

R E S P O N S E

Genius vs. Zombies: To Address Climate for the Long Haul, Empower the Innovators, but Don't Disinter the "Dead Hand"

by Keith Cole

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It may seem unfair, in the wake of the Massachusetts election¹ and *Citizens United*,² to look with hindsight at Richard Lazarus' recommendations for drafting federal climate legislation, but given that those recommendations are specifically designed to insulate the legislation from the vicissitudes of time, it is perhaps less so in this instance. It is hard not to conclude that controversial procedural innovations are the last thing we need to add onto this legislation. Rather than burden the legislation with heavy armament to ward off future political pressure, our priority should be to get started in a direction that rewards innovation in products and technologies that decrease our carbon footprint,³ and leave future battles for the future.

One does not have to be a climate scientist to be concerned about the rate of increase in the concentration of greenhouse gases (GHGs) in the atmosphere.⁴ Because energy consumption in today's economy is so closely linked with carbon dioxide emissions,⁵ legislation limiting or reversing this trend will

affect nearly every business and consumer and must overcome enormous political inertia against change.⁶

There is no question that the timescales involved in the climate debate are significantly larger than other issues confronting Congress.⁷ In order for climate legislation to be a success, it must achieve results measured over periods of multiple decades. In this context, Lazarus puts his finger on a fundamental issue for both academics and legislators: how to ensure the continued effectiveness and vitality of the required climate change legislation over time.⁸ Part of the answer lies in making the legislation as economically and politically sustainable as possible, while maintaining its environmental effectiveness. This is the approach taken by the U.S. Climate Action Partnership (USCAP), a coalition of national environmental groups and major companies whose recommendations have been reflected in most of the major climate bills to date.⁹ Lazarus echoes one of the central

to date.

6. In 2007, "[e]nergy-related carbon dioxide emissions account[ed] for over 80 percent of U.S. greenhouse gas emissions." U.S. Energy Information Administration, U.S. Energy-Related Carbon Dioxide Emissions Rose by 1.6 Percent in 2007, <http://www.eia.doe.gov/ncic/press/press298.html> (last visited Feb. 27, 2010).

7. Lazarus ELPAR, *supra* note 4, at 10750.

8. *See id.*

9. USCAP is a coalition of twenty-eight major energy, electric utility, car manufacturing, mining, and environmental groups, as well as other major corporations, including Duke Energy, Exelon, Chrysler, Ford, Dow Chemical, DuPont, General Electric, Siemens, Alcoa, and Rio Tinto. The members have "pledge[d] to work with the President, the Congress, and all other stakeholders to enact an environmentally effective, economically sustainable, and fair climate change program consistent with our principles at the earliest practicable date." USCAP, A CALL FOR ACTION, [available at](http://us-cap.org/USCAP-CallForAction.pdf) <http://us-cap.org/USCAP-CallForAction.pdf> (last visited Feb. 28, 2010). This call for action was reaffirmed and expanded in 2009: "[This blueprint is meant to] provide decision makers in the Administration and Congress with a framework for legislation that can achieve [our previously stated objectives]. It is intended as a guide for the development of legislation in the 111th Congress that can become law." USCAP, A BLUEPRINT FOR LEGISLATIVE ACTION, [available at](http://www.us-cap.org/pdf/USCAP_Blueprint.pdf) http://www.us-cap.org/pdf/USCAP_Blueprint.pdf (last visited Feb. 28, 2010). Finally, the Waxman-Markey draft climate bill adopted many of USCAP's recommenda-

Author's note: This comment represents the personal opinion of the author and does not reflect the position of General Motors.

