces Business*, WALL ST. J. (Mar. 20, 2018, 6:31 PM ET), https://perma.cc/R7GY-3GH6 (commending the Environmental Defense Fund and other organizations that partner with businesses to deploy technology that reduces waste, pollution, and greenhouse-gas emissions).

82. Skocpol, *supra* note 67, at 48.

83. Jacob M. Grumbach, *Polluting Industries as Climate Protagonists: Cap and Trade and the Problem of Business Preferences*, 17 BUS. & POL. 633, 634-35 (2015).

84. *See id.* at 642-43.

85. *See id.*

Table 1
Industry Lobbying Organizations with USCAP Members[86]

Industry Lobbying Organization	**USCAP Firms**
Americans for Affordable Climate Policy	Duke Energy
American Coalition for Clean Coal Electricity	Duke Energy
American Enterprise Institute	Chrysler, Ford, General Electric, Shell
American Petroleum Institute	BP, ConocoPhillips, Dow Chemical, Shell, Siemens
Americans for Balanced Energy Choices	Duke Energy
Cato Institute	Shell, Ford Foundation
Center for Energy and Economic Development	Alcola, Caterpillar, General Electric
Chamber of Commerce	Chrysler, Deere, Dow Chemical, Duke Energy, General Electric, PepsiCo, PNM Resources, Siemens
Consumer Energy Alliance	BP, Shell

For example, USCAP member Duke Energy was also a member of the American Coalition for Clean Coal Electricity, a lobbying organization that touted the benefits of "clean" coal and emphasized the high costs of environmental regulation.[87] In July 2009, journalists revealed that the American Coalition for Clean Coal Electricity had forged letters from racial-minority organizations that urged members of Congress to vote against the Waxman–Markey bill.[88] BP and Shell joined non-USCAP corporations Chevron and ExxonMobil to fund the Consumer Energy Alliance. This organization, like the American Coalition for Clean Coal Electricity, advertised the economic consequences of climate legislation on television and presumably on Capitol Hill.[89]

Finally, many USCAP participants sat on the board of the Chamber of Commerce,[90] a gargantuan industry association that litigated against the

86. Grumbach, *supra* note 83, at 646 tbl.3.

87. *Id.* at 645.

88. Keith Johnson, *Fake Out: Forged Letters Urged Congressman to Vote Against Climate Bill*, WALL ST. J. (July 31, 2009), https://perma.cc/3A4T-MCVR; Keith Johnson, *Clean Split: Duke Energy Leaves Clean-Coal Group*, WALL ST. J. (Sept. 2, 2009), https://perma.cc/YBF7-A9UB.

89. Grumbach, *supra* note 83, at 646.

90. *Id.*

Environmental Defense Fund and Natural Resources Defense Council to block California's cap-and-trade program and the ability of the Environmental Protection Agency (EPA) to regulate carbon dioxide emissions as a pollutant.[91] The Chamber published a letter opposing Waxman–Markey to the House of Representatives[92] and released a commercial with the narration: "[The cap-and-trade legislation] being considered by Congress could make it too expensive to heat our homes, power our lives and drive our cars. Is this really how Americans want to live?"[93] William Kovacs, the Chamber's then–Vice President of Environment, Technology, and Regulatory Affairs, revealed that none of the member firms questioned the Chamber's anti-environment advocacy.[94]

HLOGA disclosures grant us some information about lobbying on the Waxman–Markey bill[95] and its Senate equivalent, the Clean Energy Jobs and American Power Act.[96] We know that over 1,000 unique organizations registered to lobby on those two bills.[97] We know that USCAP spent $1 million lobbying in 2009[98]—presumably in favor of cap-and-trade legislation. We know that pro-environment interest groups spent a record $22.4 million on federal lobbying efforts that year, doubling their average expenditures between 2000

91. *See* Cal. Chamber of Com. v. State Air Res. Bd., 216 Cal. Rptr. 3d 694, 694 (Ct. App. 2017) (listing the California Chamber of Commerce as a plaintiff-appellant, and the Environmental Defense Fund and Natural Resources Defense Council as intervener-respondents); *id.* at 699; Massachusetts v. EPA, 127 S. Ct. 1438, 1445-46 (2007) (listing the National Chamber Litigation Center as of counsel for intervenor-respondent CO_2 Litigation Group, and the Environmental Defense Fund and Natural Resources Defense Council as counsel for petitioners).

92. Letter from R. Bruce Josten, Exec. Vice President, U.S. Chamber of Com., to Members of the U.S. House of Reps. (June 24, 2009), https://perma.cc/H34V-K4C7 ("The Chamber strongly urges you to oppose H.R. 2454. The Chamber may consider votes on, or in relation to, this issue in our annual How They Voted scorecard."). This letter is no longer available on the Chamber of Commerce's website but is still available through the Internet Archive's Wayback Machine. *See id.* (archiving the letter on February 23, 2021). Josten was the Executive Vice President of Government Affairs at the Chamber of Commerce. *R. Bruce Josten*, U.S. CHAMBER COM., https://perma.cc/XQD3-NUSV (archived Mar. 28, 2022).

93. Marketplace Morning Rpt., *Putting the Lid on Cap-and-Trade*, MARKETPLACE, at 3:02-3:13 (Dec. 6, 2007), https://perma.cc/4P85-723D.

94. Grumbach, *supra* note 83, at 646.

95. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

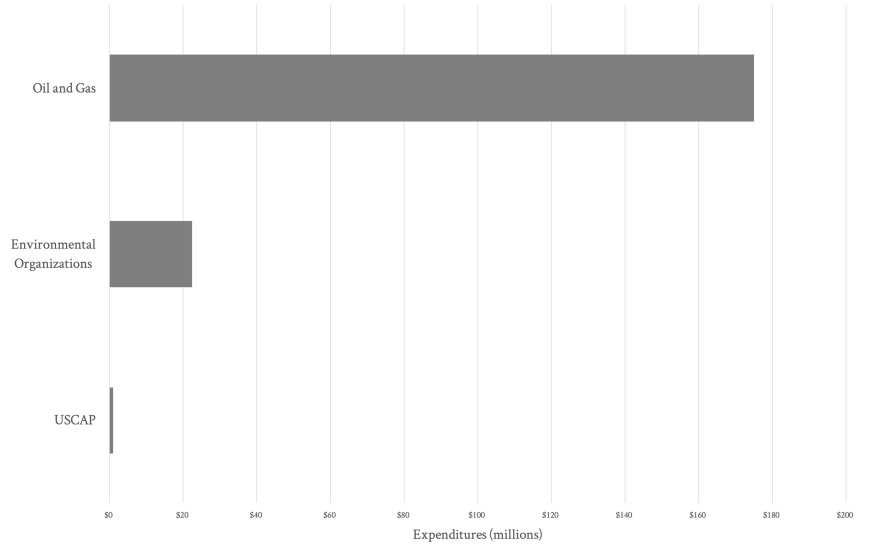
96. S. 1733, 111th Cong. (2009).

97. *Clients Lobbying on H.R.2454: American Clean Energy and Security Act of 2009*, OPENSECRETS, https://perma.cc/9UJH-4PM6 (archived Mar. 28, 2022).

98. Evan Mackinder, *Pro-environment Groups Outmatched, Outspent in Battle over Climate Change Legislation*, OPENSECRETS (Aug. 23, 2010, 12:45 PM), https://perma.cc/TDS5-7U2Y.

and 2008.[99] Finally, we know that the oil and gas industry alone spent a record $175 million on lobbying in the same year—creating a countervailing power ratio of almost 8:1.[100]

Figure 1
2009 Lobbying Expenditures



This data does not include lobbying by trans-industry organizations like the Chamber of Commerce, which alone spent $144,606,000 on a variety of issues, including the Waxman–Markey bill and its Senate equivalent, in 2009.[101] A handful of firms, including a few public-utility companies and Apple, left the Chamber to protest its stance on climate regulation.[102] But the

99. *Id.*

100. *See id.*

101. *Client Profile: US Chamber of Commerce—Summary*, OPENSECRETS, https://perma.cc/2MZH-WNWC (last updated Jan. 24, 2022); *Client Profile: US Chamber of Commerce—Bills*, OPENSECRETS, https://perma.cc/9R6M-X7BG (last updated Jan. 24, 2022) (to locate, search "H.R.2454" and "S.1733" in the "Filter results" bar).

102. *See* James Surowiecki, *Exit Through Lobby*, NEW YORKER (Oct. 12, 2009), https://perma.cc/NYW9-FE5C (arguing that the Chamber's stance on climate change will gravitate toward the preferences of its members with the greatest stakes and interests against legislation—for example, coal companies).

vast majority of Chamber members remained loyal.[103] The Chamber, despite gestures toward a more progressive stance, continued its opposition to the bill.[104] Unsurprisingly, the Clean Energy Jobs and American Power Act floundered in the Senate.[105] Goliath whipped David.

While it is possible to discern that lobbying by the fossil fuel industry and its allies far exceeds lobbying by environmental groups, four limitations of HLOGA-mandated disclosures make it difficult to determine individual firms' lobbying activity. First, HLOGA reports do not reveal how much a firm or industry organization spends on an individual bill.[106] Firms often lobby on multiple issues during a single quarter, so onlookers cannot map their expenditures onto any one policy issue.[107] We can surmise that fossil fuel interests and industry partners inundated legislators with anti–cap-and-trade propaganda in 2009. But the public cannot assign a dollar value to either industry-wide or firm-specific expenditures. Second, while HLOGA disclosures indicate the topics that a lobbyist discusses, lobbyists need not record their client's stance on an issue.[108] It would be interesting to know, for example, what a Shell lobbyist told members of the Senate and the House of Representatives about cap and trade and what American Petroleum Institute lobbyists told those same congresspeople. Third, HLOGA does not require that lobbyists record the congresspeople or administrative officials with whom they spoke—only which House(s) and federal agencies they visited.[109] It is, therefore, difficult for political scientists to use votes on legislation as a proxy for firms' lobbying positions.

