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# Corporate Triplespeak

## RESPONSES BY INVESTOR-OWNED UTILITIES TO THE EPA'S PROPOSED CLEAN POWER PLAN

*Alan R. Palmiter*<sup>†</sup>

### INTRODUCTION

It is August 2, 2015. Tomorrow the Obama administration will unveil its finalized Clean Power Plan (CPP), the centerpiece of the administration's environmental agenda.<sup>1</sup> The plan proposed by the Environmental Protection Agency (EPA) in June 2014 had called for a 32 percent reduction of CO<sub>2</sub> emissions in the U.S. electric power sector by 2030.<sup>2</sup> Reductions would be carried out

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<sup>†</sup> William T. Wilson, III, Presidential Chair for Business Law, School of Law, Wake Forest University. I thank Brooklyn Law School—and especially Professors Roberta Karmel and Jim Fanto—for the invitation to present this paper at Brooklyn's fabled Abraham L. Pomerantz Lecture on September 28, 2017. I thank the *Brooklyn Law Review* for publishing this essay, which is a disconcerting mix of political science, social psychology, and legal textual analysis—concluding with a flurry of biology-based evolutionary theory applied to behavioral economics. In other words, I am certainly wrong about many of my descriptions, assumptions, and conclusions. But I was not wrong in relying on the excellent research of three Wake Forest students: Khalif Timberlake (JD/MBA '18) researched the political economy of the CPP; Cara Van Dorn (JD '17) summarized disclosures by the largest IOUs; and Austin Thompson (JD '17) commented on the social psychology premises of the essay and provided additional research on the CPP's background and industry responses. Finally, I thank Professors Tamara Belinfanti and Daniel Greenwood for their excellent comments on my lecture and on this paper. Many oversights, misimpressions, and failings remain—they are all mine.

<sup>1</sup> See ENVTL. PROT. AGENCY, FACT SHEET: OVERVIEW OF THE CLEAN POWER PLAN 1 (2015), <https://archive.epa.gov/epa/sites/production/files/2015-08/documents/fs-cpp-overview.pdf> [<https://perma.cc/4DEF-47N3>]. In this, now archived fact sheet, the EPA described the CPP as:

a historic and important step in reducing carbon pollution from power plants that takes real action on climate change. Shaped by years of unprecedented outreach and public engagement, the final Clean Power Plan is fair, flexible and designed to strengthen the fast-growing trend toward cleaner and lower-polluting American energy. With strong but achievable standards for power plants, and customized goals for states to cut the carbon pollution that is driving climate change, the Clean Power Plan provides national consistency, accountability and a level playing field while reflecting each state's energy mix. It also shows the world that the United States is committed to leading global efforts to address climate change.

*Id.* at 1.

<sup>2</sup> See *id.* at 2.

through state-by-state goals set by the EPA on the basis of projections of how each state could modify its fuel mix for producing electric power and reduce its power consumption's carbon footprint.<sup>3</sup> Over the past year the proposal has met with unprecedented waves of support and opposition.

This essay considers how, during the year following the EPA proposal, the largest investor-owned electric utilities engaged in a curious “triplespeak.” Employing the moral language of political conservatives, many of the utilities focused on whether and how the EPA had transgressed its “traditional” regulatory role, thus altering the “structure” of energy federalism (the relationship between federal and state law in regulating the nation's sourcing and use of energy) and potentially “degrading” orderly power supplies. In their filings with the Securities and Exchange Commission (SEC), most of the utilities used the moral language of political libertarians, focusing on the “financial risks” that federal government “intervention” poses to efficient power “markets” and to the “freedom” of utilities to match energy supplies and customer demand. Meanwhile, in their Corporate Social Responsibility (CSR) reports, most of the utilities used the moral language of political progressives, highlighting their concern for the “well-being” of their customers and other stakeholders, their desire to “protect” the environment from the “threat” of climate change, and their “voluntary efforts” to shift away from fossil fuels toward non-carbon sources, especially renewables. In many instances, the same utility company took all of these seemingly inconsistent moral stances at about the same time.

This essay begins by looking at the political economy of the proposed Clean Power Plan, describing the various positions that the interested parties staked out for and against the plan during the year it was under consideration by the EPA. The arguments that swirled during the year largely reflected the broader political maelstrom between conservatives, progressives, and libertarians. Each side adopted predictable stances based on stated concerns about energy federalism, response to climate change, electric consumer well-being, environmental protection, state prerogatives in setting the fuel mix for utilities, electric grid reliability, and the authority of Congress over national energy policy. Somewhat absent from this debate, though, were the large investor-owned utilities (IOUs)—the companies that supply about two-thirds of all U.S. homes and businesses with electricity.

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<sup>3</sup> See *id.* at 3.

The peculiar absence of the IOUs led me to ponder the nature of the arguments in the debate over the proposed Clean Power Plan, arguments that were largely political. The recent area of moral psychology has sought to explain the ways in which individuals come to moral (and political) views. Contrary to the long-standing assumption that we arrive at our moral/political judgments based on rational processes in which information and arguments lead to well-reasoned conclusions, recent studies make clear that our moral judgments arise intuitively, emotionally, nearly instantly from deeply-held moral values—and then we engage in motivated reasoning to explain to ourselves and others the coherence of these views. In the United States, people who identify themselves as liberal/progressives have come to adhere to the values of compassion and fairness/equality, while conservatives find meaning in the additional values of loyalty, authority, and sacredness, while libertarians are moved primarily by the moral values of liberty and market freedom, as well as fairness/proportionality.

So what moral/political stance, I then wondered, were the IOUs taking with respect to the proposed Clean Power Plan? The answer was surprising. Looking at a sample of the largest ten IOUs, these companies' stated positions on the EPA's proposal varied significantly depending on whether they were speaking in their SEC-filed annual reports on Form 10-K, whether they were addressing the proposal in their formal comments to the EPA, or whether they were describing the EPA proposal in their CSR reports. The IOUs, I discovered, were mostly "libertarian" in their SEC disclosures, generally "conservative" in their EPA comments, and almost uniformly "progressive" in their CSR reports. I describe this as "triplespeak"—a manifestation of a political, multiple personality. Not only did the collective response to the EPA proposal by these industry leaders exhibit this triplespeak, but it was often the case that the same company was at once libertarian, conservative and progressive in its expressed views on the EPA's proposed restructuring of the industry.

This led me to consider what might explain this triplespeak, a phenomenon that might well arise in many other corporate disclosures. At one level, the explanation might be somewhat unremarkable: large corporations speak politically in different ways according to their audience. Thus, one would expect a more conservative stance from IOUs in politically conservative parts of the country and a more progressive positioning from IOUs in politically liberal regions. And, in fact, there seemed to be a correlation. Further, one might expect

different functional units of a large corporation to cater to their particular audiences, each audience with its own political/moral matrix. Thus, the finance unit that prepares SEC disclosures is likely to mirror the pro-market/libertarian leanings of investors; the government affairs unit that prepares regulatory comments is likely to echo the traditional/conservative views of its political cohort; and the sustainability unit that prepares CSR reports is likely to exude the platitudes of its green/liberal community.

But something more seemed afoot. The electric utility industry, beginning a few years ago, has found itself in the midst of a “slow-motion train wreck,” its traditional business model of centralized generation, proprietary transmission, and captive distribution is undergoing wrenching change. Not only has the recent emergence of interstate generation and transmission markets altered the industry, but the cost and ownership structure for renewables (both utility-scale and consumer-sourced) and the technological transformation of the grid promise to destabilize and remake the century-old electric utility business model. The EPA’s proposal that the industry change its fuel mix to be less carbon-intensive represents a part of this fundamental remaking.

Perhaps, I then speculated, the triplespeak by the IOUs represents an adaptation—a set of mutant positions each laying out a different perspective on where the companies, and their industry, are headed—to prepare each company with a revised mindset (and vocabulary) for what is coming next. Just as we individuals will often “try out” different explanations of our responses to novelty, the largest electric utilities are in the throes of figuring out whether their future will be market-based (the trend over the past couple decades), regulation-dependent (the historical business model), ecology-driven (the path envisioned by many, including the EPA) or most likely, a combination of the three. Interestingly, as you read this, your views on this question reflect your own value-driven moral matrix—and your views arose intuitively, emotionally, instantly.

## I. RESPONSES TO THE EPA’S PROPOSED CLEAN POWER PLAN

All told, more than 4.3 million comments were submitted to the EPA from nearly every conceivable political constituency

and interest group in the country.<sup>4</sup> As the comments made clear, the EPA's proposal was "one of the more singularly controversial regulations ever promulgated" and presented a host of constitutional, statutory, policy and technical issues.<sup>5</sup> The proposal's state-by-state emissions goals constituted a dramatic intrusion into the traditional regulation of the power industry by state public utility commissions (local generation and distribution) and by the Federal Energy Regulatory Commission (interstate generation and transmission). The plan's goals would force states to adopt a revamped "fuel mix" for generating each state's power needs, to add new grid capabilities, and to reshape power-consumption habits.<sup>6</sup> Its tight schedule would compel states to come up with a package of laws within a year of the plan's finalization to meet the timeline for the EPA's CO<sub>2</sub> reduction goals.<sup>7</sup> As the proposal's critics pointed out, the EPA was not only remaking U.S. energy federalism, but doing so without political accountability.<sup>8</sup> Early during the Obama Administration, climate change legislation had failed in Congress, but the EPA was acting as though it had legislative authority.<sup>9</sup>

Moreover, as critics pointed out, the provision of the Clean Air Act (CAA) on which the EPA based its authority—CAA Section 111(d)<sup>10</sup>—hardly created a clear basis for the agency's regulatory grab over "existing sources" of CO<sub>2</sub> emissions, particularly coal-fired power plants.<sup>11</sup> According to

<sup>4</sup> Final Rule, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,663 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60), <https://www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22842.pdf> [<https://perma.cc/GTU7-AUK6>]. In addition, lobbying on the Clean Power Plan was extensive, with 130 entities registered as lobbyists on the plan. Anthony Adragna, *Lobbying Continues Unabated on EPA's Clean Power Plan*, BNA (May 4, 2016), <https://www.bna.com/lobbying-continues-unabated-n57982070620/> [<https://perma.cc/96AT-RFG8>].

<sup>5</sup> LINDA TSANG & ALEXANDRA WYATT, CONG. RESEARCH SERV., R44480, CLEAN POWER PLAN: LEGAL BACKGROUND AND PENDING LITIGATION IN WEST VIRGINIA V. EPA 1 (2017).

<sup>6</sup> See ENVTL. PROT. AGENCY, *supra* note 1, at 1.

<sup>7</sup> See *id.* at 8.

<sup>8</sup> See *Who's Fighting the Clean Power Plan and EPA Action on Climate Change?*, UNION OF CONCERNED SCIENTISTS (2016), <http://www.ucsusa.org/global-warming/fight-misinformation/whos-fighting-clean-power-plan-and-epa-action-climate/#.WZrsZa2ZOYU> [<https://perma.cc/P5JY-5VY2>] (identifying ExxonMobil, Peabody Energy, Southern Company, American Coalition for Clean Coal Electricity, American Legislative Exchange Council (ALEC), and U.S. Chamber of Commerce as leading the campaign against the EPA's efforts on climate, including the Clean Power Plan).

<sup>9</sup> Bryan Walsh, *Why the Climate Bill Died*, TIME: ECOCENTRIC (July 26, 2010), <http://science.time.com/2010/07/26/why-the-climate-bill-died/> [<https://perma.cc/J4WA-7GB5>] (concluding that House-passed cap-and-trade bill was allowed to die in Senate because public interest in topic had not galvanized).

<sup>10</sup> Clean Air Act § 111(d), 42 U.S.C. § 7411(d) (2012).

<sup>11</sup> See Recent Regulation, *Environmental Law—Clean Air Act—EPA Interprets the Clean Air Act to Allow Regulation of Carbon Dioxide Emissions from Existing Power*

these critics, the little-used section had been meant only to create EPA authority when pollution sources were not being regulated under another provision of the CAA—namely, CAA § 112, which requires states to implement plans to regulate emissions from existing sources based on a cost-benefit analysis.<sup>12</sup> Compounding these questions of proper delegation was a myriad of policy and technical questions: Was the schedule for state implementation of the goals feasible? Was the treatment of under-construction nuclear plants appropriate? Could the nation’s electric grid handle a switch toward sporadic solar and wind power generation? Where did the EPA get authority to compel states to adopt energy efficiency standards for consumers?

As might be expected, the EPA proposal sparked an immediate firestorm of political rhetoric—the battle lines mostly drawn along typical political lines. Environmental groups and some regional utility consortia embraced the plan as a flexible and affordable blueprint for moving the electric power sector away from fossil fuels.<sup>13</sup> Meanwhile, many in Congress,<sup>14</sup>

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*Plants—The Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60), 129 HARV. L. REV. 1152, 1152, 1153 n.8 (2016).* The EPA took the position in its proposed rulemaking that § 111(d), which permits the EPA to require states to submit plans for “existing sources” of air pollution not covered by § 112, was ambiguous and permitted the agency to resolve the ambiguity by compelling states to come up with state-wide plans to reduce CO<sub>2</sub> emissions because these emissions were not otherwise regulated. *Id.* at 1153–55. See *Clean Power Plan Case Resources*, ENVTL. DEF. FOUND. (last updated 2018), <https://www.edf.org/climate/clean-power-plan-case-resources> [<https://perma.cc/48QR-E89P>] (site compiling filings in lawsuits challenging EPA’s Clean Power Plan). Congressional Republicans (and some Blue-dog Democrats) attacked the EPA proposal primarily on two grounds: as part of an Obama Administration “war on coal” and as an over-extension of federal authority through mandates on state energy portfolios. See Katherine Ling, *House Panel to Grill FERC on Grid Reliability Under EPA Carbon Rule*, E&E DAILY (July 23, 2014), <http://www.eenews.net/eedaily/stories/1060003321> [<https://perma.cc/LUD4-NG4M>].

<sup>12</sup> Clean Air Act § 112, 42 U.S.C. § 7412; see TSANG & WYATT, *supra* note 5, at 6–10 (describing legal background of Clean Power Plan and prior litigation challenging EPA’s proposal).

