

A Reply

by Richard J. Lazarus*

I am grateful to all three commenters for taking the time to read and comment on the excerpt in this publication of my article, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*.¹ I am also grateful to the organizers of the Environmental Law and Policy Annual Review Conference, co-sponsored by the Environmental Law Institute and Vanderbilt University School of Law, for providing me with this additional opportunity to reply to the comments.

My reply is directed exclusively to one of the three comments, no doubt because it is the most provocative. The comment by Keith Cole, Director of Legislative and Regulatory Affairs at General Motors, certainly should win the prize for best title: *Geniuses Versus Zombies: To Address Climate for the Long Haul, Empower the Innovators, but Don't Disinter the "Dead Hand."* In describing my article's recommendations, Cole's comment claims that "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."² I applaud a good turn of phrase—like Cole's here—and was a big fan of the classic 1960s horror flick, *Night of the Living Dead*,³ which Cole's comment strongly evokes. But I think this critique is fundamentally misguided.

1. Cole's comment raises a false question. The question is not *whether* present generations will stalk the future; the question is *how*. If we do not enact global climate change legislation capable of addressing the problem in a meaningful and sustained way over time, we risk leaving future generations with an atmosphere so loaded with greenhouse gases that there is little that they can do about it. If the current scientific consensus about the impacts of those gases is true, those future generations will suffer potentially devastating consequences. Now, that's stalking! And, irreversible stalking.

On the other hand, any precommitment strategies that Congress decides to use now to reduce the chances of that

* Professor Lazarus requested the opportunity to submit a reply to the responses to his article

1. 94 CORNELL L. REV. 1153 (2009). See Keith Cole, *Geniuses Versus Zombies: To Address Climate for the Long Haul, Empower the Innovators, but Don't Disinter the "Dead Hand,"* 40 ELR (ENV'T L. & POL'Y ANN. REV.) 10757 (Aug. 2010); Mary D. Nichols, *Comment on Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 40 ELR (ENV'T L. & POL'Y ANN. REV.) 10760 (Aug. 2010); Jeanette M. Soares, *Solving the Super Wicked Problem of Climate Change: How Restraining the Present Could Aid in Establishing an Emissions Cap and Designing Allowance Auctions*, 40 ELR (ENV'T L. & POL'Y ANN. REV.) 10763 (Aug. 2010).
2. Cole, *supra* note 1, at 10758.
3. See NIGHT OF THE LIVING DEAD (Karl Hardman & Russell Streiner 1968).

happening will not be similarly irreversible. If those strategies, described in my article, turn out to be a huge mistake, Congress can change the law. The purpose of precommitment strategies is to make it harder to change the law, but never impossible to do. If new information is developed that shows that greenhouse gases are actually fundamentally good for humankind and the natural environment and not, as most scientists currently suggest, extremely harmful, I am not the least bit worried that there will be insufficient pressure from powerful political constituencies to change the law.

Nor is there anything remotely radical or fundamentally antidemocratic about the idea of making it harder for powerful political constituencies to change the law. Precommitment strategies have a long, established pedigree in U.S. law.⁴ The Constitution is full of them. For instance, on the one hand, we do not allow ourselves to elect the same person to be President more than twice. On the other hand, we do not allow ourselves to remove the President unless he or she is impeached by the House of Representatives and convicted by the Senate, based on a supermajority vote. The Bill of Rights is one big set of precommitment strategies designed to make it hard to enact certain kinds of laws. The Framers of the Constitution and the Drafters of the Bill of Rights understood how the collision of long and short-term interests can, absent certain safeguards, create the risk of poor and destructive lawmaking.⁵