Fourth, and most importantly, HLOGA permits firms to lobby through larger collectives in a manner that is untraceable and free from reputational

103. *Id.*

104. *See* Camille Ricketts, *U.S. Chamber of Commerce Strikes Back After Apple Defection: "We Don't Have Regrets,"* VENTUREBEAT (Oct. 8, 2009, 12:48 PM), https://perma.cc/M99B-XVZT (describing how the Chamber, in a statement after Apple's departure, both asserted support for "strong action on climate change" and reaffirmed its opposition to the Waxman–Markey bill (quoting Chamber of Commerce CEO Thomas Donohue)).

105. *See* Ryan Lizza, *As the World Burns*, NEW YORKER (Oct. 3, 2010), https://perma.cc/375P-WH84.

106. *See* 2 U.S.C. § 1604(b)(3).

107. *See, e.g.*, Chamber of Com. of the U.S.A., LD-2 Disclosure Form ll. 8, 13, 16 (Oct. 19, 2009), https://perma.cc/9FCJ-YV6X (reporting that the Chamber spent $34,690,000 lobbying on hundreds of issues in the third quarter of 2009).

108. *See* 2 U.S.C. § 1604(b)(2)(A); Chamber of Com. of the U.S.A., *supra* note 107, l. 16 (disclosing, with no greater specificity, that the Chamber lobbied on the Waxman–Markey bill).

109. *See* 2 U.S.C. § 1604(b)(2)(B); Chamber of Com. of the U.S.A., *supra* note 107, l. 17 (noting only that the Chamber lobbied in both Houses of Congress and several administrative agencies).

risk. Industry organizations often do not disclose their members.[110] With a new donor-reporting provision, HLOGA attempted to "close[] a loophole that has allowed so-called 'stealth coalitions,' often with innocuous-sounding names, to operate without identifying the interests engaged in the lobbying activities."[111] Yet HLOGA requires lobbying organizations to report only those donors who "actively participate[] in the planning, supervision, or control" of lobbying activities.[112] This vague standard has proven toothless.[113] The Chamber of Commerce, for example, is known to establish accounts for firms that are reluctant to take a controversial public stance, thereby allowing those companies to anonymously funnel money to the Chamber to advocate on their behalf.[114] In an explosive interview with undercover Greenpeace reporters, an ExxonMobil lobbyist revealed that the company deliberately hides behind trade organizations to evade public scrutiny on the Hill: "We don't want it to be us, to have these conversations, especially in a hearing," he explained. "It's getting our associations to step in and have those conversations and answer those tough questions and be . . . 'the whipping boy' . . . ."[115]

These four limitations of HLOGA—our inability to map lobbying expenditures onto specific bills or issue areas, the obscurity of firms' lobbying stances, lobbyists' failure to report interactions with individual policymakers, and the option to render lobbying still more untraceable by funneling money through industry organizations—permit firms to strategically misrepresent their interests. A loophole-riddled HLOGA allows firms to publicly support

110. The Chamber of Commerce, for example, has long refused to name any of its members. Josh Harkinson, *Fact-Checking the US Chamber of Commerce*, MOTHER JONES (Jan.-Feb. 2010), https://perma.cc/L3ST-AY64 (revealing that the Chamber had routinely inflated its membership numbers by 900%, claiming that it had three million members when the true number was closer to 300,000).

111. 153 CONG. REC. S10,709 (daily ed. Aug. 2, 2007) (statement of Sen. Dianne Feinstein); *see* 2 U.S.C. § 1603(b)(3).

112. 2 U.S.C. § 1603(b)(3). HLOGA requires registrants to report any organization that: "(A) contributes more than $5,000 to the registrant or the client in the quarterly period to fund the lobbying activities of the registrant; and (B) actively participates in the planning, supervision, or control of such lobbying activities." *Id.*

113. The NAM itself pointed out this weakness in the law. Rand Robins, *Why the Honest Leadership and Open Government Act of 2007 Falls Short, and How It Could Be Improved*, LEGIS. & POL'Y BRIEF, Spring 2010, at 1, 12. ("[The HLOGA disclosure provision] is also extremely vague, and requires the expenditure of considerable resources to try to determine what it means and how to monitor the myriad member company activities that might be considered 'active participation' in lobbying." (quoting *Issue Advocacy—2008:* National Association of Manufacturers v. Taylor *(D.D.C.)*, NAT'L ASS'N MFRS., https://perma.cc/ABJ3-XGKE (archived Mar. 28, 2022)).

114. *See* Jim VandeHei, *Business Lobby Recovers Its Clout by Dispensing Favors for Members*, WALL ST. J. (Sept. 11, 2001, 12:01 AM ET), https://perma.cc/HXW6-9EGT (exposing Walmart, DaimlerChrysler, and Merck as secret Chamber of Commerce clients).

115. Channel 4 News, *supra* note 1, at 04:25-04:43.

climate legislation while simultaneously undermining that same regulation through anonymous industry organizations.

Why would firms strategically misrepresent their interests? Misrepresentation enables political actors to engage in four practices: (1) overstating their support for politically feasible outcomes; (2) trading support for access; (3) shaping policy-feedback effects; and (4) misdirecting the resources of political opponents.[116]

First, strategic misrepresentation allows firms to exaggerate their support for unwanted legislation when their true preference—no regulation at all—is politically unpopular.[117] The fossil fuel industry does not want climate legislation. "The best outcome for the oil companies is if nothing changes," a former Chevron executive explained.[118] With carbon regulation, "[y]ou just won't make as much money as the oil companies would like."[119] But when climate action looks likely, carbon-intensive firms' strategy of choice may be to "water down" regulations and advocate for more moderate, market-based alternatives.[120] In the 1990s, the Global Climate Coalition—an industry association including Chrysler, Dow Chemical, Duke Energy, DuPont, Ford, General Motors, and Shell[121]—vigorously opposed all policies that aimed to reduce greenhouse-gas emissions.[122] Just four years after the Global Climate Coalition disbanded, and as the political will for climate action grew stronger, these same firms reorganized as USCAP.[123] Pro-climate regulation industry

116. I borrowed the first three practices from an article by David Broockman and added a fourth. *See* David E. Broockman, *The "Problem of Preferences": Medicare and Business Support for the Welfare State*, 26 STUD. AM. POL. DEV. 83, 86-87 (2012).

117. *See id.* at 86-90, 94-97 (showing that firms which unequivocally opposed Medicare before the 1964 reelection of President Lyndon B. Johnson changed tactics in the wake of the Democratic landslide, advancing alternative proposals to subsidize healthcare for the elderly to limit the scope of ostensibly inevitable legislation).

118. Benjamin Elgin & Peter Waldman, *Chevron Defies California on Carbon Emissions*, BLOOMBERG BUS. (Apr. 17, 2013, 9:01 PM PDT), https://perma.cc/65YE-GH2G (to locate, select "View the live page").

119. *Id.*

120. *See* Grumbach, *supra* note 83, at 642.

121. *Global Climate Coalition (GCC)*, *supra* note 72; *see also supra* text accompanying note 72.

122. *See* Andrew C. Revkin, *Industry Ignored Its Scientists on Climate*, N.Y. TIMES (Apr. 23, 2009), https://perma.cc/ADQ7-55HD. According to the Global Climate Coalition's mission statement, "Existing scientific evidence does not support actions aimed solely at reducing or stabilizing greenhouse gas emissions." *Global Climate Coalition (GCC)*, *supra* note 72 (quoting the now-deleted Global Climate Coalition website).

123. *See Global Climate Coalition (GCC)*, *supra* note 72; *supra* text accompanying note 72; *U.S. Climate Action Partnership*, MERIDIAN INST., https://perma.cc/5XCN-6PT5 (archived May 1, 2022). Notably, in March 2000, the Global Climate Coalition limited its membership to trade organizations. *Global Climate Coalition (GCC)*, *supra* note 72. Presumably, this change increased the ability of individual firms to strategically misrepresent their interests to policymakers and the public.

lobbying is a hedge. If firms' first preference—no action—proves impossible, many firms will support a watered-down alternative to robust climate policy.[124]

Second, firms trade support for access. By overstating their support for a policy, firms may gain the audience of legislators or administrators.[125] Shell, for example, joined USCAP in part to gain access to President Barack Obama, whose support it needed to initiate drilling in the Arctic Ocean.[126] "[USCAP membership] helped people look at us differently and helped open doors," Marvin Odum, Shell's North American president, told the *New York Times*. "I do not think there is any doubt about that."[127] Odum went on to visit the White House at least six times during the Obama Administration's first two-and-a-half years.[128] Sara Glenn, another top Shell lobbyist, visited the White House thirteen times in 2010 and 2011.[129] To the shock and chagrin of his environmentalist supporters, Obama rescinded his campaign promise of continuing the moratorium on Arctic drilling and cleared Shell's proposal.[130]

Third, strategic misrepresentation allows firms create policy-feedback effects: displacing or derailing alternative legislation.[131] Firms' support for a market-based solution to climate change was a transparent effort to preempt or otherwise avoid a standards-, investments-, and equity-focused approach to

124. Grumbach, *supra* note 83, at 642, 655 ("The reelection of President Obama and the EPA's draft of power plant emission regulation forced businesses to hedge their bets. . . . [I]t is clear that this show of support from industry is meant to favorably shape policy designs as a second-best option in case of their failure to maintain the status quo of self-regulation.").

125. Broockman, *supra* note 116, at 86-88, 88 tbl.1 (noting that PACs often donate to members of the congressional majority even when they do not actually prefer their reelection because access to these politicians is valuable).

126. John M. Broder & Clifford Krauss, *New and Frozen Frontier Awaits Offshore Oil Drilling*, N.Y. TIMES (May 23, 2012), https://perma.cc/3CPC-L489 ("[B]efore Mr. Obama's election, [Shell] joined the United States Climate Action Partnership . . . . It was a canny move, calculated to gain access to top policy makers, including the president.").

127. *Id.*

128. *Id.*

129. *Id.* In contrast, Shell lobbyists visited the White House four times in 2008, biannually between 2005 and 2007, and less frequently in preceding years. *See Agency Profile: White House*, OPENSECRETS, https://perma.cc/JGJ6-WVWL (archived Mar. 28, 2022) (to locate, select "View the live page," then select the year in the "Select year" tab, and search "Shell" in the "Filter results" bar).

130. *See* Broder & Krauss, *supra* note 126 ("We never would have expected a Democratic president—let alone one seeking to be 'transformative'—to open up the Arctic Ocean for drilling . . . ." (quoting Sierra Club executive director Michael Brune)).