<sup>13</sup> See, e.g., David Doniger, *NDRC’s Public Comments on the Clean Power Plan: How EPA can Make It’s Good Plan Even Better*, NDRC (Dec. 2, 2014), <https://www.nrdc.org/experts/david-doniger/nrdcs-public-comments-clean-power-plan-how-epa-can-make-its-good-plan-even> [<https://perma.cc/9VHS-3F89>]. For example, state governments in the Northeast—members of the Regional Greenhouse Gas Initiative, which had served as model for the EPA’s proposed state-by-state emission reduction targets—lauded the EPA plan as “achievable.” See Andrew Childers, *States Say Clean Power Plan Targets Achievable Despite Critiques of Proposal*, BNA (Mar. 11, 2015), <https://www.bna.com/states-say-clean-n17179923810/> [<https://perma.cc/RAK6-5SC4>]; Colin Sullivan, *Northeast ‘Off to a Running Start’ in Advance of Obama Emissions Plan*, ENERGYWIRE (June 3, 2014), <http://www.eenews.net/energywire/stories/1060000600> [<https://perma.cc/6HLP-M2QJ>].

<sup>14</sup> For example, in an open letter, Senator Mitch McConnell (R-KY) urged state governors to ignore the Clean Power Plan. See Joel Kirkland, *One Senator’s Crusade to Combat a McConnell Anti-EPA Onslaught*, E&E NEWS (June 3, 2015), <https://www.eenews.net/stories/1060019526> [<https://perma.cc/FT6T-NKP7>]; see also Jean

members of the business community, a number of state governors and attorneys general,<sup>15</sup> municipal utilities,<sup>16</sup> rural co-ops,<sup>17</sup> and conservative think tanks attacked the plan as a heavy-handed federal usurpation of traditional state utility regulation and a misguided distortion of the market forces that set the fuel mix for the power sector.<sup>18</sup> A lawsuit by a group of states and a coal company (Murray Energy)<sup>19</sup> even asserted that the *proposal* itself was illegal and should be enjoined, an unheard-of extension of the Administrative Procedure Act.<sup>20</sup>

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Chemnick, *W.Va. House Members Urge Gov. Tomblin to 'Just Say No'*, E&E DAILY (June 4, 2015), <https://www.eenews.net/eedaily/2015/06/04/stories/1060019641> [<https://perma.cc/4KA8-BW2L>]. Republican representatives, led by Rep. Ed Whitfield (Kentucky), proposed legislation that would allow states to opt out of CPP compliance if a state determined compliance would increase electricity rates or threaten reliability. See Ari Natter, *House Plans June Votes on Bills Targeting Clean Power Plan, Chemicals Law, Coal Ash*, BLOOMBERG BNA: DAILY REP. FOR EXECS. (May 29, 2015), [http://dailyreport.bna.com/drpt/7010/split\\_display.adp?fedfid=69631683&vname=dernotallissues&fcn=44&wsn=681978000&fn=69631683&split=0](http://dailyreport.bna.com/drpt/7010/split_display.adp?fedfid=69631683&vname=dernotallissues&fcn=44&wsn=681978000&fn=69631683&split=0) [<https://perma.cc/7HEH-XWW7>] (describing proposed "Ratepayer Protection Act"). Other bills would block implementation of the EPA's proposal and set strict requirements for any further carbon emission regulations. See Anthony Adragna, *Senators Hope to Consider Bill to Block Clean Power Plan Ahead of Final Rule*, BLOOMBERG BNA: DAILY REP. FOR EXECS. (June 15, 2015), [http://dailyreport.bna.com/drpt/7010/split\\_display.adp?fedfid=70416498&vname=dernotallissues&wsn=678570000&fn=70416498&split=0](http://dailyreport.bna.com/drpt/7010/split_display.adp?fedfid=70416498&vname=dernotallissues&wsn=678570000&fn=70416498&split=0) [<https://perma.cc/8TST7-ZVUA>].

<sup>15</sup> See Nathanael Massey, *Some State Agencies Prepare to Challenge New EPA Carbon Rule*, CLIMATEWIRE (June 27, 2014), <http://www.eenews.net/climatewire/stories/1060002062> [<https://perma.cc/94QT-BP4L>] (Attorneys general and governors in several conservative and energy-focused states attacked the legal validity of the EPA's proposal, arguing the plan infringed on state sovereignty).

<sup>16</sup> See *Florida Utility Slams EPA Power Plant Rule in Draft Comments*, ENERGYWIRE (Sept. 17, 2014), <http://www.eenews.net/energywire/stories/1060005936> [<https://perma.cc/V3KT-H8H8>] (describing concern of municipal utilities that CPP would make them less competitive, given that investor-owned utilities had made recent investments in green technologies). Municipal utilities also argued that the CPP would create an unhealthy dependency on natural gas, leaving the reliability and cost of power generation subject to natural gas supplies and pricing. Edward Klump, *Texas Committee Hears of 'Severe Threat' from EPA Carbon Plan*, ENERGYWIRE (Sept. 30, 2014), <http://www.eenews.net/energywire/stories/1060006609> [<https://perma.cc/XM5K-T88E>].

<sup>17</sup> See Rod Kuckro, *Coal-heavy Electric Cooperatives Take Hard Line on EPA Clean Power Plan*, ENERGYWIRE (Dec. 15, 2014), <http://www.eenews.net/energywire/stories/1060010539> [<https://perma.cc/66WT-C6WT>].

<sup>18</sup> See Kirkland, *supra* note 14; see also Chemnick, *supra* note 14.

<sup>19</sup> *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015).

<sup>20</sup> *Id.* at 333–36. The lawsuit was dismissed as premature. *Id.* ("Petitioners . . . want us to do something that they candidly acknowledge we have never done before: review the legality of a *proposed* rule. . . . We do not have authority to review proposed agency rules." (emphasis in original)). The lawsuit, originally brought by twelve coal-reliant states, challenged the EPA's legal authority under § 111(d) of the Clean Air Act to promulgate the CPP. See *id.*; Neela Banerjee, *12 States Sue EPA Over Proposed Power Plant Regulations*, L.A. TIMES (Aug. 4, 2014), <http://www.latimes.com/business/la-fi-epa-lawsuit-20140805-story.html> [<https://perma.cc/2HFV-HWZP>]; see also Andrew Childers, *Judges Skeptical of Clean Power Plan Authority But Wary of Setting Precedent*, BLOOMBERG BNA: DAILY REP. FOR EXECS. (Apr. 17, 2015), [http://dailyreport.bna.com/drpt/7010/split\\_display.adp?fedfid=67116496&vname=dernotallissues&fcn=44&wsn=692228000&fn=67116496&split=0](http://dailyreport.bna.com/drpt/7010/split_display.adp?fedfid=67116496&vname=dernotallissues&fcn=44&wsn=692228000&fn=67116496&split=0) [<https://perma.cc/9XGS-QE7U>] (describing court's

In some instances, the arguments against the proposed CPP were framed in economic terms,<sup>21</sup> but more often they seemed to be driven by politics.<sup>22</sup> For example, state environmental agencies, which the EPA proposal charged with implementing the plan, represented a microcosm of the political schism that the EPA's proposal opened. A Brookings Institution study, which looked at comments by state environmental agencies on the proposed EPA plan, found a strong correlation between opposition to the plan and the political party of the state's governor.<sup>23</sup> Of the twenty-three state agencies that argued the CPP was illegal and the twenty-one agencies that urged the plan be abandoned, all were from states with Republican governors or from "coal-dependent" Democratic states (West Virginia and Kentucky).<sup>24</sup>

Criticism by state environmental agencies of specific aspects of the proposed CPP sometimes transcended political lines—but only to some extent. On the question of the plan's "fairness" to early-acting states that had already taken measures to reduce CO<sub>2</sub> emissions, the study found that agencies from Republican states mostly cited this concern in their comments.<sup>25</sup> Similarly, on the question of whether the

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reticence about "setting a precedent that could open all federal regulations to legal challenges at the proposed rule stage").

<sup>21</sup> Electric co-ops (mostly rural) argued that the CPP would force them to terminate their long-term power purchase agreements with coal-fired power plants, leading to higher owner-customer rates as the co-ops switched to higher-priced natural gas-generated electricity. The co-ops claimed that, unlike investor-owned utilities with access to capital markets, they would face great difficulties in making the changes needed to comply with the EPA's plan. See Press Release, America's Elec. Coops., Clean Power Plan's 'Federal Plan' and Model Trading Rules Fail to Address Electric Co-ops' Concerns (Nov. 18, 2015), <https://www.electric.coop/clean-power-plans-federal-plan-model-trading-rules-fail-address-electric-co-ops-concerns/> [<https://perma.cc/L3KR-989L>].

<sup>22</sup> As an EPA spokesperson pointed out, "a handful of special-interest critics are automatically opposed," and those claiming the CPP would threaten grid reliability "benefit from maintaining the status quo . . . [when] failing to . . . modernize our electric grid is the costliest thing we could do." Hannah Northey, *EPA Blog Slams Clean Power Plan's 'Special-Interest Critics'*, E&E NEWS (Feb. 25, 2015), <https://www.eenews.net/eenewspm/stories/1060014041> [<https://perma.cc/6CYX-SCJR>].

<sup>23</sup> PHILIP WALLACH & CURTLYN KRAMER, STATE ENVIRONMENTAL AGENCIES' COMMENTS ON THE CLEAN POWER PLAN 2–7 (2015), <https://www.brookings.edu/wp-content/uploads/2016/06/cpp.pdf> [<https://perma.cc/FLU7-DXWC>].

<sup>24</sup> *Id.* at 7. These agencies' arguments tracked those by others opposed to the CPP: the EPA lacked authority to regulate power plants under § 111(d) of the Clean Air Act; the EPA's rulemaking was "procedurally unsound;" and the EPA lacked authority to regulate "beyond the fence" (state targets that go beyond power plant emission controls). *Id.* The Kentucky and West Virginia agencies, both from states with Democratic governors at the time, argued that the CPP should be abandoned because of the rule's "potentially devastating impact on their local economies." *Id.* at 9.

<sup>25</sup> *Id.* at 3–4 (finding that fourteen agencies from Republican states and nine agencies from Democratic states cited this concern). See, e.g., Comments by the Tex. Comm. on Environ. Quality Regarding the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating United; Proposed Rule; EPA

CPP's carbon intensity reduction goals were feasible and the proposed implementation timeline attainable, twice as many agencies from Republican states voiced this concern.<sup>26</sup> On whether moving toward more renewables would affect grid reliability and risk blackouts, three times as many agencies from Republican states identified this as a concern.<sup>27</sup> In short, politics at the state level seemed paramount—with the fairness, feasibility, and risks of the plan of some (but lesser) importance.

In another interesting study on how states lined up on the EPA's proposal, Maia Draper of the University of Texas at Austin found that state support or opposition to the CPP was more driven by political, ideological factors than by economic ones.<sup>28</sup> The study found that the voting records on environmental

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Docket ID No. EPA-HQ-OAR-2013-0602 at 1 (Dec. 1, 2014), <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2013-0602-23305&attachmentNumber=3&contentType=pdf> [<https://perma.cc/L2WY-9FWR>]; see also New York State Comments on Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 FR 34830 at 4 (Dec. 1, 2014) [hereinafter N.Y. State Comments], <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2013-0602-23627&attachmentNumber=2&contentType=pdf> [<https://perma.cc/6GVT-GX84>].

<sup>26</sup> WALLACH & KRAMER, *supra* note 23, at 5–6 (finding twenty-four states with Republican governors and twelve states with Democratic governors argue that the reduction goals are unattainable).

<sup>27</sup> *Id.* at 4–6 (finding that this concern was raised by eighteen Republican states, 64 percent of the states with Republican governors, but only by six Democratic states, 30 percent of the states with Democratic governors). See, e.g., N.Y. State Comments, *supra* note 25, at 8–13. Interestingly, while many state environmental agencies (mostly in Democratic states) did not address the question of grid reliability, the topic was on the mind of grid operators. These operators, which administer the transmission grid across state lines, expressed trepidations about the CPP's possible effects on reliability, infrastructure, and cost—whether in Republican or Democratic regions of the country. Jeffrey Tomich, *Grid Operator Says EPA Rule Poses Reliability Concerns*, ENERGYWIRE (Sept. 22, 2014), <http://www.eenews.net/energywire/stories/1060006205> [<https://perma.cc/SF8K-R6KL>]; Colin Sullivan, *N.Y. Grid Operator Rips EPA's Approach to Dual-fuel Plants, Warns of Strained Reliability*, ENERGYWIRE (Dec. 3, 2014), <https://www.eenews.net/energywire/stories/1060009832> [<https://perma.cc/9JFQ-K2SE>] (describing operators' concerns that the CPP timetable would not permit operators to find alternate, reliable sources of power and the CPP failed to address the need to improve the national grid infrastructure). Some operators, as well as the Federal Energy Regulatory Commission, urged that the EPA adopt a "safety-valve," allowing deviance from the plan's timetable where grid reliability might be at risk. See Andrew Childers, *EPA, FERC Need Reliability Valve Agreement On Clean Power Plan, Utilities, Grids Say*, BLOOMBERG ENVIRON. (May 11, 2015), <https://bna.com/news/bna.com/environment-and-energy/epa-ferc-need-reliability-valve-agreement-on-clean-power-plan-utilities-grids-say> [<https://perma.cc/GL5M-U85K>]; see also Andrew Childers, *'Safety Valve,' Realistic Targets Vital to EPA Clean Power Plan, States, Utilities Say*, BLOOMBERG BNA (Feb. 20, 2015), <https://www.bna.com/safety-valve-realistic-n17179923220/> [<https://perma.cc/3WAF-E88A>].