1. On January 19, 2010, Scott Brown defeated Martha Coakley in the special election to replace Senator Edward Kennedy, becoming the first Republican in 30 years to represent Massachusetts in the U.S. Senate.
2. *Citizens United v. Federal Election Comm'n*, ___ S. Ct. ___, 2010 WL 183856 (Jan. 21, 2010).
3. The European Commission's Joint Research Centre defines "carbon footprint" as "the overall amount of carbon dioxide (CO₂) and other greenhouse gas (GHG) emissions (e.g. methane, laughing gas, etc.) associated with a product, along its supply-chain and sometimes including from use and end-of-life recovery and disposal." European Platform on Life Cycle Assessment, Carbon Footprint: what it is and how to measure it, [available at](http://lca.jrc.ec.europa.eu/Carbon_footprint.pdf) lca.jrc.ec.europa.eu/Carbon_footprint.pdf (last visited June 25, 2010).
4. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 40 ELR (ENV'T L. & POL'Y ANN. REV.) 10749 (Aug. 2010) [hereinafter Lazarus ELPAR]. A longer version of this Article was originally published at 94 CORNELL L. REV. 1153 (2009) [hereinafter Lazarus full-length].
5. Generally, carbon dioxide is seen as the principle greenhouse gas, although methane may deserve a higher level of legislative attention than it has received

elements of the USCAP recommendations, the creation of a tradable emissions program. This would “create a powerful political constituency with a strong economic incentive favoring the legislation’s preservation.”¹⁰ Such an approach potentially creates a large class of political actors, entrepreneurs, inventors, states, and environmental NGOs, which “will have a strong incentive to resist legislative amendments that threaten” the program.¹¹

If only the article had focused more on this point. Rather than exploring ways to further empower those elements of society that can be expected to support the program in future legislative and regulatory battles, the bulk of the article proposes, and seeks to justify the use of, “asymmetric precommitment strategies” comprised of “language in the original bill that directly impeded the passage of [weakening] amendments, or at least limited their effectiveness once passed.”¹² Each of these strategies is designed in some way to constrain the decisions of future legislators and regulators in ways believed to organize the program for its long-term success, regardless of which mix of controls it uses.¹³ Like zombies from a bad movie, these proposals would stalk future generations, replacing their wisdom with the decisions of the (potentially long-dead) legislators of today.

The Army of Zombies

The common thread of the proposed “asymmetric precommitment strategies” is to aggressively take decisionmaking power away from future stakeholders, and vest it with today’s legislators. Many of these suggested innovations are likely to meet resistance in Congress, where it is often politically safer to oppose legislation on procedural grounds to avoid offending constituents on the tough substantive choices. The proposed menu of “asymmetric precommitment strategies” could materially affect the chances of the bill being enacted. And without the “legislative moment,” the rest is moot.

But beyond their immediate impact on the vote count, we should ask whether these strategies are the right approach for ensuring the long-term viability of the climate program once it is in place. Should we anchor the long-term viability of the climate program in the constraint of future decisionmakers? Or, rather, should we seek to empower those with a strong economic stake in invention, clean technologies, and low-GHG business models? In short, should we entrust the future to the zombies or the innovators?

I would do without the zombies because they are a rather antidemocratic lot. Lazarus anticipates this concern, and sets out an extended rationale why, in this instance, we should set aside the usual objections to employing the dead hand.

The article lays out three primary justifications for why the usual objections to employing the dead hand should be ignored.¹⁴ The first is that it has an accepted history. Yes, Ulysses tied himself to the mast, but he didn’t tie his men’s children there.¹⁵ Decisions by Peter sober are probably better than decisions by Peter drunk, but are we so sure that after watching the Copenhagen Conference that the run-up to the next Conference of Parties will meet the test of sobriety?¹⁶ As for the value of our Constitution’s deliberate structures that make lawmaking difficult, we already have the Senate. These examples do not make a compelling case for the dead hand.

I am also unconvinced by the effort to portray the climate debate as so unusual that we should, just this once, make exceptions. Climate legislation is not uniquely “super wicked.” In fact, the three distinguishing characteristics of “super wicked” problems are not that unique.¹⁷ First, that time is not costless, is a common problem in dealing with trust funds such as Social Security and Medicare, which are going broke. Each year that passes without a resolution simply makes the following year’s challenge that much harder. Second, that those who could solve the problem both caused it and have the least immediate incentive to fix it is a feature of many of today’s challenges including, to name just a few, sprawl, wealth disparity, and overfishing of the oceans. Third, the absence of an existing government framework to develop, implement, and maintain laws to address a problem of climate change’s scope is arguably true of world hunger and terrorism as well. The legislative challenges posed by climate change have common elements with many of today’s pressing problems. Thus, the justification of adopting antidemocratic procedures could be applied to all of these problems, were it to be accepted, and we should not be so willing to look the other way on this issue.