131. Broockman, *supra* note 116, at 87 (providing an example in which conservative Democrat Wilbur Mills tripled Medicare in scope to forestall the demand for universal, single-payer health insurance).

climate policy. For example, both the USCAP Blueprint and the Waxman–Markey bill would have preempted the EPA's mandate to regulate tailpipe carbon emissions in the wake of *Massachusetts v. EPA*.[132] Moreover, the Waxman–Markey bill displaced contemporaneous bipartisan climate legislation from Senators Maria Cantwell and Susan Collins.[133] While some grassroots environmental groups deemed the Cantwell–Collins bill relatively "climate-friendly and consumer-friendly,"[134] the alternative bill fell flat.[135] The failed effort to push the Waxman–Markey companion bill through the Senate had "sucked all the air out of the room."[136]

Finally, strategic misrepresentation may drive the traditional opponents of heavy industry—environmental nonprofits—to waste resources and choose ineffective strategies to advocate for change. In her analysis of the failure of cap-and-trade legislation in the 2009-2010 session, Skocpol criticizes environmental organizations for an overly insider lobbying strategy—as opposed to grassroots organizing—and a cap-and-trade policy design that catered to industry but was unlikely to generate public support.[137] Environmental organizations squandered time and money negotiating precise emission reduction targets and free "allowance" allocations to polluters.[138] This investment followed wishful thinking that, once environmental organizations reached a deal with business groups, congressional committee leaders would fall in line.[139] Grumbach explains that this strategy of partnering with

132. *See* Grumbach, *supra* note 83, at 651; Massachusetts v. EPA, 549 U.S. 497, 528 (2007) (holding that the Clean Air Act granted the EPA authority to regulate greenhouse-gas emissions); *see also* U.S. CLIMATE ACTION P'SHIP, *supra* note 65, at 6 ("[A] goal of [climate] legislation should be to move, as soon as practicable, to a fully market-based system that relies on the price for carbon to achieve the recommended reductions.").

133. *See* Kate Sheppard, *The Other Climate Bill*, MOTHER JONES (Mar. 25, 2010), https://perma.cc/M4EZ-Y8W2. The Cantwell–Collins bill, unlike the Waxman–Markey proposal, contained provisions to protect a future cap-and-trade market from market manipulation and did not allow polluting companies to purchase offsets in lieu of reducing their emissions. Jim Snyder, *Cantwell–Collins Bill Attracts Support from Some, Loses Others*, THE HILL (Dec. 14, 2009, 11:00 AM EST), https://perma.cc/Z4NQ-ZGX9; Sheppard, *supra*.

134. Snyder, *supra* note 133 (quoting Frank O'Donnell of Clean Air Watch); *see* Sheppard, *supra* note 133 (explaining that passing a climate bill would require "all five senators who are currently spearheading efforts to cut greenhouse gas emissions," but that Senators Kerry, Graham, and Lieberman were caught in a struggle to create a bipartisan Senate counterpart to the Waxman–Markey bill).

135. *See S.2877—Carbon Limits and Energy for America's Renewal (CLEAR) Act*, CONGRESS.GOV, https://perma.cc/77TW-JS3Y (archived May 1, 2022).

136. Sheppard, *supra* note 133.

137. *See* Skocpol, *supra* note 67, at 119-20.

138. *See id.*

139. *See id.*

industry stakeholders was rooted in a "misreading of business preferences."[140] By luring environmental organizations into years of expensive negotiations only to quash the legislation in the Senate, USCAP firms prevented civil society from dedicating time and resources to building a coalition from the left—one that could achieve federal climate action regardless of industry preferences. In Skocpol's words, "Big, society-shifting reforms are not achieved . . . through insider bargains. They depend on the inspiration and extra oomph that comes from widely ramified organization and broad democratic mobilization."[141]

Some argue that strategic misrepresentation is a perfectly acceptable tactic for profit-maximizing business leaders who can and should "work in more than one way to protect their firms' bottom lines."[142] As one ExxonMobil lobbyist put it: "Did we join some of these 'shadow groups' to work against some of the early efforts [at climate action]? Yes, that's true. But there's nothing . . . illegal about that. . . . We were looking out for our investments. We were looking out for our shareholders."[143] Such behavior is antithetical to climate justice. Inadequate lobbying disclosure requirements permit firms to meddle with legislative and rulemaking processes in a manner that delays federal climate action and deprives the public of the information necessary to sanction those activities.[144]

Strategic misrepresentation continues to distort climate policymaking. In February 2020, the Climate Leadership Council—a coalition of environmental nonprofits, energy supermajors, and other firms—released a market-based climate policy proposal.[145] The Baker–Shultz Carbon Dividends Plan advertises itself as a "bipartisan climate roadmap" endorsed by "the broadest

140. Grumbach, *supra* note 83, at 636.

141. Skocpol, *supra* note 67, at 129.

142. *See id.* 48.

143. Channel 4 News, *supra* note 1, at 01:05-01:30.

144. *See* Citizens United v. FEC, 558 U.S. 310, 371 (2010) ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

145. *See Bipartisan Climate Roadmap*, CLIMATE LEADERSHIP COUNCIL, https://perma.cc/7T75-A668 (archived May 1, 2022); CLIMATE LEADERSHIP COUNCIL, THE BAKER SHULTZ CARBON DIVIDENDS PLAN: BIPARTISAN CLIMATE ROADMAP, at ii (Feb. 2021), https://perma.cc/4Q7Q-SW36. Energy founding members include BP, Calpine, ConocoPhillips, Exelon, ExxonMobil, First Solar, Shell, Total, and Vistra Energy. CLIMATE LEADERSHIP COUNCIL, *supra*, at i. Corporate founding members include Ford, General Motors, Goldman Sachs, JP Morgan, Microsoft, Schneider Electric, and Johnson & Johnson, among others. *Id.* NGO founding members include Conservation International, the World Resources Institute, and the World Wildlife Fund. *Id.*

climate coalition in U.S. history."[146] The Baker–Shultz Plan is not identical to the USCAP Blueprint. Climate Leadership Council participants advocate for a revenue-neutral carbon tax rather than cap and trade.[147] But the two proposals share concerning similarities. If USCAP represented a corporate scramble to water down proposed climate legislation in the wake of *Massachusetts v. EPA*,[148] then Climate Leadership Council firms seek to distract legislators from the Green New Deal, a policy vision released in February 2019 that calls for standards-, investments-, and justice-based approaches to climate action.[149]

Testimonials from CEOs and other leaders continue to emphasize the importance of collaboration between policymakers and business. "We will never solve our climate problem unless environmentalists work together with Big Business and Big Oil," writes Christiana Figueres, the former Executive Secretary of the United Nations Framework Convention on Climate Change.[150] "That is why the Climate Leadership Council's coalition is so unique and why the release of its Bipartisan Climate Roadmap is such an important step forward."[151] Yet Climate Leadership Council industry partners believe that a carbon tax, like a national cap-and-trade market, is a political dead-end. "Nobody is going to . . . propose a tax on all Americans," an ExxonMobil lobbyist explained.[152] "[W]e kind of know that, but it gives us a talking point. We can say, 'What is ExxonMobil for? Well, we're for a carbon tax.'"[153]

In the wake of these comments, the Climate Leadership Council suspended ExxonMobil's membership.[154] But the oil giant is far from the only Climate Leadership Council industry partner blocking climate progress. Several Climate Leadership Council members continue to serve on the boards of the Chamber of Commerce and the NAM.[155] Moreover, at the state level, these

146. CLIMATE LEADERSHIP COUNCIL, *supra* note 145, at vi.

147. *See id.* (outlining four pillars of a carbon dividends plan: (1) a gradually rising carbon tax; (2) carbon rebates for all U.S. citizens; (3) the simplification and replacement of various carbon regulations; and (4) border carbon adjustments).

148. *See supra* note 132 and accompanying text.

149. *See* Green New Deal, H.R. Res. 190, 116th Cong. (2019).

150. CLIMATE LEADERSHIP COUNCIL, *supra* note 145, at iii.

151. *Id.*

152. Channel 4 News, *supra* note 1, at 07:18-07:25.

153. *Id.* at 07:25-07:35.

154. Arathy S. Nair, Sahil Shaw & Sabrina Valle, *Exxon Suspended from Climate Advocacy Group It Helped Form*, REUTERS (Aug. 6, 2021), https://perma.cc/L87C-RJEF.

155. As of March 2022, Gretchen Watkins, President of Shell USA; Frederick Humphries, Jr., Corporate Vice President of U.S. Government Affairs at Microsoft; Andrew Lundquist, Senior Vice President of Government Affairs at ConocoPhillips; and Gerald Shaheen of Ford Motor Company serve on the Chamber's board of directors. *U.S.*

footnote continued on next page

firms behave at odds with their public endorsement of market-based climate policy. In 2018, for example, a massive coalition of environmental-justice groups, tribes, labor unions, and businesses supported ballot Initiative 1631 in Washington State.[156] The "Carbon Emissions Fee Measure" would have imposed a fee on carbon dioxide produced in the state, starting at of $15 per ton[157]—much less than the nationwide fee of $40 per ton proposed in the Baker–Shultz Plan.[158] Nevertheless, "No on 1631" became the wealthiest ballot initiative campaign in Washington State history when a handful of oil companies poured nearly $31 million into defeating the measure.[159] BP alone spent $13 million.[160]

In the absence of mandatory and meaningful lobbying disclosures, continued faith in these firms' commitment to climate action could mislead both their purported allies in environmental organizations and policymakers on Capitol Hill and in the White House.[161] Reform is imperative.

Chamber Board of Directors, U.S. CHAMBER OF COM., https://perma.cc/43QW-VDMT (archived Mar. 30, 2021). Neil Chapman, Senior Vice President of ExxonMobil; Gretchen Watkins, President of Shell USA; Frederick Humphries, Jr., Corporate Vice President of U.S. Government Affairs at Microsoft; Annette Clayton, CEO and President of Schneider Electric North America; Andrew Lundquist, Senior Vice President of Government Affairs at ConocoPhillips; and Kathryn Wengel, Executive Vice President and Chief Global Supply Chain Officer at Johnson & Johnson serve on the NAM's board of directors. *NAM Board of Directors*, NAT'L ASS'N MFRS., https://perma.cc/68TZ-PGCJ (archived Mar. 30, 2021); *see also supra* note 145 (listing the Climate Leadership Council members).