<sup>28</sup> Maia Draper, *Carbon Pricing, Politics and the Clean Power Plan*, 20–22 (2016) (unpublished M.P.A. thesis, Univ. of Tex. at Austin), <https://repositories.lib.utexas.edu/handle/2152/38196> [<https://perma.cc/FSS6-T8JP>] (testing independent variables of the percentage of votes cast for President Obama in the 2012 presidential election, the average environmental score of a state's Congressional delegation from 2011–2015, the rate-based percent emissions reduction for a state as required by the

issues of the state's congressional representatives and how the state had voted in the 2012 presidential election were much more predictive of whether a state would oppose the EPA's proposal or join in the lawsuits against it, as compared to whether the state depended on coal-fired generation or faced deep CO<sub>2</sub> cuts under the CPP.<sup>29</sup>

Further, the study found that sometimes state *political* opposition to the CPP seemed contrary to the state's *economic* interests. For example, the Texas Attorney General (along with his counterpart in West Virginia) undertook to lead a nationwide coalition against the CPP for the stated purposes of protecting grid reliability and preventing increases in consumer electric bills.<sup>30</sup> The State of Texas, however, would benefit significantly by a national move away from coal-fired to natural gas-fired production, as well as to renewables (particularly wind power). Texas has roughly 23 percent of the nation's natural gas reserves,<sup>31</sup> and its wind-generation capacity is the largest in the nation.<sup>32</sup> Moreover, by 2014, both natural gas and wind power generation have become less expensive than coal power generation.<sup>33</sup> As David Spence, an energy regulation professor at the University of Texas, commented:

It's a contradiction . . . It seems as though political ideology is driving a lot of the positions being taken by states and state institutions . . . because clearly Texas will sell a lot of natural gas to a lot of power plants all over the country, who will be generating more

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CPP, and the percentage of a given state's electricity generation from coal-fired power plants in 2014).

<sup>29</sup> *Id.* at 34–35 (“Democratic-leaning states are more likely to support the CPP than are more Republican-leaning states, and likewise . . . more politically pro-environmental states are more likely to support the CPP than less pro environmental states. . . . [T]he effect of . . . economic variables [such as reliance on coal-fired generation and required emissions reductions under the CPP] is less persistent and strongly significant across models than the effect of the political factors . . . , and the magnitude of coefficients is smaller.”).

<sup>30</sup> Lauren McGaughy, *Texas Sues EPA Over Clean Power Plan*, CHRON (Oct. 23, 2015, 11:58 AM), <http://www.chron.com/news/politics/texas/article/texas-epa-federal-lawsuit-ken-paxton-carbon-6586330.php> [<https://perma.cc/7M52-NK28>].

<sup>31</sup> *A Look at Natural Gas Production in Texas*, STATEIMPACT, <https://stateimpact.npr.org/texas/tag/natural-gas-production-in-texas/> [<https://perma.cc/K7DY-TBXK>].

<sup>32</sup> *Texas State Energy Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (last updated Jan. 18, 2018), <https://www.eia.gov/state/?sid=TX> [<https://perma.cc/9GPT-D6A6>] (“Texas leads the nation in wind-powered generation capacity . . .”).

<sup>33</sup> *See Comparing the Costs of Renewable and Conventional Energy Sources*, ENERGY INNOVATION (Feb. 7, 2015), <http://energyinnovation.org/2015/02/07/levelized-cost-of-energy/> [<https://perma.cc/96MY-WE3C>]. By 2014, solar and wind power had started to win on price over coal-fired and even natural gas-fired power plants. *See* Diane Cardwell, *Solar and Wind Energy Start to Win on Price vs. Conventional Fuels*, N.Y. TIMES (Nov. 23, 2014), <https://www.nytimes.com/2014/11/24/business/energy-environment/solar-and-wind-energy-start-to-win-on-price-vs-conventional-fuels.html> [<https://perma.cc/NY2L-JVX8>].

often because of the Clean Power Plan, yet we are opposing the Clean Power Plan.<sup>34</sup>

So, there's a nutshell of the roiling political economy of the EPA's proposed clean power plan. But what about the large investor-owned utilities, the largest segment of the power industry? The IOUs, which supply electricity to more than 60 percent of U.S. consumers, were muted in their response to the EPA's proposal. Rather than presenting a united front of opposition or a list of specific criticisms, they gave a tepid, mixed reaction to the plan, even as the plan promised over the coming decade to transform the way the power industry generates, transmits, and distributes electric power. That surprised me!

## II. RESPONSE BY INVESTOR-OWNED UTILITIES

I was curious. What was the story of how the IOUs had responded to the EPA's proposal?

As of 2015, investor-owned utilities had come to dominate the increasingly concentrated U.S. power industry. The twelve largest IOUs—the sample on which I base this essay—operated in twenty-eight states and served 60 million customers (about half the national total), with a generating capacity of 334 gigawatts (more than half the national total) and annual revenues of \$195 billion.<sup>35</sup> They seemed to be the 800-pound gorilla in the room.

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<sup>34</sup> Mose Buchele, *Texas Power Players Sit Out Political Opposition To Clean Power Plan*, NPR (Apr. 16, 2016, 8:38 AM), <http://www.npr.org/2016/04/16/474462519/texas-power-players-sit-out-political-opposition-to-clean-power-plan> [<https://perma.cc/P7L6-LVCR>].

<sup>35</sup> I have created a “web repository” of materials on which this essay is based. This repository, on a Google Drive accessible to anyone with the following URL, contains easily-accessible and downloadable PDFs of the responses of the twelve sampled companies to the EPA proposal. See <https://drive.google.com/drive/folders/1AQZ1k1tvhnC2ciq1D6ZT9rL5QmfY9L9i>. Specifically, the Google Drive includes:

- each company's 10-K filings for fiscal year 2014 ([https://drive.google.com/drive/folders/1Bncl\\_dONPRe0PB58ljuzLYK94KfitWKO](https://drive.google.com/drive/folders/1Bncl_dONPRe0PB58ljuzLYK94KfitWKO))
- each company's comments submitted to the EPA on the proposed Clean Power Plan (<https://drive.google.com/drive/folders/1njgfJfAhf1Hmmm9FfTPxcPTZhyWlxNOi>)
- each company's CSR report for the period during which the CPP proposal was under review (June 2014 to August 2015) ([https://drive.google.com/drive/folders/1oG7WkaR\\_W2cnasehDEUgmh0aQ41Krs0e](https://drive.google.com/drive/folders/1oG7WkaR_W2cnasehDEUgmh0aQ41Krs0e))

In addition to these primary source documents, the Google Drive includes: (1) a table with demographic information about the twelve sampled companies, including the headquarters, states of operation, number of electricity customers, electric generating capacity, and revenues; (2) a chart summarizing the various positions taken by each of the sampled companies to the EPA proposal, along with links to the relevant documents; and (3) more-detailed research memos that analyze each of the company's responses to the EPA proposal. See <https://drive.google.com/drive/folders/1icjbIdSVqAjDIBLVp4Wp>

Individually and collectively, the twelve IOUs responded to the EPA proposal with a cacophony of voices.<sup>36</sup> Although the industry's Electric Edison Institute (EEI) submitted comments to the EPA, there did not seem to be a coordinated, united front by the industry.<sup>37</sup> Instead, some of the IOUs stated their support for the EPA's proposal; others gave mixed support, often commenting on how the plan failed to address the particular

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bVx9jqNpoQO2. My purpose in creating this web repository on a Google Drive was to provide easy access to readers and researchers to these materials, some of which (such as CSR reports for 2014–2015) are no longer available on the Internet. Rather than the usual “on file with the author” parenthetical in a citation, using the Google Drive allows for anyone inclined to dig into the documents that this essay considers to review the primary documents and the research memos on which I base my thoughts.

<sup>36</sup> These responses can be found at a clunky government website. See *Standards of Performance for Greenhouse Gas Emissions from Existing Sources: Electric Utility Generating Units*, REGULATIONS.GOV, <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=EPA-HQ-OAR-2013-0602> [<https://perma.cc/JRR2-CVKC>]. For easier access, the EPA comments by these IOUs, along with their 2015 10-K filings (covering the period of the EPA proposal), and their 2015 CSR filings (also for this same period), can be found on the public Google Drive links I have created. See *supra*, note 35.

<sup>37</sup> The industry group representing investor-owned electric utilities, the Edison Electric Institute, submitted comments to the EPA proposal, which were generally non-committal. Neither supporting nor opposing the overall EPA proposal, the EEI reminded the agency of the importance of its members (which “provide electricity for 220 million Americans . . . in all [fifty] states”) and their “commit[ment] to providing safe, reliable, affordable and increasingly clean electricity to all customers.” EDISON ELECTRIC INST., COMMENTS OF THE EDISON ELECTRIC INSTITUTE ON CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING AND STATIONARY SOURCES: ELECTRIC UTILITY GENERATING UNITES, DOCKET NO. EPA-HQ-OAR-2013-0602 cover letter (2014) (comment letter available in web repository). The EEI explained that the EPA proposal would require “dramatic changes” and an “accelerated a transition” to cleaner forms of generation, raising “concerns” about “affordable, reliable electricity to customers.” *Id.* The EEI's comments were framed as a set of “suggestions” to ensure the EPA's emission rate goals could be met without compromising affordability and reliability, while the Institute offered to continue “our dialog with the Agency on this complex and significant rulemaking.” *Id.* The EEI's 296-page comment on the EPA proposal sidestepped the issue of the proposal's legality, pointing out that the “EPA's novel ‘systems’ approach” for states, utilities and consumers to achieve the targeted emission reductions “eventually will be addressed by the inevitable litigation.” *Id.* at 9. Without endorsing the EPA's approach, the EEI left to “individual entities” to address the state-specific guidelines. *Id.* at 10. The tension in the EEI comment was palpable. While offering specific (often useful) suggestions to “mitigate concerns about the impact of the guidelines” on member utilities, the EEI emphasized it was not “endorsing” the guidelines. *Id.* at 9. The EEI comment thus focused primarily on giving the states (and their utilities) a longer “glide path” to implement the proposed CO<sub>2</sub> reductions. *Id.* at 12–16. In the end, the EEI comment seemed a hodge-podge collection of criticisms, suggestions and occasionally platitudes on the EPA proposal, reflecting the different (and varying) views of the Institute's members. In addition to recommending a less stringent implementation timeline, the EEI urged that nuclear power plants (along with lower-emission natural gas power plants under construction and imported hydropower) be recognized in a state's emission goals, that states be able to “bank” already-existing moves toward renewables, that states be given flexibility in adopting energy-efficiency programs, that multi-state compliance plans be facilitated, and that electrification (such as of transportation) be given credit. *Id.* at 16–24.

company's historic and changing fuel mix; others opposed the plan, though to varying degrees.

On the other hand, in their 10-K filings with the SEC, the IOUs offered a more common narrative. While some of the IOUs identified their pleasure or displeasure with the EPA plan, most did not, and instead merely recited a stock summary of the plan and indicated that, after its finalization and possible implementation, the plan might have a material effect on the company's financial position.

In their CSR reports, the IOUs presented a host of attitudes, generally quite different from those presented by the companies to the EPA and the SEC. Some went to lengths to identify how their business was in the process of transformation in response to environmental and customer concerns about CO<sub>2</sub> emission; others identified how the company had already begun to implement the basic building blocks of the EPA proposal, moving away from coal-fired generation to natural gas and renewables, along with a commitment to fostering greater customer efficiency. None of the sampled companies mentioned in their CSR reports their regulatory or financial concerns about the EPA proposal, concerns often raised in their EPA comments or 10-K filings.

The "triplespeak" that these twelve largest investor-owned utilities engaged in during the year between the EPA's proposal and the plan's finalization reflected palpably different political perspectives. In their EPA comments, many of the utilities generally criticized the EPA for overstepping—even transgressing—its role as environmental regulator, thus introducing chaos to utility operations and risking orderly power supplies. In their SEC filings, the utilities' disclosures about the proposed EPA plan generally revolved around the risks of the proposed government intrusion into power markets and the uncertainties it would create for the companies' financial/business models. In their CSR reports, the same utilities highlighted their environmental records, their concern for the well-being of their customers and other stakeholders, and their ongoing plans to respond to the threat of climate change—often failing to mention the regulatory concerns over the proposal (the general thread in the EPA comments) or the financial risks raised by the EPA plan (the gist of the SEC filings).

Thus, the utilities alternatively used the moral language of political conservatives, libertarians and progressives in their

response to the EPA proposal.<sup>38</sup> In their EPA comments, the utilities generally used the moral language of political conservatives, identifying their obligations to provide economical and reliable power to their customers, while questioning the EPA plan to upset traditional state-based utility regulation and to potentially degrade the power grid. In their SEC filings, the utilities generally used the moral language of political libertarians, focusing on the risks that (federal) government intervention posed to efficient power markets and the way in which the EPA threatened the freedom of utilities to best determine how to match energy supplies and customer demand. Yet, in their CSR reports, the utilities generally used the moral language of political progressives, pointing to their conscientious efforts already underway to shift away from fossil fuels and toward renewables, thus to protect the environment and respond to the impending harm of climate change.

In short, the utilities' responses to the EPA proposal generally were conservative in their comments to the EPA (asserting the values of U.S. federalism and traditional utility regulation), libertarian in their SEC-filed 10-K reports (asserting the values of business freedom), and progressive in their CSR reports (asserting the values of protecting consumers and the environment). While each of the largest investor-owned utilities exhibited its own "moral matrix"—some more conservative, some more libertarian, and some more progressive—none of them (except perhaps Berkshire Hathaway Energy) adopted an integrated, coherent, singular moral stance on the EPA plan.<sup>39</sup> That is, each utility company's stated moral positions often reflected all three perspectives in different

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<sup>38</sup> A chart summarizing of the responses to the EPA proposal by the twelve sampled IOUs can be found in the "web repository" for this essay. See Summary Chart, <https://drive.google.com/drive/u/0/folders/1icjbIdSVqAjDibLVp4WpbVx9jqNpoQO2>. The chart identifies each company's general statements about the EPA proposal in the company's 10-K filing with the SEC for fiscal year 2014, its comments submitted to the EPA, and its CSR report (sometimes labeled "corporate accountability" or "sustainability" report) for the 2014–2015 period. In addition, research memos prepared by Cara Van Dorn and Alex Thompson, my excellent research assistants, describing the various responses by each company to the EPA proposal can also be found in the web repository. See Responses by Investor-Owned Utilities to EPA's Proposed Clean Power Plan, [https://drive.google.com/file/d/14gYUjzmRKvRb7E\\_YA0qmBWwpbL9Tth6z/view](https://drive.google.com/file/d/14gYUjzmRKvRb7E_YA0qmBWwpbL9Tth6z/view).