While democracy comes in a multitude of flavors, the *sine qua non* of a democratic system is the ability of the governed to jettison those who claim to speak on their behalf. The article proposes legislative and regulatory innovations that are explicitly designed to shift legislative power from future Congresses to today’s Congress. If successful, this transfer in legislative authority is irreversible, or at least hard to reverse, by design. As a result, today’s representatives, or under some of the proposals, an appointed official or entity, would “represent” future generations. But if those generations are dissatisfied with their representation, they are powerless to jettison their representatives.

The article presents the case for why we should not be concerned with the antidemocratic nature of these measures. It sets out a number of reasons why today’s lawmakers are to be trusted to know the future well enough to represent those future decisionmakers and stack the deck accordingly. While this is advanced in the name of preserving the options of future generations, I would rather not burden the legislation

tions including its medium-term target emissions reductions. U.S. HOUSE OF REPRESENTATIVES, DISCUSSION DRAFT SUMMARY: THE AMERICAN CLEAN ENERGY AND SECURITY ACT OF 2009, available at http://energycommerce.house.gov/Press_111/20090331/acesa_summary.pdf (last visited Feb. 28, 2010).

10. Lazarus ELPAR, *supra* note 4, at 10752.

11. *Id.*

12. *Id.*

13. *See id.*

14. *Id.* at 10751-52.

15. Lazarus full-length, *supra* note 4, at 1196.

16. *Id.* at 1197.

17. Lazarus ELPAR, *supra* note 4, at 10750.

with efforts to game future decisions and trust that future Americans will do the right thing.¹⁸

There are other reasons not to disinter the dead hand. One is that we may not know as much as we think we do. Setting aside the subtleties of exactly how much increasing concentrations will change the climate, where those changes will occur, and when, we may enact legislation that sends us barking up the wrong tree. We assume that mitigation by reducing anthropogenic carbon dioxide emissions is the overriding priority (actually, a specific technique of reducing such emissions), but what if methane plays a much bigger role than we realize? What if cap-and-trade is enacted, but turns out to be a huge mess? What if it turns out to be easier to scrub GHGs from the air than trying to get all the major emitters to stop using coal? What if we should put our money into geoengineering or solar shielding? What if our goose is already cooked and we should focus much more on adaptation? If any of these come to pass, we may well regret having enshrined today's solution with protections against future meddling.

Finally, the article's undercurrent of technological pessimism may be at the root of why it seems troubling. There appears to be a hidden assumption here that the goal of legislation will effectively diminish our economic activity and put developing nations, such as China, at an economic advantage. The possibility that we can meet the climate challenge with the American genius for ingenuity and invention does not appear to be considered by the article. Placing a cost on carbon and internalizing it into our economy will certainly bring out political opponents. But it will also create opportunities for innovation in low-GHG products and technologies, along with business opportunity, and the jobs that come with it..

If you believe there is a deep well of creativity, waiting to respond to these market signals, then you can envision climate legislation that will also create strong constituencies within the business community to support its continued implementation and enhance the long-term political sustainability of the climate program.

If, on the other hand, limiting GHG emissions is really a matter of rationing energy and limiting economic growth then there really is no viable political constituency to sustain climate legislation, and fortifying it with lots of procedural roadblocks makes perfect sense. It is just a matter of how many dead hands you can bring to the table.

I'll take my chances with the living.

18. Several recommendations revolve around the elevation of select stakeholders to privileged status. *Id.* at 10755. More radical is the "bold step of creating an office with the formal responsibility of safeguarding the interests of future generations," that is envisioned as potentially having "actual veto authority over certain kinds of decisions." *Id.* at 10754