156. Kate Aronoff, *BP Claims to Support Taxing Carbon, but It's Spending $13 Million Against an Initiative That Would Do Just That*, INTERCEPT (Nov. 1, 2018, 10:19 AM), https://perma.cc/PZ56-ZM4U (describing the pro-tax coalition as "enormous").

157. *Id.*

158. *See* CLIMATE LEADERSHIP COUNCIL, *supra* note 145, at 2.

159. Robinson Meyer, *Washington State Likely Rejects a Historic Carbon Tax*, ATLANTIC (Nov. 7, 2018), https://perma.cc/37W9-779Y.

160. Aronoff, *supra* note 156.

161. For example, Janet Yellen, President Biden's Treasury Secretary, was a founding member of the Climate Leadership Council and has remained an outspoken advocate of the Baker–Shultz Plan. *See* Steven Mufson, *The Fastest Way to Cut Carbon Emissions Is a "Fee" and a Dividend, Top Leaders Say*, WASH. POST (Feb. 13, 2020), https://perma.cc/KML8-L9SX; *see also* CLIMATE LEADERSHIP COUNCIL, *supra* note 145, at i (naming Janet Yellen as a founding member).

III. Opportunities for Reform

> *Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.*
>
> —Justice Antonin Scalia[162]

The strategic misrepresentation that doomed Waxman–Markey reveals four limitations of the current lobbying disclosure regime: (1) the obscurity of firms' lobbying stances; (2) our inability to map lobbying expenditures onto specific bills or issue areas; (3) lobbyists' failure to report interactions with individual policymakers; and most perniciously, (4) the option to render lobbying still more untraceable by funneling money through trade organizations.[163]

Reforms that circumvent strategic misrepresentation must close these loopholes while evading two pitfalls: the First Amendment and the "hydraulic" nature of money in politics. Enhanced disclosures of corporate political activity—whether voluntary or mandatory—have the potential to address these concerns. But recent developments in First Amendment jurisprudence threaten effective disclosure requirements.[164] As an alternative strategy, lawmakers should consider mitigating the influence of interest-group lobbyists by fortifying internal sources of policy information.

A. Constraints on Regulatory Responses

Policymakers might imagine a wide array of responses to the problem of strategic misrepresentation—from an outright lobbying ban to measured restrictions levied against certain categories of organizations. Any lobbying reform will, however, face both legal and pragmatic hurdles.

First, Congress must create lobbying reforms that do not infringe on donors' First Amendment rights. Some scholars, among them Zephyr Teachout, make originalist and consequentialist arguments for outright bans on lobbying.[165] But most believe that the current Supreme Court would not

---

162. Doe v. Reed, 561 U.S. 186, 228 (2010) (Scalia, J., concurring in the judgment).

163. *See supra* Part II.

164. *See infra* text accompanying notes 212-25.

165. For example, Teachout points out that before 1950, American courts tended to regard paid lobbying as a civic wrong rather than a protected First Amendment right. The historical treatment of lobbying, she argues, "is indirect evidence that lobbying was not intended to be protected by the original First Amendment." Zephyr Teachout, *The Forgotten Law of Lobbying*, 13 ELECTION L.J. 4, 6 (2014). Rather,

> [i]n a system where those with money are always trying to find access to power, and the hands of the public are tied by the First Amendment, democracy will tend towards oligarchy, whereas in a system where the public is as flexible as the concentrated interests, the possibility of self-government remains.

footnote continued on next page

tolerate such restrictions.[166] Disclosure requirements appear attractive because they are constitutional—to an extent.

Even as the Court suggested in *Citizens United* that Congress lacks the power to enact lobbying bans, it cited *United States v. Harriss* as confirmation that disclosures are fair game.[167] In 1954, the Court in *Harriss* rejected a First Amendment challenge to lobbying disclosure requirements under the Federal Regulation of Lobbying Act, the predecessor to the Lobbying Disclosure Act and HLOGA[168]:

> [Congress] has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. . . .
>
> . . . [W]e believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection.[169]

The *Harriss* Court thus placed a premium on Congress's ability to protect itself from deceit. Disclosure, the Court found, is an appropriate safeguard.

The D.C. Circuit applied and reinforced this holding in *National Association of Manufacturers v. Taylor*, in which the NAM challenged HLOGA's disclosure provision.[170] "[P]ublic disclosure of 'who is being hired, who is putting up the money, and how much' they are spending to influence legislation is 'a vital national interest,'" then-Judge Merrick Garland wrote, quoting *Harriss*.[171] He continued, "Because nothing has transpired in the last half century to suggest that the national interest in public disclosure of lobbying information is any less vital than it was when the Supreme Court first considered the issue [in *Harriss*], we reject that challenge."[172]

In extreme circumstances, however, the impact of compelled disclosure can outweigh the government interest in requiring it. In *NAACP v. Alabama ex rel. Patterson*, the Court found that the State of Alabama could not compel

---

Id. at 25.

166. *See, e.g.*, Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1161 (2011) ("In the wake of *Citizens United* . . . [disclosure] strategies will not just be the dominant game, they may be the only game in town . . . .").

167. *See* Citizens United v. FEC, 558 U.S. 310, 369 (2010) ("[T]he Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself." (citing United States v. Harriss, 347 U.S. 612, 625 (1954))).

168. *See supra* note 18 and accompanying text.

169. *Harriss*, 347 U.S. at 625-26.

170. 582 F.3d. 1, 8 (D.C. Cir. 2009).

171. *Id.* at 6 (quoting *Harriss*, 347 U.S. at 625-26).

172. *Id.*

disclosure of the local National Association for the Advancement of Colored People (NAACP) membership list because the civil rights organization "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[173] To create successful disclosure requirements, Congress must thread the needle between exposing strategic misrepresentation—which may trigger consumer resentment—and demonstrating that its interest in expanded disclosures outweighs any public hostility toward impacted organizations. As discussed in Subpart C below, the Supreme Court's recent holding in *Americans for Prosperity Foundation v. Bonta*[174] raises additional hurdles to constitutional disclosure requirements.

Second, Congress should consider the "hydraulic" nature of money in politics when designing lobbying reforms.[175] In their pivotal article, *The Hydraulics of Campaign Finance Reform*, Samuel Issacharoff and Pamela Karlan name a "First Law of Political Thermodynamics": One cannot destroy the desire for political power, only channel it into different forms.[176] They also identify a "Third Law of Political Motion": Efforts to constrain political actors will produce reactions to hold onto power.[177] Political money is hydraulic in the sense that it doesn't disappear—it just changes channels.[178] This dynamic is especially apparent in the campaign-finance context, where regulations have not reduced the influence of dark money in elections. Rather, regulation has forced that money into new outlets.[179]

Issacharoff and Karlan's hydraulics framework likewise applies to lobbying. Regulations that forbid certain categories of organizations from lobbying, restrict the airtime allocated to a single party, or mandate disclosures only in limited contexts are unlikely to bear fruit. As in the campaign-finance context, firms seeking to influence public policy have numerous possible

173. 357 U.S. 449, 462-63 (1958) ("Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it . . . .").

174. 141 S. Ct. 2373 (2021).

175. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999).

176. *Id.* at 1705.

177. *Id.*

178. *Id.* at 1708.

179. *See* Gerken, *supra* note 31, at 911 ("Party donors whose contributions were limited turned to soft money. When the soft money loophole was closed, the money went into 527s. 527s morphed into SuperPACs, then 501(c)(4)s and (c)(6)s.").

avenues of influence.[180] Shutting one door may send firms flooding through another.

B. Mandatory Disclosures of Political Activity

As Louis Brandeis famously observed, "Sunlight is said to be the best of disinfectants."[181] Disclosures are the natural and constitutional antidote to deceit. The Waxman–Markey debacle, however, demonstrates that our current disclosure requirements are inadequate. Stance disclosure would close the first major HLOGA loophole but would require radical change.[182] Richard Briffault identifies two additional approaches to reform with greater potential for growth: contact disclosure and coalition disclosure.[183] While all three categories of reform may be worthwhile, coalition disclosure is the most important step that Congress can take to circumvent strategic misrepresentation. While adequate coalition disclosure requirements may face First Amendment challenges, courts have protected legislatures' prerogative to enact such reforms.

Stance disclosure. A stance-disclosure requirement would ask lobbyists to report their position with respect to a bill or proposed regulation. But stance disclosure may be the most challenging category of reform to enact. While self-reported information about a lobbyist's stance may be accurate for a yes-or-no decision such as a floor vote, such disclosures are unlikely to be realistic or useful for other aspects of the complex policymaking process. Scholars have suggested that Congress achieve complete stance disclosure by creating an online forum that would serve as the clearinghouse for all public-policy advocacy.[184] But such a radical overhaul of the federal lobbying system may not be realistic in the short term.

Contact disclosure. Most disclosure laws, including HLOGA, focus on the money spent on lobbying during the reporting period rather than the

180. For example, some firms engage in grassroots lobbying: communications that encourage members of the public to contact lawmakers about pending government action. *See* Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELECTION L.J. 160, 186 (2014).

181. Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10, 10.

182. As a reminder, HLOGA reports do not reveal how much a firm or industry organization spends on an individual bill. *See supra* text accompanying note 106 (discussing the first HLOGA loophole).

183. Briffault, *supra* note 180, at 190-92. Briffault also proposes a third issue: grassroots lobbying. *Id.* at 186. Should the law require disclosure of grassroots-lobbying activities? This question is important but not relevant to the issue of strategic misrepresentation.