<sup>39</sup> The relative integrity of the Berkshire Hathaway voice may reflect the company's relatively non-bureaucratic structure in which responsibility for the company's operational units is concentrated in a single person. See Lawrence A. Cunningham, *Berkshire's Disintermediation: A Managerial Model for the Next Generation*, 50 WAKE FOREST L. REV. 509, 509–10, 521 (2015) (describing the disintermediated governance structure at the company in which ultimate responsibility is delegated to one individual in charge of each of the company's different business units).

formats and to different audiences—and all essentially at the same time.

### III. A DALLIANCE IN MORAL PSYCHOLOGY

What was happening? To better understand this “corporate triplespeak”—which may reflect a characteristic of modern corporate personhood that extends well beyond the investor-owned utility industry—it is useful to turn to moral structures that have been identified by social psychology and its relatively nascent sub-field of moral psychology.

#### A. *Haidt’s Moral Foundations*

Over the past couple decades, studies and experiments have revealed that our moral judgments and discourse arise from a moral matrix, different for each person that mixes and matches fundamental moral values that can be expressed as opposites, each along a separate axis:<sup>40</sup>

care / harm
fairness / cheating
liberty / oppression
loyalty / betrayal
authority / subversion
sanctity / degradation

According to these studies, we humans weight these values in different ways—often based on the social or political group with which we identify.<sup>41</sup> In this country, self-identified

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<sup>40</sup> See generally JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012). A summary of “moral foundations theory” can be found in another essay of mine on a similar topic. See generally Alan R. Palmiter, *Corporate Governance as Moral Psychology*, 74 WASH. & LEE L. REV. 1119 (2017).

<sup>41</sup> If you’re curious, you can answer some questions and obtain your “moral foundations” profile at [MoralFoundations.org](https://moralfoundations.org). MORAL FOUNDATIONS, *Moral Foundations.org* [<https://perma.cc/T6FD-TPPY>]. Here’s mine (the far-left bars), which was generally more “progressive” (the middle bars), though with some tendencies toward “conservative” (the far-right bars). I seem to place less value in loyalty, authority, sacredness—at least as understood by U.S. political conservatives:

political liberals are moved almost exclusively by the values of caring/compassion and fairness/equality, with adherents feeling strong (even visceral) reactions against narratives of harm and inequality.<sup>42</sup> Meanwhile, political conservatives are moved by the additional values of loyalty, authority/order, and sanctity, with adherents experiencing strong reactions against narratives involving disloyalty, disrespect, and desecration.<sup>43</sup> And, political libertarians are moved primarily by the value of liberty/freedom, with strong reactions against government (or other) coercion that restricts individual freedom and collective free markets.<sup>44</sup>

The following schematics from Haidt’s *The Righteous Mind* identify the different weights these moral values hold for American liberals, conservatives, and libertarians:<sup>45</sup>

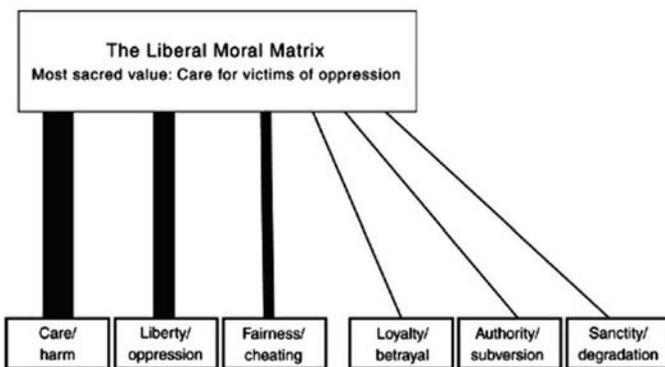
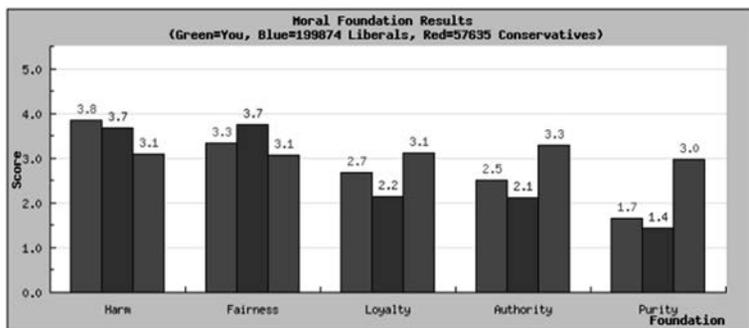


FIGURE 12.2. *The moral matrix of American liberals.*



<sup>42</sup> See Jesse Graham et al., *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. PERSONALITY & SOC. PSYCHOLOGY, 1029, 1029–46 (2009).

<sup>43</sup> *Id.*

<sup>44</sup> HAIDT, *supra* note 40, at 302.

<sup>45</sup> *Id.* at 297–308.

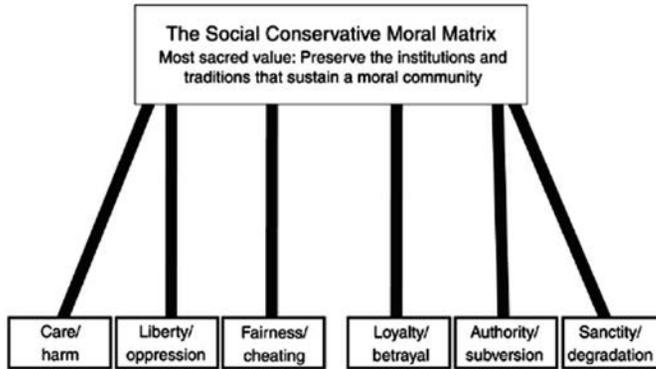


FIGURE 12.4. *The moral matrix of American social conservatives.*

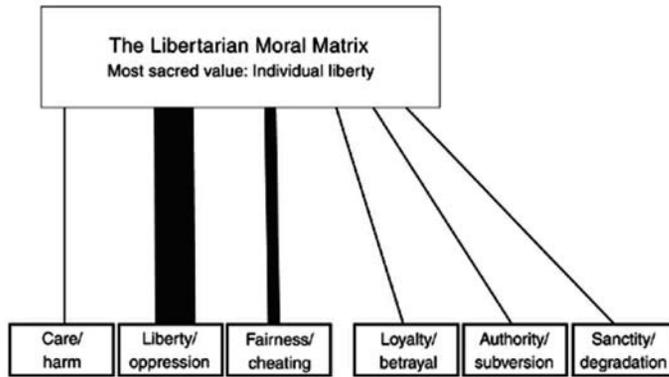


FIGURE 12.3. *The moral matrix of American libertarians.*

Further, as each political group self-reinforces its own value matrix, the group's views are purified and harden as the group members "bind" together and then become "blind" to the other.<sup>46</sup> Thus, each political camp—which for the past fifty years has become more compartmentalized and purer—is built upon a

<sup>46</sup> Besides, better facts tend to be counterproductive on hot-button issues like gun control.

As Tali Sharot notes in her book "The Influential Mind," when you present people with evidence that goes against their deeply held beliefs, the evidence doesn't sway them. Instead, they invent more reasons [to buttress the view that] their prior position was actually correct. The smarter a person is, the greater his or her ability to rationalize and reinterpret discordant information, and the greater the polarizing boomerang effect is likely to be.

set of “moral foundations” that constitute the camp’s moral matrix.<sup>47</sup> For progressives, the defining account is “oppressed versus protected,” using narratives that value compassion and fairness in a struggle against hatred and inequality. For conservatives, the defining account is “traditional versus radical,” built on narratives that value ordered authority built on deeply-held (often religious) views. For libertarians, the defining account is “free markets versus regulatory intervention,” using narratives of individual and collective liberty struggling against the tyranny of regulatory (public and private) intrusion and coercion.

Using different narratives, moral psychologists have conducted experiments that gauge the responses to different moral narratives given by adherents to each group. Members of different groups react strongly to different narratives:<sup>48</sup>

<b>Political group</b>	<b>Narrative Evoking Strongest Response</b>	<b>Values Triggered</b>
Progressive	A man walks down a sidewalk and kicks a dog sleeping on the side of the sidewalk.	Caring, fairness
Conservative	A woman finds an old American flag in her attic and cuts it into rags to clean the toilet.	Loyalty, authority, sanctity
Libertarian	A parent, whose gambling hurts their family, is jailed for being a compulsive gambler.	Personal freedom

The studies on how people react to these and similar stories reveal that our moral views are mostly emotive, even instinctual—and happen almost instantly, often subconsciously.<sup>49</sup> These studies find that human decision-making appears to arise from two cognitive systems: System 1 is quick and intuitive, and

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<sup>47</sup> See Jonathan Haidt, *The Psychology of Self-Righteousness*, ONBEING: PODCAST (Oct. 19, 2017), <https://onbeing.org/programs/jonathan-haidt-the-psychology-of-self-righteousness-oct2017/> [<https://perma.cc/5U3W-KB6L>] (transcript of interview between Jonathan Haidt and OnBeing Host, Krista Trippet discussing the increasing polarization of American political parties for the past several decades).

<sup>48</sup> The first two narratives are from Haidt. Haidt, *supra* note 40, at 19; Jesse Graham & Jonathan Haidt, *Sacred Values and Evil Adversaries: A Moral Foundations Approach* 14 (n.d.), <http://portal.idc.ac.il/en/symposium/hspsp/2010/documents/01-graham.pdf> [<https://perma.cc/9JCU-9WNT>]. The third is one that I came up with, based on the suggestion of libertarian Ron Paul.

<sup>49</sup> DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2012); Daniel Kahneman, *Why We Contradict Ourselves and Confound Each Other*, ONBEING: PODCAST (Oct. 5, 2017), <https://onbeing.org/programs/daniel-kahneman-why-we-contradict-ourselves-and-confound-each-other-oct2017/> [<https://perma.cc/JD22-88EM>] (transcript of interview between Daniel Kahneman and OnBeing Host, Krista Trippet).

System 2 is slow and considered.<sup>50</sup> The studies indicate that our moral positions and actions arise through System 1 and then are explained and defended by System 2, which seems to engage in motivated reasoning (like that of a zealous, close-minded defense lawyer) rather than constructive reasoning (like that of an objective, fair-minded judge).<sup>51</sup>

**Motivated reasoning.** That is, our moral explanations (rationalizations) come only after arriving at a moral conclusion about a given situation. Thus, these studies address and answer the age-old question of whether we are essentially rational beings who sometimes must tame our emotions, or whether we are emotional beings who use reason to justify our actions and beliefs. The resounding answer from the studies is that, at least with respect to moral judgments on how we respond to other humans, we are emotional beings who come to moral views based on a moral matrix that we are often unaware of and that we often take from the moral group to which we are aligned. And only after coming to a moral conclusion do we then rationalize our view by resorting to the language sets provided by each of the fundamental moral values.

The studies also suggest that value matrices tend to harden into psychological (perhaps even neurologically-based) attitudes. For example, conservatives tend to like order and predictability (both attributes of tradition and authority), while liberals tend to like variety and diversity (both attributes of tolerance and liberty). Thus, when shown dots moving on a screen, conservatives prefer the images of dots moving in lock step, while liberals prefer random movement.

In addition, liberals tend to be universalists who view people everywhere in the world as relevant to their moral

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<sup>50</sup> KAHNEMAN, *supra* note 49, at 19–30 (providing overview of two systems and, among other illustrations, identifying System 1 as the automatic activity of driving a car down a road and System 2 as parking a car in a narrow space); *see also* Kahneman, *supra* note 49.

<sup>51</sup> KAHNEMAN, *supra* note 49, at 45, 49, 103 (describing System 1 as “intuitive and impulsive,” and System 2 as “capable of reasoning,” but also “lazy”, and asserting that “[i]n the context of attitudes . . . System 2 is more an apologist for the emotions of System 1 than a critic of those emotions” and when “System 1 is involved the conclusion comes first and the arguments follow.”); *see also* Kahneman, *supra* note 49. Of course, judges may also engage in motivated reasoning to defend their moral decisions. *See* KAHNEMAN, *supra* note 49, at 45, 49, 103 (describing use of “critical reasoning” to explain one’s views). The insights from moral psychology have profound implications for the law and legal education. *See* Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, BEHAV. & BRAIN SCI. 57, 57 (2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1698090](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698090) [<https://perma.cc/ZV4N-TFD4>] (concluding that the “function of reasoning should be rethought,” given that reasoning arises not to improve knowledge and decisions, but instead to provide supportive argumentation; this explains the “confirmation bias” in which erroneous beliefs persist because reasoning is designed to merely confirm one’s pre-existing beliefs).

equation, sometimes even more than people nearby, while conservatives are more parochial staying focused on people in their country or their self-defined communities. Thus, political policies aimed to improve the lives of people generally in the world resonate with liberals, while those same policies when presented to conservatives both have less salience and suggest disloyalty to one's own.

Likewise, the studies suggest liberals are more open to new experiences, while conservatives have trouble assimilating to modernity. That is, liberals exhibit the trait of being willing to accept and accommodate to change, while conservatives remain cautious and prefer the predictability of tradition.

**Moving beyond one's moral matrix.** Change is not easy. This is particularly true when we do not see how our context drives our views. Thus, "facts" often don't matter—we will have a compendium of rationalizations to avoid, explain, or simply avoid uncomfortable truths. That is, expounding a message is not the road to change. Instead, given that our moral views arise from the context of our social surroundings, change will happen only if the messenger changes.