Congress and the President have likewise long understood this risk and promoted laws and lawmaking processes, based on precommitment strategies, to reduce that risk. That is why, at the turn of the 20th century, President Woodrow Wilson and William Jennings Bryan came up with the remarkable lawmaking innovation called the Federal Reserve System.⁶ They understood the limits on Congress' ability to address certain complexities of a then-emerging national economy. President Wilson, not coincidentally himself a scholar of political science, appreciated the need to insulate some kinds of lawmaking processes from the hurly burly of daily political life. These are also lessons that Congress has not forgotten in recent years. One sees analogous uses of precommitment strategies in the crafting of the federal military base closures and health information privacy laws.⁷ In each, legislators understood why the short- and long-term dimensions of a particular problem defied easy lawmaking

4. Lazarus, *supra* note 1, at 1195-1200.

5. *Id.* at 1199.

6. *Id.* at 1203-04.

7. *Id.* at 1201-02.

and so they created a different kind of lawmaking structure to break the logjam.

My only further point is that it is going to require similarly creative lawmaking now to address global climate change and that precommitment strategies should play a significant role in such lawmaking. Global climate change presents an extraordinarily difficult lawmaking challenge because of its enormous spatial and temporal horizons. But nothing in my article suggests what those precise precommitment strategies should be other than that they should be asymmetric in character in order to promote the possibility that the voices of the future will have a fighting chance.⁸

2. A further claim in Cole's submission is that my article rests on an "undercurrent of technological pessimism . . . [and] [t]he possibility that we can meet the climate change with the American genius for ingenuity and invention does not appear to be considered by the article."⁹ Not so. My article is premised on technological optimism. And I fully agree with Cole that it will require enormous technological innovation to meet climate change goals. But, I am also well aware of what will be necessary to make that innovation occur: a stable regime of climate change law over time.

If entrepreneurs in the private marketplace believe that climate change law is unstable and susceptible to constant change over time—in response to short-term economic interests seeking to modify the law's requirements in their favor—market prices will fail to send the necessary signals for long-term investment by entrepreneurs and those interested in technological innovation. That is precisely why asymmetric precommitment strategies are necessary: to stabilize the market and allow for the genius of technological innovation. Cole's own General Motors well illustrates the critical role that law plays in sending the necessary market signals. General Motors waited until legal requirements for better fuel economy became clear, prior to (belatedly) promoting greater fuel efficiency in its production line.¹⁰

3. Cole's final comment has more force but still remains wide of mark. He contends that "[t]he 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."¹¹ This is a legitimate concern. All too often the price of seeking to achieve the best possible law—and refusing to compromise—is no law at all. And I agree with Cole's basic point that it would be a mistake for those serious about the need for meaningful climate change law now to fall into that trap.

Where I nonetheless depart ways from Cole is his too easy assumption that asymmetric precommitment strategies should therefore not be pursued in existing legislative proposals. Of course, if we already knew that all one can pass is legislation without those strategies, and nothing more, then their promotion might well be a mistake. But we do not know that. We do not yet know how strong and effective climate change legislation can be and still pass Congress. And, in what is still an early moment in the legislative process, we should discuss what that legislation should include rather than assume we already know the answer.

If, moreover, we do not now seek to ensure that the legislation that is enacted is sustainable over time, it is unlikely to matter much what Congress nominally passes. The new legislation will become largely symbolic legislation. And its passage will, as a practical matter, sap the force of those seeking climate legislation with promises that, absent the necessary precommitment strategies, quickly become illusory. That's the kind of mootness that worries me the most.

8. *Id.* at 1193-95.

9. Cole, *supra* note 1, at 10759.

10. See John M. Broder, *Limits Set on Pollution From Autos*, N.Y. TIMES, Apr. 2, 2010, at B1; Bill Vlasic & Nick Bunkley, *G.M. Puts Volts Mileage in Triple Digits*, N.Y. TIMES, Aug. 12, 2009, at B5; see also General Motors, Fuel Economy & Alternative Fuels, available at http://www.gm.com/experience/fuel_economy/ (last visited May 2, 2010).

11. Cole, *supra* note 1, at 10758.