184. *See, e.g.*, LEE DRUTMAN, A BETTER WAY TO FIX LOBBYING 2 (2011), https://perma.cc/ESQ8-78U9.

officials targeted.[185] Contact disclosure reforms would require lobbyists to report more specific information about the officials with whom they interact. Some model contact disclosure laws mandate disclosure of congressional offices and committees contacted,[186] while others could require individual names. While disclosures of individual contacts might be less palatable to legislators, this information could serve as a useful proxy for the content of lobbying activity and shed sunlight on individual relationships between legislators and lobbyists.[187]

Alternatively, disclosure requirements could require public officials to report their contacts with lobbyists.[188] Briffault, however, cautions that this formulation is less likely to be successful.[189] Public officials may not always know whether they are meeting with registered lobbyists,[190] although forcing legislators to make this distinction could be a productive exercise. Shifting reporting requirements to public officials also shifts the cost burden—effectively creating a small lobbying subsidy—while lobbyists likely already keep time logs to bill their clients.[191] Finally, legislative resistance to contact disclosure is likely to be greater if lawmakers themselves take on the disclosure burden. For example, congressional leaders rejected President Obama's call for lawmakers to publicly disclose meetings with lobbyists.[192]

The San Francisco Lobbyist Ordinance can serve as a working model for enhanced contact disclosure requirements.[193] The ordinance requires contact

185. *See, e.g.*, 2 U.S.C. § 1604(b)(3)-(4). HLOGA also requires that lobbyists report: (1) the "general issue area in which the registrant engaged in lobbying activities"; (2) the "bill numbers and . . . specific executive branch actions" they lobbied on; and (3) "the Houses of Congress and the Federal agencies contacted by lobbyists employed by the registrant on behalf of the client." *Id.* § 1604(b)(2). Notably, these disclosure requirements omit the specific actions that lobbyists request of officials, the identity of those officials, and even the specific congressional committee or agency division contacted. *See also supra* text accompanying notes 106-15.

186. *See, e.g.*, Charles Fried, Rebecca H. Gordon, Trevor Potter, Joseph E. Sandler & Ronald M. Levin, Report, *Lobbying Law in the Spotlight: Challenges and Improvements—Report of the Task Force on Federal Lobbying Laws, Section of Administrative Law and Regulatory Practice, American Bar Association*, 63 ADMIN. L. REV. 419, 443 (2011).

187. *See* Briffault, *supra* note 180, at 191.

188. *See* Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 545 (2007).

189. *See* Briffault, *supra* note 180, at 191-92.

190. *Id.* at 191.

191. *Id.*

192. *Id.*; Russell Berman & Kevin Bogardus, *Obama's Call for Disclosure of Lobbying Visits Falls Flat*, THE HILL (Jan. 27, 2011, 12:36 AM EST), https://perma.cc/GVK3-UT4Q; *see also* President Barack Obama, Remarks by the President in State of Union Address (Jan. 25, 2011), https://perma.cc/ZWF9-TPU2.

193. S.F., CAL., CAMPAIGN & GOVERNMENTAL CONDUCT CODE art. II, ch. 1 (2022).

lobbyists to report the name of each government official whom the lobbyist contacted, the dates of those contacts, the local legislative and administrative action that the lobbyist sought to influence, and the client on whose behalf each contact was made.[194] The San Francisco Ethics Commission, in turn, makes this information available to the public in an easily accessible website.[195]

Whether sourced from public officials or lobbyists, contact disclosure requirements alone would not circumvent strategic misrepresentation. They could, however, make deception more apparent. Armed with more detailed lobbying data, onlookers could use individual legislators' votes or administrative officials' decisions as a proxy for the content of a lobbyist's message. This information could help the public determine whether lobbyists funded by the same firm or individual deliver different messages over time.

Coalition disclosure. Strategic misrepresentation consists not of hiding interactions with lobbyists, but of misleading the electorate and lawmakers as to the ultimate source of that influence.[196] Take, for example, the euphemistic naming of business associations. An average voter may not sanction their representative for taking direction from the Chamber of Commerce. Indeed, they might mistake the business association for a government agency. But that same voter might take issue with their Senator for implementing legislation designed by ExxonMobil and Shell. Coalition disclosure would directly confront trade associations, business organizations, and other umbrella organizations that undertake significant lobbying campaigns on behalf of anonymous donors.

Adequate coalition disclosure requirements must circumvent the daisy-chain effect[197] or succumb to the hydraulics of lobbying reform. California has attempted to do so in the campaign-finance context by requiring all "multipurpose" organizations—including 501(c)(4) organizations—to disclose their donors.[198] Notably, the law exempts donors who indicate that none of

194. *Id.* § 2.110(c)(1)(A)-(E).

195. *Directory of Contacted Public Officials*, CITY & CNTY. S.F. ETHICS COMM'N, https://perma.cc/Q36L-JBZ8 (archived Mar. 30, 2022) (to locate, select "View the live page").

196. *Cf.* Issacharoff & Karlan, *supra* note 175, at 1720 (explaining that, in the campaign-finance context, corrupt legislators may deceive their constituents not by "hiding the receipt or expenditure of funds themselves, but [by] misleading the electorate as to the *source* of the funds"); Linda Sugin, *Politics, Disclosure, and State Law Solutions for 501(c)(4) Organizations*, 91 CHI.-KENT L. REV. 895, 935 (2016) ("The problem of dark money arises on account of daisy chains of organizations siphoning funds to one another.").

197. By "daisy-chain effect," I am referring to the effect of partial disclosure requirements, which enable firms to transfer funds through several layers of front organizations before arriving at a lobbying firm. *See* Sugin, *supra* note 196, at 935.

198. CAL. CODE REGS. tit. 2, § 18422(c)(3) (2022); CAL. GOV'T CODE § 84222(a) (West 2022) ("For purposes of this title, 'multipurpose organization' means an organization described in

footnote continued on next page

their contributions may be used for political purposes.[199] This is a much stricter and clearer standard than HLOGA, which requires coalition disclosures only when a donor "actively participates in the planning, supervision, or control" of lobbying activities.[200]

Critics of HLOGA have suggested that all organizations that lobby should be required to disclose their members.[201] Indeed, comprehensive coalition disclosure is perhaps the single most important way in which lawmakers can expose strategic misrepresentation. Only increased disclosure requirements that apply to a wide range of organizations will avoid "hydraulic" funneling of money into new, more discreet groups. Regulations that force all multipurpose lobbying organizations to disclose their members could circumvent the historical tendency to play regulatory whack-a-mole with categories of nonprofits.

Legislation requiring complete coalition disclosure would, however, almost certainly face First Amendment challenges. To successfully defend such disclosure requirements, the government would need to show that its interest in coalition disclosure outweighs any threat to organization members' right of association.[202] One of these government interests is, as the Court in *Harriss* emphasized, circumventing lobbyist deceit.[203]

Sections 501(c)(3) to 501(c)(10), inclusive, of the Internal Revenue Code and that is exempt from taxation under Section 501(a) of the Internal Revenue Code, a federal or out-of-state political organization, a trade association, a professional association, a civic organization, a religious organization, a fraternal society, an educational institution, or any other association or group of persons acting in concert, that is operating for purposes other than making contributions or expenditures. 'Multipurpose organization' does not include a business entity, an individual, or a federal candidate's authorized committee, as defined in Section 431 of Title 2 of the United States Code, that is registered and filing reports pursuant to the Federal Election Campaign Act of 1971 (Public Law 92-225)." (footnote omitted)).

199. GOV'T § 84222(e)(2)(B).

200. 2 U.S.C. § 1603(b)(3)(B).

201. *See* Robins, *supra* note 113, at 13 ("In the NAM's case, the real question is why is the association so reluctant to disclose its member organizations?").

202. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958) ("We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association.").

203. In *Harriss*, Chief Justice Earl Warren rejected a challenge to disclosure requirements in the Federal Regulation of Lobbying Act in part because of Congress's strong interest in such information. *See* United States v. Harriss, 347 U.S. 612, 625 (1954). He wrote:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the

footnote continued on next page

Moreover, courts have upheld lobbying coalition disclosure provisions in the past. In 2009, the D.C. Circuit repudiated the NAM's challenge to the coalition disclosure provision in HLOGA.[204] The NAM has attempted to distinguish itself from the "stealth coalitions" implicated in HLOGA's legislative history.[205] In *Taylor*, however, then-Judge Garland surmised that the NAM was exactly the kind of lobbying organization that Congress intended to expose. "[I]t is not at all clear that the sobriquet 'stealth coalition' fails to encompass an entity like [the] NAM," he wrote.[206] "As [the] NAM points out," he continued, "its membership list is confidential and it prefers not to reveal which members actively participate in its lobbying efforts, thus permitting it 'to operate without identifying the interests engaged in [its] lobbying activities.'"[207]

The NAM attempted to show that the repercussions associated with disclosure hampered its First Amendment rights by analogizing itself to the NAACP. It claimed that

> [the] NAM regularly lobbies on a variety of hot-button issues, including global warming . . . that may lead to adverse consequences for members identified as 'actively participa[ting]' in such efforts. . . . Taking policy positions that are unpopular with some groups may lead to boycotts, shareholder suits, demands for political contributions or support, and other forms of harassment.[208]

The D.C. Circuit was unimpressed.

> [T]he risks that [the] NAM claims its members would suffer if their participation in controversial lobbying were revealed are no different from those suffered by any organization that employs or hires lobbyists itself . . . . If that kind of risk rendered amended [2 U.S.C.] § 1603(b)(3) unconstitutional, it would invalidate most compelled lobbying disclosures in contravention of *Harriss* . . . .[209]

In Judge Garland's view, the reputational damage that disclosures may inflict upon lobbying firms did not come close to outweighing Congress's powerful

---

> people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.

Id.; *see also supra* text accompanying notes 167-69.

204. Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 6 (D.C. Cir. 2009).

205. Robins, *supra* note 113, at 11 ("[T]he provision was nominally targeted at 'stealth coalitions,' whatever they are, but missed that mark and hit legitimate, long-standing and well-known organizations like the NAM that have corporate members." (quoting *Issue Advocacy—2009:* National Association of Manufacturers v. Taylor *(D.D.C.)*, *supra* note 113)).

206. *Taylor*, 582 F.3d at 12.

207. *Id.* at 12-13 (quoting 153 CONG. REC. S10,709 (daily ed. Aug. 2, 2007) (statement of Sen. Dianne Feinstein) (second alteration in original)).

208. *Id.* at 21-22 (third alteration in original) (quoting a declaration from the NAM's General Counsel).