Even though some studies suggest that techniques such as "debiasing" stereotypes can make constructive reasoning possible,<sup>52</sup> there is an axis we tend to automatically turn to without thinking.<sup>53</sup> If we actually think, it can be different, but as Daniel Kahneman persuasively argues in *Thinking, Fast and Slow*, we do this far less often than we realize.<sup>54</sup>

Reflecting on our ability to recognize our own intuitive, emotional thinking (System 1 thinking) and change ourselves, Daniel Kahneman is not optimistic:

Well, what is disappearing, or seems to be disappearing, is a culture of debates between diverse opinions. . . . What can be done is superficial. . . . so teaching statistics to the young would be useful,

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<sup>52</sup> Scott O. Lilienfeld, Rachel Ammirati, & Kristin Landfield, *Giving Debiasing Away Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?* 4 PERS. ON PSYCHOL. SCI. 390, 393, 395 (2009), <https://www3.nd.edu/~ghaefel/Lilienfeld2009%20Perspectives%20on%20Psychological%20Science.pdf> [<https://perma.cc/Q5T5-NCXJ>].

<sup>53</sup> ARNOLD KLING, *THREE LANGUAGES OF POLITICS: TALKING ACROSS POLITICAL DIVIDES* (2017). Kling uses a sports analogy (the football audible) to how political groups use language "to solidify in-group relations while separating one ideology from another." Mark Charles, *Book Review of Arnold Kling's Three Languages of Politics: Talking Across Political Divides* (2013), AMAZON (Aug. 9, 2013), [https://www.amazon.com/gp/customer-reviews/R3SX0VXZ4G9NOY/ref=cm\\_cr\\_ar\\_p\\_d\\_viewpnt?ie=UTF8&ASIN=1944424466#R3SX0VXZ4G9NOY](https://www.amazon.com/gp/customer-reviews/R3SX0VXZ4G9NOY/ref=cm_cr_ar_p_d_viewpnt?ie=UTF8&ASIN=1944424466#R3SX0VXZ4G9NOY) [<https://perma.cc/9RXE-48S7>].

<sup>54</sup> KAHNEMAN, *supra* note 49, at 44–49 (identifying our "monitor and control" System 2 as being lazy, and when "System 1 is involved, the conclusion comes first and the arguments follow").

teaching economics to the young would be useful, teaching self-critical thinking, or better yet, how to criticize other people, because this is more pleasant and more interesting . . . . But those are very marginal improvements. When it comes to the big issues, I'm not very optimistic.<sup>55</sup>

And change in others may be even harder. In fact, presenting facts to someone who does not share your views may even be counterproductive. According to recent studies, when people are presented with evidence that goes against their deeply held beliefs, they are not swayed by the evidence. Instead, they invent more reasons to justify their prior position as correct. In fact, smarter people exhibit greater ability to rationalize and reinterpret information at odds with their beliefs—thus “the greater the polarizing boomerang effect is likely to be.”<sup>56</sup>

**Comparison to “Critical Legal Studies.”** The insight that our moral judgments are intuitive, emotional and instantaneous goes beyond the movement in the law academy in the 1970s and 1980s that framed legal decisions—especially those by judges—as arising from an unstated purpose to advance a social theory, specifically one enabling and preserving dominant social hierarchies.<sup>57</sup> Moral psychology does not build on a particular social theory. Instead, it identifies that social theories (or structures) arise from prevailing moral matrices held by individuals in a society or political group. That is, unlike the critical legal studies (CLS) critique that legal institutions (and their methods of rule-making and interpretation) are built on undemocratic motives of class domination, moral psychology does not assume a particular institutional design.

The CLS movement, however, has some parallels to the insights drawn from moral psychology. For one, both reject the notion that human decision-making (whether moral or legal) is based on rationality.<sup>58</sup> For another, both question whether individuals or society come to moral decisions (or resolve disputes) through value-neutral systems of rules and doctrines. Instead, both agree that our moral discourse (whether individually or in law) is largely “mere rationalizations of the

<sup>55</sup> *Id.*

<sup>56</sup> David Brooks, *Guns and the Soul of America*, N. Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/opinion/guns-soul-of-america.html> [<https://perma.cc/YZN4-H7KV>] (describing findings by Tali Sharot in her book, *The Influential Mind*).

<sup>57</sup> See Jonathan Turley, Introduction, *The Hitchhikers Guide to CLS*, *Unger, and Deep Thought*, 81 NW. U. L. REV. 593, 594–95 (1987) (describing the movement's premise that identifying “hidden interests and class domination of legal institutions” would first “unravel” legal institutions built on political domination, thus to build institutions focused on “progressive change”).

<sup>58</sup> GEORGE C. CHRISTIE & PATRICK H. MARTIN, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 1095 (3d ed. 2008).

status quo.”<sup>59</sup> Thus, CLS mirrors the conclusions of moral psychology that we (including judges) cannot transcend our social, political, and economic contexts—our moral views inextricably linked to our operating “social theory” (to use the language of the “crits”) or our “moral matrix” (to use the language of Haidt).<sup>60</sup>

The CLS movement saw as its mission to expose and educate the elites—especially judges—who would come to reflect on the value-laden nature of the law and, coming to their senses, adopt a more progressive (just and compassionate) understanding of the law’s purpose. That is, the CLS was a decidedly political movement, reflecting the then-prevailing assumption that the only true moral values were those of caring and fairness, universally applied.<sup>61</sup> The notion that social (and political) cohesion, resilience, and success could come from loyalty, authority, and tradition was antithetical (even unimaginable) to the crits—as it was also to social psychologists of the same era.<sup>62</sup> Thus, the crits clung to the agenda (one that proved untenable) of convincing judges that their unstated and wayward conservative moral matrices, on reflection, should give way to an explicit and enlightened progressive moral matrix.<sup>63</sup>

## B. *Corporate Moral Speech*

Moral speech within corporations seems lately to be on the rise. Business leaders regularly talk in moral terms, often referring to many of the moral values that arise in political

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<sup>59</sup> Turley, *supra* note 57, at 597 (“CLS scholars, like Kennedy, reject suggestions that law is neutral and apolitical as apologetic, mere rationalizations of the status quo.”); *see also* Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 *BUFF. L. REV.* 209, 354 (1979). *See* Allan C. Hutchinson et al., *Law Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 *STAN. L. REV.* 199, 206 (1984) (attacking legal formalism as “simply politics dressed in different garb”); *see also* CHRISTIE & MARTIN, *supra* note 58, at 1091.

<sup>60</sup> CHRISTIE & MARTIN, *supra* note 58, at 1094 (section C on Formalism).

<sup>61</sup> Jesse Graham et al., *Mapping the Moral Domain*, 101 *J. PERS. SOC. PSYCHOL.* 366, 366, (2011) (describing how social psychologists, before recent insights from studies in moral psychology, assumed that morality is about “how well or poorly individuals treated other individuals”—which boiled down to “justice, rights, and welfare”).

<sup>62</sup> *See* Lawrence Kohlberg, *From is to Ought: How to Commit the Naturalistic Fallacy and Get Away with It in the Study of Moral Development*, in *COGNITIVE DEVELOPMENT AND EPISTEMOLOGY* 151–235 (Theodore Mischel ed., New York: Academic Press 1971) (viewing moral rationalizations based on authority, loyalty, and tradition as “immature and unconventional,” reflecting a stunted moral development stuck in a “law and order” ethos).

<sup>63</sup> The parallel to the religious right’s attempts to convince young gay people to go straight seems inescapable. *See* John Paulk, *To Straight and Back*, *POLITICO* (June 19, 2014), <https://www.politico.com/magazine/story/2014/06/life-as-ex-ex-gay-paulk-108090> [<https://perma.cc/BK58-AARR>].

decision-making and discourse. For example, many business publications and websites offer their business readers “workplace morality tales” whose lessons are framed in terms of empathy, fairness, loyalty, and larger (sacred) purpose.<sup>64</sup>

The long-prevailing view had been that corporate decisions, like other human decisions, occurred as a rational fact-gathering process in which a business reality was constructed and then, after appropriate deliberation, responded to. But with the insights from moral psychology that “most ethical judgment relies more on emotionally laden intuition,” those who study institutional decision-making are re-thinking the question.<sup>65</sup> Rather than accepting the “bounded rationality” of institutional decisions—that is, the notion that institutional decisions are rational, but often based on limited information—there is an emerging focus on the institutional conditions (or the context in which business decisions are made). That is, just as context is what drives moral decisions by individuals, institutional context appears to be the driver of institutional moral decision-making. Thus, for example, corporate decision making on chief executive officer (CEO) pay appears to be principally shaped by institutional underpinnings, where “bad barrels” can poison corporate decision-making, just as “good barrels” can guide such decisions.<sup>66</sup>

But the discourse about the moral dimension of corporate decision-making—which continues to be described as “corporate ethics”—is almost entirely focused on conscious recognition of conflicts, overcoming cognitive biases, re-conceiving business goals, recognizing “motivated blindness,” stepping off the

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<sup>64</sup> See, e.g., Adam Bryant, *Corner Office* N.Y. TIMES, <https://www.nytimes.com/column/corner-office> [<https://perma.cc/Q4GG-N4L3>] (weekly interviews in the *New York Times*’ Sunday business section on lessons learned from CEOs); Adam Bryant, *How to Be a CEO, from a Decade’s Worth of Them*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/business/how-to-be-a-ceo.html> [<https://perma.cc/NU47-EZBX>] (based on interviews of 525 CEOs, identifying that successful CEOs explain their success by engaging in a range of moral vectors—namely, caring about others, being concerned about fairness, fomenting freedom in the workplace, showing loyalty, creating a sense of order, and respecting the sacredness of people); Vivian Giang, *7 Business Leaders Share How They Solved the Biggest Moral Dilemmas of Their Careers*, FASTCOMPANY (June 2, 2015), <https://www.fastcompany.com/3046630/7-business-leaders-share-how-they-solved-the-biggest-moral-dilemmas-of-their> [<https://perma.cc/9BPE-93TQ>] (describing moral dilemmas in business situations, such as risking being fired for restoring funds to employee investment accounts or telling a client about a mistake, and the lessons learned: empathize with those affected by business decisions, avoid harming others, reciprocate loyalty, consider larger goal of long-term value, treat all customers fairly).

<sup>65</sup> See Emily S. Block & Edward Conlon, *Institutional Logics and Individual Ethical Judgment*, in INEQUALITY, TRUST AND ETHICS CONFERENCE: LONDON 2015 (Abstract 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2607645](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2607645) [<https://perma.cc/KLU8-PWG8>].

<sup>66</sup> *Id.*

“slippery slope,” and becoming aware of “blind spots.”<sup>67</sup> The possibility that we don’t recognize what we can’t see is lost in the stories of how business leaders have lacked sufficient clarity of vision in particular situations.

#### IV. CORPORATE TRIPLESPEAK IN PRACTICE—DUKE ENERGY

Corporate responses to the EPA’s proposed clean power plan were not uniform, and hardly monolithic. For example, comments on the EPA’s proposed clean power plan by IOUs ranged from appreciation (Berkshire Hathaway) to smoldering, even livid resistance (Southern Company).<sup>68</sup> Likewise, in their 10-K filings, the disclosures spanned a spectrum from a cockiness that the CPP played into the company’s strategic fuel-mix planning (NewEra and Exelon) to a deer-in-the-headlights bewilderment about where new GHG regulation might lead the company (PPL and Duke Energy).<sup>69</sup> And the companies’ CSR reports sometimes seemed green-washing pabulum (FirstEnergy) and other times heart-felt contemplations about the company’s role in our energy future (PG&E).<sup>70</sup>

Using the insights from moral psychology and the identification of the moral matrices of American liberals/progressives, conservatives and libertarians, this essay turns next to the specific moral positions and rationalizations used by the investor-owned utility companies.<sup>71</sup> Specifically, the following considers the corporate triplespeak engaged in by the largest of the IOUs, Duke Energy.<sup>72</sup> The company’s mixed

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<sup>67</sup> Max H. Bazerman & Ann E. Tenbrunsel, *Ethical Breakdowns*, HARV. BUS. REV. (Apr. 2011), <https://hbr.org/2011/04/ethical-breakdowns> [<https://perma.cc/BPQ5-B7S6>] (concluding that most unethical corporate behavior arises because “employees bend or break ethics rules because those in charge are blind to unethical behavior and may even unknowingly encourage it.”).

<sup>68</sup> See Comments, *supra* note 35. In fact, the Southern Company was identified by the Union of Concerned Scientists as being at the “forefront of disinformation campaigns targeting climate science” and a “staunch opponent” of the EPA’s actions on climate change, lobbying state attorneys general to set aside the Clean Power Plan. *Who’s Fighting the Clean Power Plan and EPA Action on Climate Change*, *supra* note 8.

<sup>69</sup> See 10-K filings, *supra* note 35.

<sup>70</sup> See CSR reports, *supra* note 35.

<sup>71</sup> I use Haidt’s moral values framework and his six identified “moral values” as a metric, but not as an assertion that these are the only moral values that underlie our moral (or corporate) decisions. In fact, Haidt and others acknowledge that other moral values may be at play in human decision-making. I’m sure this is right. For me, it’s curious that “love” is missing from the mix. But that’s entirely another inquiry: “love as a corporate value!” See László Zsolnai, *Genuine Business Ethics* (2007), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=983788](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=983788) [<https://perma.cc/WAX4-TTH4>].

<sup>72</sup> In 2014, Duke Energy (through its electric utility subsidiaries) provided electrical service to 7.2 million retail, commercial, and industrial customers in North Carolina, Florida, Kentucky and Ohio. Its service area in the Southeast and Midwest had a total population of 21 million. With annual revenues of \$23.5 billion, it was in 2015 the largest investor-owned utility in the United States. See Comments of Duke Energy

responses to the EPA proposal were typical, reflecting both an ambivalence about the EPA's proposal and remarkably different moral vectors in the company's 10-K filing, its comments submitted to the EPA, and its contemporaneous CSR report.

Although Duke Energy (along with a few other of the large investor-owned utilities) helped fund conservative political groups that launched shrill political attacks on the EPA's plan, the company itself was noticeably non-committal—largely posturing with different political-oriented groups in different ways, working with the EPA to fine-tune the proposal, and taking a wait-and-see attitude. That is, whatever its public statements about the EPA proposal, its actual behavior suggested that the company had not resolved which voice directed its actions.

#### A. *SEC Filings: Mostly Libertarian*

In looking at the 10-K disclosures by the sample investor-owned utilities on the EPA proposal, one finds a focus principally on the risks of the plan to the companies' profitability. Although some of the 10-K filings describe the companies' opposition to or support for the plan in their comments to the EPA, most of the 10-K filings stick to the SEC's current disclosure philosophy (and disclosure items) that companies identify risks to operations and profitability.

Perhaps not surprisingly, though tellingly, none of the sampled 10-K filings revealed any discussion by these large investor-owned utilities that their business model faced possible extinction. With the advent of less expensive solar and wind-powered generation, much of it distributed throughout the grid, and the ever-growing expense and possible obsolescence of massive, capital-intensive power generation plants (coal, natural gas, nuclear), the business model of centralized electric generation, transmission and distribution appears to be headed toward a "slow train wreck."<sup>73</sup> Perhaps on the minds of far-

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on the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Proposed Rule at 1 (Dec. 1, 2014) [hereinafter Duke Energy Comment Letter], [https://drive.google.com/open?id=1dLWPL\\_rozrtXMqOV5D-QmGvE3JBpIZAe](https://drive.google.com/open?id=1dLWPL_rozrtXMqOV5D-QmGvE3JBpIZAe); List of IOUs, <https://drive.google.com/open?id=15v34oKO8AHIZW2vPQLTOjzHKImexYiuz>.

<sup>73</sup> The fundamental changes at work in the electric utility industry, including those affecting the investment cycle, were well-recognized at the time of the EPA's proposal. See Rod Kuckro, 'Major Investment Cycle' and Rapidly Changing U.S. Energy Markets Pose Fresh Challenges for FERC—Chairman LaFleur, ENERGYWIRE, (Aug. 22, 2014), <http://www.eenews.net/energywire/stories/1060004814> [https://perma.cc/6H37-4NWW]. In fact, the industry acknowledged that falling natural gas prices, as well as the falling costs for onshore wind, were the drivers of the declining prospects for coal-

thinking utility executives and investors, this bleak future for the industry did not make it to the stylized 10-K filings.

Duke Energy filed its 10-K annual report, signed by the company's CEO, for the period ending December 31, 2014, on February 27, 2015.<sup>74</sup> Compared to its submitted comments on the EPA proposal (which were generally negative) and its discussion of the proposal in the company's CSR report (which was more balanced), the SEC filing is somewhat nondescript. It identifies the existence of the EPA's proposal, without taking any position on its merits or demerits. Except for the conclusion that the EPA plan (once finalized and implemented) "could be significant" to the company's utility subsidiaries, the company does not elucidate its legal or political views on the EPA's game-changing plan.

The 10-K addresses the EPA's proposal only once at page 73 of its 251-page filing under the heading "CO<sub>2</sub> Existing Source Performance Standards and Standards for Reconstructed and Modified Units."<sup>75</sup> The 10-K describes the date and publication of the EPA's proposed Clean Power Plan (CPP), along with a statement that the company had submitted comments to the EPA on December 1, 2014.<sup>76</sup> The 10-K then describes the potential impact of the proposed EPA plan as follows:

Once the CPP is finalized, states will be required to develop plans to implement its requirements. The CPP will not directly impose any regulatory requirements on Duke Energy Registrants. State implementation plans will include the regulatory requirements that will apply to Duke Energy Registrants. Based on the EPA's June 18, 2014 proposal, states will have from one to three years after the CPP is finalized to submit a plan for EPA's review.<sup>77</sup>

The 10-K continued by describing how the EPA's proposal called for phased CO<sub>2</sub> emission reductions over the period from 2020 to 2030, but pointed out that the implementation schedule was still uncertain and "could be significantly different from the

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generated electricity. See Rod Kuckro, 'War on Coal' Rhetoric Belies Robust Forecast for Coal-Fired Electricity, ENERGYWIRE (Jan. 22, 2015), <https://www.eenews.net/stories/1060012054> [<https://perma.cc/R6HV-CS7G>]; see also Christopher Martin & Justin Doom, Wind Power Without U.S. Subsidy To Become Cheaper Than Gas, BLOOMBERG (Mar. 12, 2015), <https://www.bloomberg.com/news/articles/2015-03-12/wind-energy-without-subsidy-will-be-cheaper-than-gas-in-a-decade> [<https://perma.cc/98A4-8N29>].

<sup>74</sup> See Duke Energy Corp., Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act (Form 10-K) at 73 (Feb. 27, 2015), <https://www.sec.gov/Archives/edgar/data/17797/000132616015000008/duk-20141231x10k.htm> [<https://perma.cc/G2GM-XXTG>].

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

proposal.”<sup>78</sup> The company also pointed out that it would be “several years before the requirements of the subsequent state plans are known.”<sup>79</sup> Thus, the company concluded it was “unable to predict the outcome of this rulemaking, or how it might impact [the affected Duke Energy companies], but the impact could be significant.”<sup>80</sup>

Noticeably missing is any indication that the company had taken the position in its already-submitted comments on the EPA proposal that the plan, as proposed, was beyond the EPA’s authority under the Clean Air Act and that it suffered from significant policy and technical defects. That is, the company did not seem to factor into its assessment of the EPA’s plan the possibility courts might invalidate it.<sup>81</sup> Limiting itself to a description of the proposal and its stated implementation schedule, the company pointed out only that the plan’s final requirements, its implementation schedule, and the details of the state implementation plans were all uncertain—“but the impact could be significant.”<sup>82</sup>

Nonetheless, the company’s focus in its 10-K filing on the uncertainties of the EPA proposal—what the finalized plan will be, what the state implementation plans will be, what the EPA’s implementation plan will be (for states that fail to submit their own plan), and what the implementation schedule will be—suggested a concern about the risks of the plan to the company’s utility business model. But the company did not describe how the plan, as proposed, would change traditional state utility regulation or specifically how it might have a negative impact on customers. Instead, the clear (though only lightly sketched) message was that the new regulation’s effect on the company’s utility operations—its freedom of action—could be “significant.”

The failure of the 10-K to mention how the EPA plan might change the traditional regulatory model and the potential impact on customer rates and service reliability (the centerpieces of the company’s comments to the EPA) are even clearer in the next section of the company’s 10-K filing. Under the heading “Global Climate Change,” the company described the level of its GHG emissions in 2014, which it said came primarily from

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Arguably, the potential invalidity of the EPA’s Clean Power Plan, as proposed, would seem an “uncertainty” that Duke could reasonably have expected would have an impact on its continuing operations. See 17 C.F.R. § 229.303 (2017).

<sup>82</sup> Duke Energy Corp., *supra* note 74, at 73.

the company's "fleet of coal-fired power plants."<sup>83</sup> The company then said that "future CO<sub>2</sub> emissions will be influenced by variables including new regulations, economic conditions that affect electricity demand, and the [company's] decisions regarding generation technologies deployed to meet customer electricity needs."<sup>84</sup> Although the 10-K explained that the company was already "taking actions that will result in reduced GHG emissions over time [thus lowering the company's] exposure to any future mandatory GHG emission reduction requirements or carbon tax," the company's utilities "would plan to seek recovery of compliance costs associated with their regulated operations through appropriate regulatory mechanisms."<sup>85</sup>

In short, the company's 10-K filing addressed only whether GHG regulations (including, presumably, the EPA's proposed plan) would affect profitability and concluded that under the traditional utility rate-setting model its utilities would simply pass on any additional regulatory costs to customers. That is, the company would itself be free from the financial impact of the EPA's plan, given that the plan's impact would fall on customers. The 10-K filing, unlike the comments the company made to the EPA or its stated views in its CSR report, did not intimate any particular concerns about passing on higher costs to customers.

The 10-K thus reflects a particularly libertarian attitude by focusing mostly on one's own freedom—in the process, disregarding the harm to others and the departure from tradition. Although the company's comments to the EPA would identify affordable rates and power reliability as a critical (if not central) value for the company, concern about the potential impact on customers of the EPA proposal is wholly lacking in the company's 10-K filing. This attitude of "my freedom first" is a defining characteristic of the libertarian value matrix.

### *B. EPA Comments: Leaning Conservative*

In looking at the submitted comments by investor-owned utilities to the EPA proposal—one discovers a variety of positions. Across the sampled investor-owned utilities, there was a spectrum of views. Some companies strongly opposed the EPA proposal on legal, policy and technical grounds (Southern Company). Others were more sanguine and, while opposing

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

some aspects of the proposal, also embraced its overall approach (Con Edison). Yet others showed strong support for the proposal, recommending ways to strengthen it on legal and technical grounds (PG&E).

Thus, among the sampled companies, their EPA comments—compared to their 10-K filings and CSR reports—revealed the broadest range of divergent views. The levels of opposition and support also tended to follow the political map, with the greatest opposition coming from utility companies in the South (more politically conservative) and the strongest support from utility companies in the Northeast and West Coast (more politically liberal). And, in the politically-mixed Midwest, the utility companies showed greater ambivalence about the EPA proposal.

Duke Energy's comments to the EPA, submitted on the agency's deadline for making comments of December 1, 2014, were signed by the company's Vice President of Environmental and Energy Policy.<sup>86</sup> The company's comments run a total of 220 pages, not counting an extensive appendix on the estimated costs of the EPA proposal to the company.<sup>87</sup>

The company began its EPA comments by invoking the company's customers and the importance of producing and delivering reliable electric service.<sup>88</sup> The company next focused on the tradition of utility regulation being left to the states and the insufficient congressional delegation under the Clean Air Act to the EPA to take on this role, pointing out that the EPA's proposal "would fundamentally alter how electricity is generated, delivered and consumed in the country."<sup>89</sup> The company made clear that electric utility regulation "is a matter typically left to states."<sup>90</sup> Echoing the criticisms of the many opponents of the EPA proposal, Duke questioned the EPA's "attempt to establish a national energy policy through a section of the Clean Air Act . . . never designed for that purpose."<sup>91</sup> Although the company

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<sup>86</sup> See Duke Energy Comment Letter, *supra* note 72 (cover letter from Cari Boyce, Vice President, Env'tl. Energy & Policy).

<sup>87</sup> *Id.*

<sup>88</sup> The company stated:

Through our 6 regulated utilities, we produce and deliver electricity to 7.2 million homes and businesses located in six states. About 21 million people depend on us to keep their lights and air conditioning on, not to mention the hospitals, airports, commercial businesses, and manufacturers who depend on us for reliable electric service 24 hours a day, 7 days a week.

*Id.* at 1–2 (emphasis omitted).

<sup>89</sup> *Id.* at 3.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

did not explain what federal CO<sub>2</sub> regulation it had in mind, the company stated its belief “that creating a national energy policy would best be accomplished through comprehensive federal legislation rather than a regulatory approach.”<sup>92</sup>

The company stated its ongoing commitment to addressing GHG emissions—while providing customers affordable and reliable electricity—and identified its investments in new generation technologies as it began to retire its coal-burning fleet. While stating its support for “policies that will result in reasonable decreases in greenhouse gas (‘GHG’) emissions over time,” the company emphasized that any such reductions should be balanced with “impacts to our customers’ electric rates, our states’ economies, and the reliability that our customers demand.”<sup>93</sup> The company touted its efforts over the previous decade to modernize its generation fleet, pointing out that it had “invested over \$9B in new state-of-the art generation, which has allowed the retirement of over half of our coal fleet (6800 megawatts of capacity).”<sup>94</sup> The company continued, “To date, we have reduced our CO<sub>2</sub> emissions by 20 percent from 2005 levels while also achieving sulfur dioxide reductions of 84 percent and nitrogen oxides reductions of 63 percent during the same time period.”<sup>95</sup> Like other of the large IOUs, Duke Energy sought to have the EPA recognize its early action, thus “to ensure that our customers get the full benefit of these early actions and investments.”<sup>96</sup>

In short, the company identified a full range of moral vectors implicated by the EPA proposal. The company stated its commitment to providing affordable and reliable power to its customers—a “caring” value. The company also stated its commitment to a balanced approach to reducing CO<sub>2</sub> emissions, bearing in mind the burdens on customers and “state economies”—a “fairness” value built on proportionality. The company also stated its belief that changes to utility regulation, which had typically resided with the states, should happen only through federal legislation—an “authority” value. The company emphasized its commitment to its customers and its concerns about betraying their trust, both in the actions it had already taken and its concerns about the EPA proposal—a “loyalty” value.

Although the company would later, in its Sustainability Report (described below), discuss its commitment to reducing the company’s carbon footprint and thus to address the broader

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 2.

<sup>94</sup> *Id.* (emphasis omitted).

<sup>95</sup> *Id.* at 3.

<sup>96</sup> *Id.*

impacts of climate change, this universalist caring value is absent in the company's comments to the EPA. Instead, the EPA comments both in their structure and tone are like a court brief that seeks to create the impression of a balanced, objective analysis while arguing for a position. Here, perhaps in recognition of where these arguments would end up—a tradition-bound, conservative Supreme Court—the centerpiece of the company's comments to the EPA is an attack on the agency's authority to promulgate its proposed plan:

The CAA was passed more than 40 years ago and was never designed to implement national energy policy or to deal with the global issues associated with greenhouse gas emissions. A standard of performance under section 111 of the CAA must be achievable with adequately demonstrated, commercially available technology that can be achieved by the individual regulated sources (coal-fired electric generating units ("EGUs")). The EPA's proposed best system of emissions reduction ("BSER") is unprecedented because it proposes to include the entire electric system, including sources that do not produce power or any emissions to establish the proposed standards states must meet. The fundamental departure from established statutory requirements in the EPA's Clean Power Plan is the Agency's assertion that the BSER for coal-fired EGUs may include measures that would either directly or indirectly reduce a source's utilization or that are not within the control of individual sources. The EPA's redefinition of what measures may constitute a "system of emission reduction" is contrary to over 40 years of the EPA's consistent interpretation and implementation of section 111.<sup>97</sup>

In addition, the company questioned the building blocks and interim compliance period for the state implementation plans. Commenting that, despite EPA claims, states have little or no flexibility to meet the proposed state goals. Among other things, the company asserted that states would be compelled to retire coal-fired generating units as the only way to achieve the proposed state goals. In addition, to avoid reliability problems and the cost burden of stranded assets, the company argued that states should be permitted to decide on their own "glide path" for compliance during the interim period. The comments on the state implementation plans emphasized the importance of state autonomy ("tradition" and "liberty") to decide how to best balance—presumably in collaboration with the state's utility regulator—the issues of grid reliability, timing for retiring old generation units and bringing online new ones, and meeting the emission goals set for the state.