209. *Id.* at 22.

interest in such information.[210] Indeed, one goal of coalition disclosure requirements should be to encourage firms to align their political behavior with their public values. *Harriss*, as applied and interpreted in *Citizens United* and *Taylor*, provided a powerful bulwark against constitutional challenges to lobbying disclosure requirements.[211]

But recent developments may frustrate lawmakers' capacity to enact coalition disclosure laws. The Supreme Court's opinion in *Americans for Prosperity Foundation v. Bonta* expanded First Amendment protections for interest-group donors by clarifying the level of scrutiny applied to disclosure requirements.[212] In *Americans for Prosperity*, two conservative nonprofits sued to overturn California's requirement that charities operating in the state send the names of certain major donors to the state's Attorney General.[213] The issue, as framed by the petitioners, goes to the heart of coalition disclosure: Can a "blanket governmental demand for the individual identities and addresses of major donors to private nonprofit organizations" survive the First Amendment scrutiny called for in *NAACP v. Alabama ex rel. Patterson*?[214] The magnitude of this case was not lost on civil society. More than fifty organizations filed amicus briefs—ranging from the NAM and the Chamber of Commerce to a group of U.S. senators and the United States itself.[215] Legal historians distinguished the circumstance at issue from the "context thick with government-sponsored public and private violence against Black citizens" that informed the Court's holdings in *Patterson*.[216] But the NAACP itself filed a brief in support of the conservative groups' claims.[217]

Together, the Court's three holdings in *Americans for Prosperity Foundation* may, in Justice Sotomayor's words, "mark[] reporting and disclosure

210. *See id.* at 20 ("This conclusion [that HLOGA is constitutional] is confirmed by the Supreme Court's repeated determination that the interest in public disclosure of information concerning those trying to influence the political process is sufficiently compelling to outweigh the burdens that disclosure may impose.").

211. *See also supra* notes 167-72 and accompanying text.

212. 141 S. Ct. 2373, 2383-89 (2021).

213. *Id.* at 2380.

214. Petition for a Writ of Certiorari at i, *Ams. for Prosperity Found.*, 141 S. Ct. 2373 (No. 19-251), 2019 WL 4034754.

215. *Docket for 19-251*, SUP. CT. U.S., https://perma.cc/3YQH-VELQ (archived Mar. 30, 2021).

216. Brief of Amici Curiae Legal Historians in Support of Respondent at 1, 3, *Ams. for Prosperity Found.*, 141 S. Ct. 2373 (Nos. 19-251 & 19-255), 2021 WL 1312935 ("This Court should consider the history of racial violence in the southern states as an important foundation of the associational right established in *NAACP v. Alabama*. That history diverges dramatically from Petitioners' thin evidentiary record of threatened or actual harms . . . .").

217. *See* Brief Amici Curiae of the ACLU et al. in Support of Petitioners, *Ams. for Prosperity Found.*, 141 S. Ct. 2373 (Nos. 19-251 & 19-255), 2021 WL 826687.

requirements with a bull's-eye."[218] First, the Court clarified the level of scrutiny applied to disclosure obligations. Chief Justice Roberts, Justice Kavanaugh, and Justice Barrett, in a plurality portion of the opinion, prescribed an "exacting scrutiny" standard for such situations.[219] Second, the Court added a "narrow tailoring" requirement to the exacting scrutiny standard as applied to disclosure laws.[220] Under this test, a constitutional disclosure requirement must be narrowly tailored to a given governmental interest—not just tied to that interest.

Third, the Court found the California law to be facially unconstitutional in the absence of evidence that the law burdened a substantial proportion of affected individuals.[221] In other words, unlike the D.C. Circuit in *Taylor*, the Court did not require the plaintiff organizations to show a concrete burden resulting from California's disclosure requirement.[222] This omission implies that the Court has adopted the view—long held by Justice Thomas[223]—that disclosure requirements automatically burden associational rights.[224] Therefore, all disclosure requirements are now presumptively reviewed with

218. *Ams. for Prosperity Found.*, 141 S. Ct. at 2392 (Sotomayor, J., dissenting).

219. *Id.* at 2383 (plurality opinion) ("Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny."). Justice Thomas, in a concurring opinion, argued that a strict scrutiny standard should apply instead. *Id.* at 2390 (Thomas, J., concurring in part and concurring in the judgment). Justice Alito and Justice Gorsuch did not reach the question of which standard applies. *Id.* at 2392 (Alito, J., concurring in part and concurring in the judgment) ("Because the choice between exacting and strict scrutiny has no effect on the decision in these cases, I see no need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases in which the compelled disclosure of associations is challenged under the First Amendment.").

220. *See id.* at 2383-84 (majority opinion).

221. *See id.* at 2389 ("[P]laintiffs may be required to bear this evidentiary burden where the challenged regime is narrowly tailored to an important government interest. Such a demanding showing is not required, however, where—as here—the disclosure law fails to satisfy these criteria." (citation omitted)).

222. *See id.* ("When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, '[b]ecause First Amendment freedoms need breathing space to survive.'" (alteration in original) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))).

223. *See* Citizens United v. FEC, 558 U.S. 310, 483 (2010) (Thomas, J., concurring in part and dissenting in part) ("Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specificially calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights.").

224. *See Ams. for Prosperity Found.*, 141 S. Ct. at 2390 (Thomas, J., concurring in part and concurring in the judgment) (endorsing the idea that "the right to assemble includes the right to associate anonymously").

exacting scrutiny.[225] This holding is a stark departure from the Court's past First Amendment jurisprudence and does not bode well for future disclosure requirements.

In the wake of *Americans for Prosperity Foundation*, Congress's ability to impose blanket coalition disclosure requirements may be limited. Even if plaintiffs cannot show a concrete burden arising from such disclosures, and even if the law does not burden the vast majority of affected individuals, policymakers may, in effect, need to demonstrate that coalition disclosure is the least restrictive means of achieving their interests.[226] A bar this high may preclude disclosure requirements that prevent strategic misrepresentation.

C. CSR Needs CPR: Voluntary Disclosures of Political Activity[227]

In some cases, private environmental governance can fill the vacuum left by inadequate legislation.[228] Private parties have developed a range of measures designed to achieve traditionally public ends, including standards, monitoring, enforcement, and dispute resolution.[229] Third-party ratings and voluntary-disclosure initiatives have been among the most important private environmental-governance initiatives in the climate sphere. For example, the Carbon Disclosure Project invites firms to report their efforts and

225. Justice Sotomayor sharply criticizes this holding in her dissent. *Id.* at 2395 (Sotomayor, J., dissenting) ("[A] subjective preference for privacy, which previously did not confer standing, now subjects disclosure requirements to close scrutiny. Of course, all disclosure requires some loss of anonymity, and courts can always imagine that someone might, for some reason, prefer to keep their donations undisclosed. If such speculation is enough (and apparently it is), then all disclosure requirements *ipso facto* impose cognizable First Amendment burdens.").

226. The Court took pains to distinguish its narrow-tailoring requirement from strict scrutiny, which would require that a law be the "least restrictive means" of achieving a governmental interest. *See Ams. for Prosperity Found.*, 141 S. Ct. at 2384 (majority opinion) ("Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end."). Yet paragraphs later, the Court condemned California's government for failing to evaluate other options for monitoring fraud. *See id.* at 2386 ("California is not free to enforce *any* disclosure regime that furthers its interests. It must instead demonstrate its need for universal production in light of any less intrusive alternatives.").

227. I borrowed this heading from Thomas Lyon et al.'s article of a similar name. *See* Lyon et al., *supra* note 8. "CSR" refers to corporate social responsibility; "CPR" refers to corporate political responsibility. *See id.* at 8.

228. *See* Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 133 (2013) (explaining that the public can express their environmental preferences not only through the politics process but also through "private interactions in social settings and the marketplace").

229. *Id.*

performance regarding greenhouse-gas emissions.[230] While some experts call for mandatory reporting schemes or other pressures such as securities litigation, there is some evidence that participation in an emissions disclosure program correlates with a decrease in total greenhouse-gas emissions.[231]

Although disclosures of operational emissions are commonplace, corporate political actions, including lobbying, arguably represent a firm's greatest potential to mitigate or exacerbate climate change.[232] Some scholars call for third-party rating systems to demand corporate political responsibility—disclosures regarding campaign contributions, lobbying activities, and public policy stances—from participating firms.[233] But only a few rating systems have attempted to include firms' political activities, with mixed results. For example, the CPA–Zicklin Index shows that S&P 500 companies have become more transparent over time about their political spending, although the petroleum and natural gas industries (grouped together) and the automobile industry have below-average political-spending disclosures.[234] But the Index assesses only election-related expenditures—not lobbying.[235]

230. *See What We Do*, CARBON DISCLOSURE PROJECT, https://perma.cc/PY35-U354 (archived Mar. 31, 2021).

231. *See* Rüdiger Hahn, Daniel Reimsbach & Frank Schiemann, *Organizations, Climate Change, and Transparency: Reviewing the Literature on Carbon Disclosure*, 28 ORG. & ENV'T 80, 87, 94 (2015) (noting that some programs, such as the Chicago Climate Exchange, have been more successful in eliciting greenhouse-gas emissions reductions than others, including the Climate Disclosure Project).

232. *See, e.g.*, Auden Schendler & Michael Toffel, Opinion, *The Factor Environmental Ratings Miss*, MIT SLOAN MGMT. REV., Fall 2011, at 17, 17 (lamenting that News Corp—the parent company of Fox News—received the highest possible climate-change performance score in the MSCI ESG Research database because it had become carbon neutral, even though it also disseminated dangerous misinformation about climate change).

233. *See* Lyon et al., *supra* note 8, at 8-10.

234. Lisa Goh, Xuejiao Liu & Albert Tsang, *Voluntary Disclosure of Corporate Political Spending*, J. CORP. FIN., Apr. 2020, at 1, 2 & n.2, 12 tbl.2. The two industries scored 29.48 and 21.00, respectively, out of maximum of 74. *Id.* at 8, 12 tbl.2. The average score across industries in 2018 was 30.88. *Id.* at 10.

235. *See id.* at 8; *CPA–Zicklin Index: A Focus on Transparency*, CTR. FOR POL. ACCOUNTABILITY, https://perma.cc/RHL8-4HS4 (archived Apr. 9, 2022) (noting that the CPA–Zicklin Index measures "electoral spending transparency and accountability").