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<sup>97</sup> *Id.* at 3–4.

Overall, the company thus situated its EPA comments squarely in a conservative camp. The focus was on the virtue of tradition—of staying with the time-tested rituals of electric utility regulation. The EPA had overstepped its authority by setting state emission goals, as opposed to emission standards for individual “electric generating units,” the traditional subjects of its regulation. For the company, the traditions of energy federalism—based in the constitutional notions that what is not federal is for the states—and the delegation doctrine commanded a nearly sacred stature.

The company’s EPA comments then continued by identifying various policy and technical flaws with the proposal, which generally criticized the EPA for being too regulatory. Specifically, the company stated:

- The proposed interim compliance period (2020-2029) could result in significant stranded assets for customers.
- The EPA’s assumed 6 percent heat rate improvement target for coal-fired generation units (Block 1) is unachievable.
- The EPA’s assumed “redispatch” from coal-fired generation units to natural gas combined cycle units (Block 2) is unachievable.
- The EPA’s proposed treatment of renewables and nuclear power in setting state goals (Block 3) is inappropriate.
- The EPA’s proposed targets for end-use energy efficiency (Block 4) are unreasonable.
- The EPA should correct the numerous errors in calculating the state emission goals, should clarify how combined cycle gas units will be treated, should use a multi-year historic baseline for setting state goals, and should clarify how rate-to-mass translations should be made.<sup>98</sup>

The company concluded by summarizing its criticisms of the EPA’s assumptions in its building blocks and by reiterating its various recommendations on the proposal—among them on determining achievable generation emission targets, removing nuclear capacity from state goal calculations, and reconsidering the feasibility efficiency savings rates.

Making clear that its recommendations to improve the proposal should not be understood as an endorsement of the EPA’s plan, the company reiterated its view that the EPA plan exceeded the agency’s authority and usurped the traditional state regulatory role, and reserved the company’s option to

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<sup>98</sup> *Id.* at 4–10.

challenge the plan, once finalized.<sup>99</sup> The EPA's plan—it seemed for Duke Energy in its comments to the EPA—was teed up for review by a conservative Supreme Court.

### C. *CSR Reports: Clearly Progressive*

All of the sampled utilities prepared a CSR report for 2014, and all of their CSR reports make reference (directly or indirectly) to the EPA's proposed clean power plan.<sup>100</sup> Interestingly, each company (except perhaps Berkshire Hathaway) stated a viewpoint on the EPA's proposal in its CSR report different from the company's stated views in their SEC filings and EPA comments. In general, the CSR reports focused on company achievements and plans for cutting GHG emissions and responding to climate change.<sup>101</sup>

Thus, while the companies had expressed a range of views on the EPA's proposal in their comments to the agency, each of the companies shifted its attention when discussing the plan with its public constituents. The CSR reports generally reflected much less commitment to the traditions of utility regulation and the industry's centralized business model. Although none mentioned (or even hinted) that the companies' utility business model might be headed toward radical change, the CSR reports reflected companies that saw themselves in the midst of transformation as they responded to technological change, customer demand, and environmental concerns.

That is, CSR reports (far more than the companies' 10-K filings or the EPA comments) reflected an acceptance of change, a hallmark of the progressive mindset. Interestingly, the

<sup>99</sup> The company seemed strident in its view that even if the EPA made the changes suggested, the rule would be legally invalid:

None of these comments offered by Duke Energy, however, should be taken as an endorsement of or support for any part of the [EPA's proposal]. The EPA's [proposal] first and foremost exceeds the authority of the CAA and must be withdrawn. Simply tweaking various parts of the [proposal] will not change that fact. . . . A section 111 standard of performance cannot be based on "beyond-the-source" actions like mandating the displacement of generation from coal-fired EGUs with generation from natural gas combined cycle (NGCC) units, displacing coal-fired generation with renewable energy, and decreasing electricity demand by increasing end-use energy efficiency. . . .

. . . .

In addition to being unlawful, The Proposed Guidelines are unconstitutional because they usurp sovereign state authority in violation of the Tenth Amendment.

*Id.* at 219–20.

<sup>100</sup> See CSR Reports, *supra* note 35.

<sup>101</sup> *Id.*

companies' CSR reports also generally acknowledged that they were also being read by investors, for whom an impending change in the business model of their utility investments would be highly material. The CSR reports often included boilerplate about forward-looking statements designed to insulate securities information from liability for making predictions or forecasts that go awry.

Duke Energy's 2014 "Sustainability Report," which includes an introductory letter from its CEO, was prepared by the company's Chief Sustainability Officer.<sup>102</sup> The report, dated April 17, 2015, highlighted Duke Energy's rankings on various sustainability indices (Dow Jones, Corporate Knights, Newsweek) and focused on five areas, which it described as its "Road Ahead"—namely, customers, growth, operations, environmental metrics, and employees.<sup>103</sup>

The Sustainability Report includes a discussion of the EPA's clean power plan in a five-paragraph section on "Climate Change".<sup>104</sup> The section begins by restating some language from the CEO's letter: "Duke Energy supports climate change policies that will result in reductions in greenhouse gas (GHG) emissions at achievable rates over time while balancing impacts to our customers' rates, the economies of our service territories and the reliability that our customers count on."<sup>105</sup>

This policy statement, typical of those by investor-owned utilities, is useful to unpack to get a sense for its political impetus. The company exhibits concern about the harm of GHG emissions—expressing a caring value on avoiding harm to unnamed persons, and perhaps even the planet, affected by climate change. The statement also exhibits a concern for customers, both financially and in terms of service. Thus, it expresses caring and loyalty values toward customers, while stating a commitment to maintaining order in power markets. In short, the company's overarching statement on the issue of climate change is a balanced conservative one, similar to the tone of the EPA comments.

But then the company's Sustainability Report takes a turn toward a more progressive description of its actions on CO<sub>2</sub> emissions:

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<sup>102</sup> DUKE ENERGY CORP., 2014 SUSTAINABILITY REPORT 1 (2015) <http://sustainability.report.duke-energy.com/2014/pdfs/2014-duke-sustainability-report-complete.pdf> [<https://perma.cc/BCX4-JNF2>].

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 26–27.

<sup>105</sup> *Id.* at 26.

We have taken a number of significant actions that have reduced our CO<sub>2</sub> emissions. Clean, innovative, natural gas plants are being built and many older, less efficient generating units have been retired (with plans to close more in the future). The company also offers its customers a variety of energy efficiency and conservation programs to help them reduce their electricity consumption in a cost-effective manner. In addition, Duke Energy continues to add wind and solar power to its generation portfolio.<sup>106</sup>

Again, it is useful to unpack the language. The company said it was taking various actions against a perceived harm, including some actions it described as “innovative” and new—an expression of progressive caring values. Moreover, the look was toward the future not bound by the traditional use of older units or existing patterns of consumption—an expression of a progressive’s embrace of novelty and against tradition. The company thus sought to portray itself as not bound by tradition or loyal to prevailing business methods.

Next, the Sustainability Report addressed the EPA’s proposal:

The U.S. Environmental Protection Agency (EPA) has proposed regulating CO<sub>2</sub> from new, existing and modified or reconstructed fossil fuel plants under section 111 of the Clean Air Act (referred to as the Clean Power Plan). Duke Energy thinks that creating a national energy policy would best be accomplished through comprehensive federal legislation, rather than a regulatory approach like the one proposed in the EPA’s Clean Power Plan.

Duke Energy established voluntary carbon reduction goals in 2010. The goals—which were updated in the company’s 2012 Sustainability Report after the merger between Duke Energy and Progress Energy—reflect Duke Energy’s aspiration to reduce or offset the company’s generation fleet CO<sub>2</sub> emissions by 17 percent below its 2005 level by 2020. Duke Energy achieved this level of emission reduction earlier than anticipated. However, the company’s current forecasts suggest it will experience a gradual increase in CO<sub>2</sub> emissions in the years ahead as the economy continues to recover and the demand for electricity increases. Fluctuations in fuel prices could also contribute to increased emissions.<sup>107</sup>

This reaction to the CPP, which paralleled the company’s EPA comments, reflected a strong assertion of liberty values—that is, the freedom to set and then implement the company’s own goals. The statement made clear that the company considered a federally-legislated “national energy policy” and its own voluntary responses to be superior to the unilateral regulatory imposition of the EPA. Of course, Duke Energy did not explain what federal legislation it would prefer or whether it had been

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* 26–27.

engaged in any lobbying for such legislation, but its statement implied that any “comprehensive federal legislation” should involve its and the power industry’s buy-in. The statement thus heavily leaned on the libertarian value of uncoerced, free markets—a moral vector embraced by many progressives.

Perhaps most interesting was the way that the company treated its Sustainability Report as a securities disclosure. Recognizing that CSR reports have become material also to public investors, the company’s Sustainability Report concluded its discussion of the clean power plan with a caveat that the company’s GHG emissions could increase as the economy improved. (In fact, the last page of the report provided a boilerplate disclaimer on forward-looking statements, thus to gain safe-harbor treatment under the Sarbanes-Oxley Act for predictions that might turn out to be wrong. The page also added a note on reconciling financials non-GAAP financials to GAAP.

Duke Energy will continue to be actively engaged in the development of the EPA’s CO<sub>2</sub> regulations with the focus on outcomes that are in the best interest of customers and shareholders. The company will also continue to modernize its generation fleet and implement technologies to improve efficiency, which will help continue to lower CO<sub>2</sub> emissions.<sup>108</sup>

That is, the company declared that its role in a free market to supply what customers want at market prices—strong libertarian values—trump any progressive values to avoid harm to the environment.

It is interesting to compare the company’s Sustainability Report to its EPA comments. While the company strongly and extensively questioned the legality of the EPA’s proposal in its EPA comments, seemingly to set the stage to join a judicial challenge of the EPA plan, its stated position in the Sustainability Report on the clean power plan was to “actively engage” in shaping the regulations, thus suggesting that it was willing to work to balance harm to environment with loyalty to customers. Noticeably absent in its Sustainability Report was any mention of the federalism concerns or the tradition of state-based utility regulation—that is, the values of order and authority that framed its EPA comments. The company seemed to take more of a libertarian/progressive approach toward the EPA proposal—at least in its statements addressed to its stakeholders, who the company described as including employees, contractors, customers, state economies, and communities (including,

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<sup>108</sup> *Id.* at 27.

explicitly, those affected by Duke's coal-ash spill on the Dan River in North Carolina).

## V. EXPLANATIONS OF TRIPLESPEAK

The responses by large investor-owned utilities to the EPA's proposed clean power plan reflected a triplespeak at two levels. Across the industry, the companies exhibited different moral matrices, weighting the different moral vectors differently in their public statements about the proposed Clean Power Plan. Some companies were more conservative, some more libertarian, and some more progressive than their counterparts. In many respects, this is quite unremarkable. Different companies even within the same industry take different views on different issues—reflecting differences in company culture, business focus, leadership proclivities, even regional allegiances.

The more interesting phenomenon revealed in the company responses to the EPA plan was how within each sampled company there was a divergence (sometimes even a cacophony) of viewpoints. But, again, this can be seen as quite unremarkable. As organizational theory teaches, within a company's organizational chart lie many functions, each with a different audience having its own peculiar agendas and expectations.<sup>109</sup> Thus, individuals operating in the modern corporation find themselves operating in different political, social, and economic contexts. In investor-owned utility companies, the government affairs departments responsible for submitting comments to the EPA live in the more traditional world of political connections and state-based utility regulation; the financial departments responsible for preparing 10-K filings live in a libertarian world of market freedom and constantly-shifting risks to business profitability; and the corporate sustainability departments responsible for creating CSR reports live in a progressive world of people, planet, and (some) profits.<sup>110</sup>

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<sup>109</sup> See CHRISTIE & MARTIN, *supra* note 58, at 1097 Organizational theory has long recognized that the political, social, and economic "surroundings" in which individuals operate create a "context" that limits and shapes the individual's "institutional and imaginative assumptions." *Id.*

<sup>110</sup> In some ways, this "deconstruction" of the stated views by the sampled IOUs is similar to the "critical legal studies" enterprise of identifying legal statements as value-laden exercises in power. See Alan D. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1236 (1981) (stating that the "critical method" seeks to reduce "abstract universals to concrete social settings" and thus expose "how patterns of domination, exploitation, and oppression within those settings relate to the abstract universals", with the "task of [the critical] scholar . . . to expose as ideology what appears to be [] fact or ethical norm.>").

But I suspect something more was happening. The utility industry—whether its participants admitted it or not—were living at the time of the EPA proposal (and continue to live) in a world of unprecedented change. As rising CO<sub>2</sub> levels cause us to re-think our collective future, the power industry in this country and throughout the world is under great pressure to adapt and to begin an irreversible process of de-carbonization. As a new generation of lower cost power sources and technologies emerge, many of which are likely to lead to a more distributed and certainly smarter grid, the traditional utility model is already under strain, a strain that is likely to become only more intense. And, as the political climate begins to awake to the radical changes underway in our physical climate, electric utility companies (especially the bigger ones) will be compelled to respond to shifting attitudes about their purpose and responsibilities.

Perhaps the triplespeak within these utility companies was an organic response to the changing business, political, consumer environment in which the companies find themselves. Unsure of which direction their industry will be pushed or pulled, the companies responded as do organisms in nature—by releasing a multitude of mutations to respond to whatever the environment becomes.<sup>111</sup> For example, in my own backyard the oak trees produced last fall more acorns than I can ever remember—in fact, so many acorns fell to the ground that there were places you couldn't see the grass under the piled-high trees-in-waiting.<sup>112</sup> My biologist friends say this is happening everywhere. Plants are putting out record amounts of seeds, apparently hoping that some will contain the mutations that will permit survival of their species.

Thus, triplespeak can be seen as a set of mutations—that is, a set of different business directions, plans, attitudes, purposes—from which the company can craft a response or series of responses to the changing landscape. Just as we as individuals offer different views or statements in response to a new situation—a sort of “testing the field”—companies may speak in different ways to see which approach feels right. If the corporation is indeed a super-organism—much like a hive of bees

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<sup>111</sup> See Emma Marris, *Trees in Eastern US Head West As Climate Changes*, NATURE (May 17, 2017), <http://www.nature.com/news/trees-in-eastern-us-head-west-as-climate-changes-1.22001#ref-link-1> [<https://perma.cc/NRV2-DHFR>].

<sup>112</sup> Years in which there is an over-production of acorns are known as “mast years.” See Katrina Rossos, *Acorns and Mast Years: Masses of Acorns and Why*, NATURE WORLD NEWS (Oct. 30, 2015), <http://www.natureworldnews.com/articles/17888/20151030/acorns-mast-years-masses-why.htm> [<https://perma.cc/7N7E-PKH8>] (identifying one theory for massive release of acorns to “maximize pollination efficiency”).

or mound of ants, in which individuals perform specialized functions for a greater common good—then it would stand to reason that such super-organisms must have mechanics for responding to change. Just as individual organisms do this by a process of mutation, with each mutation’s efficacy tested by natural selection, it stands to reason that a super-organism would borrow this survival technique. Though, unlike the quite slow process for mutation and adaptation in a species, the mutation and adaptation process for the super-organism corporation may be much faster.<sup>113</sup> In fact, the past two hundred years of the modern corporation are a testament to the rapidity of the organism’s capacity for adaptation. But that broader and deeper inquiry is for another day.

#### A. *Variation Across Utility Companies*

One explanation for the different moral matrices exhibited by the largest investor-owned utilities might be that each was responding to the political environment specific to the company. That is, the EPA’s political economy might well be a reflection of the nation’s political map—or, more specifically, of the political views of the various state public utility commissions.<sup>114</sup> For example, that a utility company in California would have different views on the EPA’s proposal compared to one in Georgia is understandable. It would seem

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<sup>113</sup> For example, corporations have recently created new internal mechanisms—such as the monitoring board, compliance and risk management systems, and shareholder engagement—as adaptations that respond to “growing corporate complexity, threats to corporate value, and political compromise”—a new “corporate immune system.” See Omari Scott Simmons, *The Corporate Immune System: Governance from the Inside Out*, 2013 ILL. L. REV. 1131, 1131 (2013).

<sup>114</sup> Attitudes among state public utility commissions varied. While some state regulators (from more conservative states) opposed the EPA’s plan as a federal overreach and a threat to state autonomy over energy diversity, most regulators (even in states where their governors had joined lawsuits challenging the plan) were supportive. See Klump, *supra* note 16; Rod Kuckro, *Ohio Regulators Tell Lawmakers to Butt Out on EPA’s Clean Power Plan*, ENERGYWIRE (Mar. 27, 2015), <https://www.eenews.net/energywire/2015/03/27/stories/1060015862> [<https://perma.cc/35YE-K3C8>]; Kristi E. Swartz, *Ga. Utility Regulators’ Race Gets Crowded, More Than a Year Before Elections*, ENERGYWIRE, (Apr. 13, 2015), <http://www.eenews.net/energywire/stories/1060016577> [<https://perma.cc/QX7X-9LN8>]. Instead, the state regulators seemed to accept the new role thrust on them by the EPA’s plan, their responses mostly seeking guidance on how to comply. Patrick Ambrosio, *Clean Power Plan Deadlines May Discourage Emission-Trading Programs, Some States Say*, BLOOMBERG ENVIRON. (Apr. 16 2015), <https://bna.com/news/bna.com/environment-and-energy/clean-power-plan-deadlines-may-discourage-adoption-of-trading-programs-states-say> [<https://perma.cc/HW9U-HG37>]; Andrew Childers, *EPA to Propose Federal Plan in August To Guide State Clean Power Compliance*, BLOOMBERG ENVIRON. (Apr. 10 2015), <https://bna.com/news/bna.com/environment-and-energy/epa-to-propose-federal-plan-in-august-to-guide-state-clean-power-plan-compliance> [<https://perma.cc/8LX5-78F9>].

likely the California utility would find itself under pressure from its public utility commission, its local politicians, its consumers, and even its investors to have a progressive business agenda; similarly, the Georgia utility would be under pressure from the same sorts of constituents to be conservative in its views on the CPP and its choice of fuel mix.

In fact, looking at the ten largest investor-owned utilities, there seems to be a strong correlation between their moral matrices and the prevailing politics of the states in which they operate. Thus, the support of the EPA's proposal by ConEd, the largest investor-owned utility in New York and reliant on coal-fired power generation, may be explained on political grounds, not necessarily economic ones. Similarly, the opposition to the EPA's plan by Westar, the largest investor-owned utility in Kansas where wind power has taken off, would seem to be matter of political expedience, not economic calculation.

But the correlation is not perfect, nor does it explain the triplespeak within the different utilities. Many of the largest utilities—particularly in the Midwest—took positions in their comments to the EPA at odds with the comments of their local politicians. For example, the Berkshire Hathaway utilities that operate throughout the Central States were decidedly in favor of the EPA's proposal, even as politicians in the area lined up against the EPA plan. And, even more telling, was the failure of utilities in conservative regions to launch a full-throated attack on the EPA's proposal, as reflected in their somewhat balanced comments to the EPA and their non-committal (even supportive) statements in their SEC filings and CSR reports.

### *B. Variation Within Company's Organizational Chart*

The moral attitudes toward the EPA plan varied within each of the largest investor-owned utilities depending on the forum in which the company stated its views. Although some companies were more integrated in their stated views—that is, generally either more conservative or more progressive than their counterparts—there was significant variation within each company.

The story at Duke Energy was one repeated in each of the sampled investor-owned utilities. The comments to the EPA generally reflected a conservative agenda, often pointing out that the proposal upset the traditional (and cozy) regulation of utilities by state regulators and the EPA's limited authority to impose "smokestack" rules for pollutants from individual generating units. At the same time, the companies' 10-K

disclosures describing the expected effect of the proposal on business and profitability reflected a libertarian bent, with nearly every company stating its concerns about the risks of the proposal to the company's business model and its freedom to make choices on such matters as fuel mix and energy sources. Meanwhile, the various statements in the companies' CSR reports to the public about their sustainability efforts took a decidedly more progressive viewpoint, generally pointing to the efforts of the company (sometimes in coordination with government programs) to protect vulnerable consumers and an at-risk environment.

In many respects, none of this is remarkable. It should be expected that the modern large corporation—even on an existential question like who and how humanity's carbon footprint should be managed—would internally have different perspectives and thus answers to the same question. Those in the corporation charged with overseeing regulatory affairs (and thus comments to the regulator, here the EPA) would understandably take a traditional view of the question. The story by Duke Energy and the other sampled utilities revolved around the company's role of providing low-cost, reliable energy to a variety of consumers, under the watchful eye of state utility regulators and coordinated by the Federal Environmental Regulatory Commission (FERC).

Those in the company charged with financial disclosure and investor relations took, not surprisingly, a libertarian view of the corporation as a private business meant to maximize returns to shareholders, within the constraints of the utility's regulatory model. Over the past couple of decades, investor-owned utility companies—with the opening of interstate supply markets—have become much bolder as free market participants. Not surprisingly, the SEC filings are redolent of the language of corporate profitability and business flexibility.

Those in the company charged with communication and public affairs (and thus the voluntary CSR reports that have become a ubiquitous part of the corporate landscape) assumed a more progressive attitude toward the role of the corporation in society. Rather than acting as instruments for producing electric power in an industry whose contours have been defined over the past century or for engaging in unfettered business activities for the benefit of investors, the investor-owned utilities described in the CSR reports have an important social role. They provide universal electric service to all consumers, while ensuring that the company's impact on the air and water is minimized, and

providing benefits to communities in which the company operates. The theme of the CSR reports is the responsibility the utilities have to vulnerable persons and the fragile environment.

But viewing the variation in the moral perspectives within these utility companies as simply a product of their organizational charts does not answer why there would be such a clear, often distinct message from each department. That there was some coordination seems likely, given that each of the statements on the EPA proposal whatever their originating source went through a review by the company's legal department. Why would it be seemly—if not acceptable—for the same company to emphasize the importance of operating within the existing regulatory model, while stating a preparedness to respond to changing market circumstances, while also stating a commitment to its consumers and the environment? Somehow, it seems, triplespeak was serving an unstated, grander purpose.

### C. *Variation as Adaptive Mutation*

Thus, the observed triplespeak leads to the questions of why the company engaged in these rhetorical inconsistencies and what purposes the inconsistency might serve. When confronted by individuals unable to make up their minds, we describe them as suffering from cognitive dissonance. But cognitive dissonance in a multi-purpose organization—which seeks to serve investors, consumers, managers, workers, local economies, and society at large—will perhaps invariably lack rhetorical and philosophical cohesion. While as individuals, we feel compelled to create a sense of moral integrity and often seek to embrace a coherent set of social and political views, reinforcing them by exposing ourselves to others (especially information sources) that succor our views, the corporation may not be so driven.

So what is the corporate purpose? As the debate over this question still rages, the answer seems clear, right before our noses: the purpose of the modern for-profit corporation is multi-faceted.<sup>115</sup> Thus, it is neither inconsistent nor fraudulent for such corporations

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<sup>115</sup> See generally Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579 (2018). Belinfanti and Stout point out that the “nature and purpose of the corporations remain hotly contested.” *Id.* at 579. They further assert that the emerging view that the corporation should be seen as serving “long-term shareholder value” fails to provide a framework for management accountability, given that nearly all corporate decisions and actions can be framed as serving such value. *Id.* at 596–98. Instead, they assert that “systems theory” (using design and performance measures for multi-goal systems) offers an answer—particularly in assessing corporate sustainability. See generally *id.*

to say multiple things to multiple audiences. If each audience understands that the corporation necessarily has a split (and shifting) personality—where there is no expectation or even striving for cognitive integrity—then nobody is really misled.<sup>116</sup>

Investors likely know that the posturing before the regulator probably does not reflect the company's true assessment of the validity (and likely effects) of a regulatory initiative, and the feel-good statements in the CSR reports are likely not seen by investors or others as material representations on revenue quality, employee productivity, or even the real orientation of the business. And even financial disclosures to investors about risks are discounted as boilerplate—that is, investors understand them as incantations meant to forestall second-guessing suits claiming securities fraud.

Likewise, regulators know that the comments on a regulatory proposal are often posturing for political purposes—for example, to gain credibility with the anti-regulation political crowd. The EPA is unlikely to come down hard only on those companies that took a stance against a regulatory proposal that becomes law. Likewise, it seems unlikely that regulators read CSR reports as an indication of a company's compliance agenda—that is, such reports have only tangential meaning to the company's status as a regulated entity. Even the public understands (or should understand) that CSR reports are feel-good statements of aspiration, not binding promises or even verifiable truth about the company's willingness to accomplish its stated goals.

That is, the corporate voice is far from an integrated mouthpiece, but may rather be simply a set of kabuki dancers each performing a different dance—but for a broader, organic purpose. Without the ability to try out a shareholder primacy model in SEC filings, or check the fit of a “don't tread on me” approach with regulators, or a set of universalist exclamations in CSR reports, the corporation is left without a dialectic. It is triplespeak that may well allow the corporation, internally and externally, to adapt to its changing political, economic, technological, and physical environments. Among other things,

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<sup>116</sup> Things are different when the corporation says one thing and does another, contrary to the expectations of those who have an interest in the words resulting in action. See generally Cheryl L. Wade, “We Are an Equal Opportunity Employer”: *Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541 (2004) (criticizing corporate speech that suggests company's interest in “racial diversity” when this “diversity rhetoric” does not lead to actual anti-discrimination efforts). Empty rhetoric without action—where action is implied and expected—increases the likelihood of conflict and litigation. *Id.*

triplespeak permits the corporation to “test the waters” of its moral direction.<sup>117</sup>

If it turns out—as seems to have been the case for the last century—that the shareholder-wealth-maximizing corporation is the optimal design for business in an extractive society, then keeping a storehouse of libertarian values (and language) will facilitate pushing corporations in this direction. If the regulated corporation—which may define the investor-owned utility more than any other industry—is optimal for a particular business function, then having at hand the conservative values of ordered authority and loyalty to a served community will permit the corporation to articulate and define itself according to this function. If the CSR corporation—a direction in which many businesses seem to be headed and one on which many have already embarked with solid recent success—is actually where we are headed, then having at hand an articulation of the progressive values of care and fairness, mixed with a new sacred regard for Gaia, helps prepare for the universalist business.

## CONCLUSION

Triplespeak in investor-owned utilities—perhaps a microcosm of a corporate triplespeak that may well be engulfing the planet—suggests that the corporate organism is preparing itself for radical change.

A half century ago, Stephen Stills captured what may be happening:

There’s something happening here  
 But what it is ain’t exactly clear  
 There’s a man with a gun over there  
 Telling me I got to beware  
 . . . .  
 There’s battle lines being drawn  
 Nobody’s right if everybody’s wrong

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<sup>117</sup> Psychological studies show that individuals often re-frame their own moral codes to best serve themselves. James Dungan & Liane Young, *Multiple Moralities: Tensions and Tradeoffs in Moral Psychology and the Law*, 36 T. MARSHAL L. REV. 177, 191 (2011) (commenting that “[o]ften we become our own law-makers, re-writing our own morals to better serve ourselves”); see also C. Daniel Batson, et al., *Moral Hypocrisy: Appearing Moral to Oneself Without Being So*, 77 J. PERSONALITY & SOC. PSYCHOL. 525, 525–37 (1999).

Young people speaking their minds

Are getting so much resistance from behind

It's time we stop

Hey, what's that sound

Everybody look—what's going down<sup>118</sup>

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<sup>118</sup> BUFFALO SPRINGFIELD, *FOR WHAT IT'S WORTH* (Atco Records 1967). See *For What It's Worth Lyrics*, METRO LYRICS, <http://www.metrolyrics.com/for-what-its-worth-lyrics-buffalo-springfield.html> [<https://perma.cc/LCR6-2CVD>].