Other rating systems, including the GRI Sustainability Reporting Standards, attempt to solicit disclosures of political activity.[236] GRI standard 415, titled "Public Policy," reads:

> The purpose of this disclosure is to identify an organization's support for political causes. This disclosure can provide an indication of the extent to which an organization's political contributions are in line with its stated policies, goals, or other public positions. Direct or indirect contributions to political causes can also present corruption risks, because they can be used to exert undue influence on the political process. Many countries have legislation that limits the amount an organization can spend on political parties and candidates for campaigning purposes. If an organization channels contributions indirectly through intermediaries, such as lobbyists or organizations linked to political causes, it can improperly circumvent such legislation.[237]

GRI standard 415 identifies and addresses a core problem: firms' abilities to channel political influence through intermediaries. Like the CPA–Zicklin Index, however, GRI standard 415 requires disclosures only of political contributions—not of lobbying expenditures.[238] Notably, the standard also recommends (but does not require) that a participating firm disclose "the significant issues that are the focus of its participation in public policy development and lobbying" as well as "its stance on those issues, and any differences between its lobbying positions and any stated policies, goals, or other public positions."[239]

While GRI standard 415 solicits useful information, it is unclear that firms actually make the recommended disclosures.[240] In the absence of mandatory disclosure requirements, some companies reveal only information that creates

---

236. Lyon et al., *supra* note 8, at 15 (noting that GRI standards are the "the first and most widely adopted global standards for sustainability reporting" (quoting a previous version of *About GRI*, GLOB. REPORTING INITIATIVE, https://perma.cc/ZB2P-3B6R (archived Mar. 31, 2022)).

237. *Id.* (quoting GLOB. SUSTAINABILITY STANDARDS BD., GRI 415: PUBLIC POLICY 6 (2016), https://perma.cc/2VN6-89E9).

238. *See* GLOB. SUSTAINABILITY STANDARDS BD., *supra* note 237, at 8.

239. *Id.* at 7.

240. Academic studies on compliance tend to focus either on the GRI 300 standards, which concern firms' direct environmental impacts, or on European companies. *See, e.g.*, Eduardo Ordonez-Ponce & Anshuman Khare, *GRI 300 as a Measurement Tool for the United Nations Sustainable Development Goals: Assessing the Impact of Car Makers on Sustainability*, 64 J. ENV'T PLAN. & MGMT. 47, 47-48 (2021); Leontina Pavaloaia, Roxana Dicu, Gabriel Chelariu & Daniela Mardiros, *Study on GRI Reporting of Non-profit Organizations in Europe*, 7 J. ACCT. & MGMT., no. 1, 2017, at 14; Mihai Berinde & Nicoleta Alina Andreescu, *Reporting Corporate Social Responsibility According to GRI Standards*, ANNALS U. ORADEA ECON. SCI., July 2015, at 17 (discussing Romanian companies); Alexandrea-Oana Marinescu, *Analysis on the Compliance of Sustainability Reports of Romanian Companies with GRI Conceptual Framework*, 18 AUDIT FINANCIAR 361 (2020) (same).

a positive public impression.[241] This tactic, also known as "greenwashing," is replete across industries[242] and common among some carbon-intensive firms.[243] Chevron, for example, recently discontinued its practice of submitting data to the Climate Disclosure Project in favor of conducting its own internal review process and publishing a report on its website.[244] The firm has never voluntarily disclosed its political activity.

Voluntary disclosures, incentivized by third-party corporate-responsibility ratings, can guide consumers, job seekers, and investors toward ethically responsible firms.[245] If firms choose not to voluntarily report or disclose their lobbying activities, policymakers could model mandatory disclosure requirements after private schemes.[246] Importantly, private governance regimes may complement or compete with public regulation.[247] While voluntary initiatives may prove a useful stopgap measure, they are likely insufficient to prevent corporate deceit.

D. "Leveling Up" Lobbying

Mandatory and voluntary disclosure requirements would still leave legislators dependent on lobbyists for policy information. And lobbyists' power, Lee Drutman contends, "comes from their ability to become an essential part of the policymaking process by flooding . . . congressional offices with enough information and expertise to help shape their thinking."[248] Gerken and Tausanovitch agree: Concerns around lobbying arise because "[p]rivate actors . . . are carrying out a public function."[249]

Yet congresspeople and their staff rely on lobbyists because they lack resources and other sources of policy information. In Drutman's words, congressional offices are "understaffed, under-experienced, and

241. Christopher Marquis, Michael W. Toffel & Yanhua Zhou, *Scrutiny, Norms, and Selective Disclosure: A Global Study of Greenwashing*, 27 ORG. SCI. 483, 483 (2016).

242. *See, e.g.*, Astrid Sailer, Harald Wilfing & Eva Straus, *Greenwashing and Bluewashing in Black Friday–Related Sustainable Fashion Marketing on Instagram*, SUSTAINABILITY, Feb. 1, 2022, at 1, 1-2 (retail).

243. *See* Billy Nauman, *Amazon Accused of Lack of Transparency on Climate Impact*, FIN. TIMES (June 16, 2019), https://perma.cc/A5DG-LEQK ("The lack of disclosure standards also makes it easier for companies to 'greenwash' their results.").

244. *Id.*

245. Schendler & Toffel, *supra* note 232, at 18.

246. Hahn et al., *supra* note 231, at 89.

247. *See* Vandenbergh, *supra* note 228, at 133 (explaining that private disclosure standards are sometimes independent, sometimes provide private enforcement of public standards, and sometimes undermine support for public standards).

248. DRUTMAN, *supra* note 184, at 1.

249. *See* Gerken & Tausanovitch, *supra* note 37, at 76.

overworked."[250] A dearth of congressional expertise has thus created a "critical weakness" in our democracy[251]—one that leaves our legislative branch vulnerable to the hydraulics of political money. In the campaign-finance context, Issacharoff and Karlan explain, *Buckley v. Valeo* and its progeny created an unlimited demand for campaign funds among candidates by preventing Congress from capping campaign expenditures.[252] This situation breeds opportunities for money to exert political influence.[253]

The information gap left by inadequate internal resources creates a similar channel for political influence. While legislators' appetite for information may not be limitless like their demand for campaign funds, lobbyists still fill that gap. Therefore, the most effective lobbying reforms may not be lobbying reforms at all. Rather, lawmakers would benefit from efforts to strengthen institutional sources of policy information. Congress once possessed the requisite tools for sophisticated analysis: robust agencies created to support Congress and congressional staff. Lobbying reforms need not reinvent the legislative branch. Bolstering these atrophied analytical bodies can produce meaningful change.

Legislative agencies including the Congressional Research Service (CRS), the Congressional Budget Office, and the Government Accountability Office remain important resources for Congress. But these agencies alone cannot meet Congress's institutional needs. The CRS, for example, suffers from insufficient funding and staffing.[254] It is used to justify rather than inform policy and is "limited to providing nonpolitical information."[255] Moreover, these agencies are generalist by nature. An issue area as complex and urgent as climate change demands specialized staff to sift through dense technical information and diverse stakeholder interests.

Congress once benefited from agencies with deep subject-matter expertise. In 1972, Congress created the bipartisan Office of Technology Assessment (OTA) to evaluate and forecast applications of technology.[256] Approximately 200 OTA staff delivered hundreds of reports to Congress on topics ranging

250. DRUTMAN, *supra* note 184, at 1.

251. LORELEI KELLY, NEW AM. FOUND., CONGRESS' WICKED PROBLEM: SEEKING KNOWLEDGE INSIDE THE INFORMATION TSUNAMI 1 (2012), https://perma.cc/R3GW-U7WQ.

252. Issacharoff & Karlan, *supra* note 175, at 1710-11.

253. *See id.* at 1711.

254. In 1995, Congress reorganized the CRS and consolidated issue sectors. The CRS has failed to replenish top-level staff in the decades since. KELLY, *supra* note 251, at 11.

255. *See id.* at 10 ("[CRS s]taff mention that 'their information is used to justify not inform.'"); Gerken & Tausanovitch, *supra* note 37, at 79 & n.28.

256. Technology Assessment Act of 1972, Pub. L. No. 92-484, § 3, 86 Stat. 797, 797 (codified at 2 U.S.C. § 472).

from healthcare information systems to offshore energy.[257] The rigorous OTA process included both peer review and working groups with academics and nonprofits.[258] One of the most important roles of the agency's staff, moreover, was translating and contextualizing dense technical information for congressional leaders in person.[259] But Congress eliminated the OTA in 1995.[260]

A modern, climate-focused OTA equivalent—perhaps the Office of Climate Assessment—could similarly assist congresspeople in developing policy that serves their constituents' interests.[261] Congress developed the OTA because many of its members desired a legislative counterpart to the Office of Science and Technology Policy housed in the executive branch.[262] The Biden Administration's renewed emphasis on climate expertise presents a similar window of political opportunity.[263] While an Office of Climate Assessment would not prevent strategic misrepresentation, it would reduce Congress's dependence on lobbyists engaged in questionable behavior.

Congress could also "level up" policy staff. The climate crisis and industry lobbyists' strategic misrepresentation tactics are colliding with an acute "brain drain" from Congress. Restricted funding, declining staff age, and short tenures limit Congress's capacity to sift through policy information. Support for teams of experienced staff with institutional knowledge and subject-matter expertise could deemphasize the role that industry lobbyists have in crafting policy.

---

257. *See* KELLY, *supra* note 251, at 12-13.

258. *Id.* at 13. "My job was not to resolve the debate, but to inform and enhance it," wrote Nancy Lubin, a former OTA Project Director. *Id.* at 12. Melanie Greenberg, a former OTA staffer, similarly characterized the atmosphere as information driven. "The atmosphere was much like [the Center for International Security and Arms Control] at Stanford: highly intellectual and collaborative, full of extremely smart and dedicated people, and dedicated to providing the best background possible for the creation of sound public policy." *Id.*

259. *Id.* at 13. OTA staff also frequently testified in the House and the Senate. *Id.*

260. *Id.* at 11, 12.

261. Inspiration for this idea derives from Gerken and Tausanovitch's suggestion that Congress and state legislatures fund a team of "policy research consultants"—some with political savvy, and some with technical expertise—to advise legislators on proposed policies. *See* Gerken & Tausanovitch, *supra* note 37, at 87-90.

262. *See* KELLY, *supra* note 251, at 12 (explaining that scientific leaders and Representative Emilio Daddario, who inspired the formation of the OTA, "felt that Congress lacked a body to provide technical advice to legislative committees in order to match the Executive Branch on technological issues").

263. *See* Dino Grandoni & Juliet Eilperin, *Biden Swells the Ranks of His White House Climate Team*, WASH. POST (Jan. 14, 2021), https://perma.cc/7X5T-K5BA.

At a time when numerous complex policy issues face the nation, members of Congress are spending less and less on policy staff.[264] Representatives and senators can use their allotted budgets for any expense they want: hiring staff, increasing staff wages, purchasing printers, or utilizing reelection-oriented constituent services.[265] This flexibility—paired with incentives to prioritize public appearance over policy—has resulted in a decrease of funds allocated to policy-focused staff.[266] Since the 105th Congress, members have spent far less on policy staff in Washington, D.C., than on efforts to get reelected in their home districts.[267]

Members' total spending power has also decreased over time. Beginning in 2013, legislative-branch appropriators stopped reporting House members' representative allowance and adjusting the base amounts.[268] In effect, the House had "reduced its spending on staffing and overhead by 10 cents on the dollar in just five years."[269] The outcome of these restricted and reallocated resources is underpaid, overworked, and inexperienced staff. Staffers that manage policy portfolios in Congress are typically under thirty, have only one or two years of experience on the Hill, and may work on up to six or seven issues daily.[270] These young people earn less than $40,000 per year for working more than fifty hours per week.[271]

A frenetic and underpaid Capitol Hill work environment is problematic for two reasons. First, staff turnover is out of control. The average legislative staffer remains on the Hill for just over three years, and about one-third of staffers have not yet served the duration of a single Congress.[272] Employees on

264. FURNAS & LAPIRA, *supra* note 33, at 6, 8. Representatives pay office expenses using the members' representational allowance (MRA), and senators pay using the Senators' official personnel and office expense account (SOPOEA). *Id.* at 8.

265. *Id.* at 10, 12. This is the case even though individual representatives and senators receive different allowances for travel costs to their districts and rent for a district office, among other things. *Id.* at 9-10.

266. *See id.* at 17-18.

267. *Id.* at 8, 17-18.

268. *Id.* at 10.

269. *Id.* The MRA remains stagnant "despite a total inflation rate increase of 9.8 percent from 2013 to 2017." *Id.*

270. *Id.* at 24-25, 37. Staff age and tenure have declined since at least the mid-1990s. *Id.* at 23. In 2019, 13% of staffers were under twenty-five years old; 27% were between the ages of twenty-six and thirty, 22% were between thirty and thirty-five; and 17% were between thirty-six and forty. *Id.* at 24 tbl.6. The typical staffer works on between two and six issues daily. *Id.* at 37. One in four work on seven or more issues regularly. *Id.*

271. *See id.* at 31. In 2019, 62% of staffers worked over fifty hours per week. Almost one in five worked more than sixty hours per week. *Id.* at 31 tbl.13.

272. *Id.* at 24-25. In 2019, the average tenure for Capitol Hill staff was 3.1 years, with a standard deviation of 1.9 years and a possible variation between 2.9 and 3.3 years for the full population of staffers. *Id.* at 24. In 2019, 71% of staffers planned to leave Congress

footnote continued on next page

Capitol Hill develop specialized expertise over time,[273] and young staffers with split attention are at an information disadvantage when meeting with lobbyists.[274] Worse, many staffers see jobs in Congress as stepping stones to K Street rather than as sustainable, long-term positions.[275] Alexander Furnas and Timothy LaPira put it bluntly: "Congress—with its declining pay, demanding expectations, and short job tenure—is subsidizing the lobbying industry."[276] Congress has the capacity to slow the revolving door and retain staff. While outcompeting exorbitant K Street salaries is unrealistic, Congress could hire more staff at appropriate living wages, thereby reducing the burden placed on each individual and cultivating a sustainable, mission-driven work environment.[277] By hiring more staff with higher salaries, Congress can both send a message that it values policy input and reduce the burden placed on each individual.[278] Overworked and inexperienced staffers may be less attuned to strategic misrepresentation and more subject to industry capture.[279] But if

within five years, and more than two in five planned to leave within just two years. *Id.* at 25.

273. *Id.* at 35-37. A "pop quiz" embedded in a survey for staffers revealed that, as one would expect, longer-term staffers were more knowledgeable about both specific policy issues and the inner workings of Congress. *See id.*; *see also* Gerken & Tausanovitch, *supra* note 37, at 82, 88 (suggesting that many lobbyists gleaned a deep "understanding of the legislative process" from their experiences as staffers).

274. While most staffers are policy generalists, "lobbyists have the luxury of focusing on a few key issues." Gerken & Tausanovitch, *supra* note 37, at 82.

275. Forty-three percent of staffers plan to move into the private sector in some capacity, and roughly half of those individuals want to become lobbyists. FURNAS & LAPIRA, *supra* note 33, at 29-30; *see also* Gerken & Tausanovitch, *supra* note 37, at 82 ("Lobbyists, in short, are a lot like the seasoned congressional staffers they were before they left for K Street.").

276. FURNAS & LAPIRA, *supra* note 33, at 31.

277. As lawmakers hire additional staff, they have an opportunity to cultivate office environments that represent their constituents. In 2019, BIPOC (Black, Indigenous, and people of color) individuals represented just over one-quarter of Democratic staff and less than 7% of Republican staff. That is, Democrats and Republicans hire 73% and 94% white staff, respectively, though only 60% of the U.S. population is non-Hispanic white. *Id.* at 21.

278. Gerken and Tausanovitch caution against increasing congressional office budgets, lest members of Congress continue to repurpose these funds toward constituent services, media outreach, or other projects. *See* Gerken & Tausanovitch, *supra* note 37, at 88. But while the current MRA and SOPOEA allow representatives and senators total discretion with their allotted funds, *see supra* text accompanying note 265, there is no reason why Congress could not earmark additional funding for staffers.

279. *See* Gerken & Tausanovitch, *supra* note 37, at 82 ("A lobbyist might, for instance, email a staffer when there's a vote on a key amendment or a mark-up of a key bill. Better yet, they can provide talking points to explain the decision if a reporter presses. When you are a twenty-something staffer with a degree in medieval literature working on a bill that involves financial regulation or health care insurance or corporate tax subsides, this kind of information can seem like a career saver.").

armed with issue-area expertise and institutional knowledge, these same individuals could act as a powerful bulwark against lobbyist pressures.[280]

Could an Office of Climate Assessment and additional staffers fall prey to the hydraulics of political money? If lawmakers choose to hire from industry, the resulting regulatory capture may be no more favorable to the public and much more expensive for the government. Ideally, legislators would hire a diverse group, including scientists and representatives of underserved communities. Gerken and Tausanovitch suggest that the latter is likely, given that industry expertise is already widely available.[281]

Grassroots lobbying is another channel through which political money may flow. Rendered obsolete in Congress, industry groups could simply use research institutions, education, and public-relations campaigns to build support among voters and indirectly influence legislators.[282] This concerning possibility merits further study and a suite of regulatory reforms all its own. But if our concerns about corporate lobbying arise not only from the nature of these activities but also from legislators' dependence on them, then reducing Congress's reliance on private actors could help restore integrity to the public function of lawmaking.[283]

Conclusion

Over the last two decades, industry actors have exploited weak federal lobbying regulations to dilute and sink bills addressing climate change. These firms have undermined aggressive climate legislation and promising coalitions within the left while earning respect and favors from policymakers. The public cannot account for the lobbying resources that companies funnel through industry organizations, which makes it difficult to hold individual firms accountable for their political actions. Although fortified contact disclosure and coalition disclosure requirements could help legislators protect themselves from strategic misrepresentation, recent First Amendment jurisprudence may threaten such reforms. Voluntary disclosure to third parties

280. Even with additional funding, congresspeople could not maintain expert staffers on every policy issue. But climate change is a growing priority for many lawmakers, who may see a climate expert as a worthwhile hire.

281. *See* Gerken & Tausanovitch, *supra* note 37, at 89 ("The oil industry is already delighted to provide its own legislative assistance to Congress. . . . [W]e are certain that oil executives would far prefer that congressional members consult with their hand-chosen (and financially beholden) lobbyists rather than an independent thinker chosen by a member of Congress. We thus think it is quite likely that congressional representatives will do what we hope they will do—they will look for expertise where it is *not* being supplied.").

282. *See* Briffault, *supra* note 180, at 186.

283. *See* Gerken & Tausanovitch, *supra* note 37, at 83.

could also provide a stopgap measure. But Congress's best chance to circumvent strategic misrepresentation may lie with weaning the legislative branch from lobbyist information. New legislative agencies and additional policy staff would expand Congress's internal capacity to produce useful insights, thereby minimizing the role of industry lobbyists in policymaking. These simple reforms have the potential to reinvigorate the legislative branch while avoiding the hydraulic behavior of money in politics.

President Joe Biden and the 117th Congress have a promising window of opportunity to address climate change.[284] But the Waxman–Markey debacle during President Obama's first term demonstrates that Democratic control of the legislative and executive branches does not guarantee climate legislation. In the absence of lobbying reform, strategic misrepresentation has the potential to disrupt legislative processes once again. When President Biden attempted to push a far-reaching climate and infrastructure bill through Congress, industry lobbyists visited lawmakers, urging them to "stick to roads and bridges."[285] What was once a $2.3 trillion plan recently passed the Senate at less than half of its former size, reducing critical funding for public transit and clean energy.[286] President Biden's Build Back Better Act is in jeopardy.[287]

The clock is ticking on climate action. There is no time to waste on duplicitous policy campaigns.

284. President Biden has been outspoken about his intent to address climate change. *See, e.g.*, *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, BIDEN–HARRIS, https://perma.cc/T25A-H6JF (archived Apr. 1, 2022) (detailing the then–presidential candidate Biden's ambitious climate-action plan).

285. Channel 4 News, *supra* note 1, at 05:37-06:50.

286. Emily Cochrane, *Senate Passes $1 Trillion Infrastructure Bill, Handing Biden a Bipartisan Win*, N.Y. TIMES (updated Nov. 15, 2021), https://perma.cc/MG3N-P8N7.

287. *See* Press Release, Sen. Joe Manchin, Manchin Statement on Build Back Better Act (Dec. 19, 2021), https://perma.cc/7X2S-RNUK ("I cannot explain the sweeping Build Back Better Act in West Virginia and I cannot vote to move forward on this mammoth piece of legislation.").