

2014

Zombie Federalism

William Baude

Follow this and additional works at: [http://chicagounbound.uchicago.edu/
public_law_and_legal_theory](http://chicagounbound.uchicago.edu/public_law_and_legal_theory)

 Part of the [Law Commons](#)

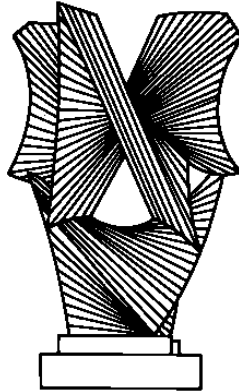
Recommended Citation

William Baude, "Zombie Federalism," University of Chicago Public Law & Legal Theory Working Paper, No. 475 (2014).

This Working Paper is brought to you for free and open access by the Working Papers at Chicago Unbound. It has been accepted for inclusion in Public Law and Legal Theory Working Papers by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 475



ZOMBIE FEDERALISM

William Baude

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

April 2014

This paper can be downloaded without charge at the Public Law and Legal Theory Working Paper Series:
<http://www.law.uchicago.edu/academics/publiclaw/index.html>
and The Social Science Research Network Electronic Paper Collection.

Zombie Federalism¹
William Baude

The most natural question to ask about zombies and constitutional law is whether zombies are persons within the meaning of the Constitution. But that question turns out to be remarkably difficult. The word “person” appears repeatedly throughout the Constitution, but without any clues about whether it extends to zombies.

There is no judicial precedent. *Roe v. Wade* examined the word “person” in the Constitution and concluded that it did not include fetuses, but the Court relied on specific textual clues that the term excludes the unborn.² There are no similar clues that the term excludes the undead.

Nor is there any good evidence of what James Madison thought about zombies.³

This ambiguity is exacerbated by the fact that there are several different types of zombies. Some are self-motivated; some are controlled. Some are basically unthinking, some have the capacity to learn or to remember. Some were created through magic, some through scientific causes. Some zombies have actually died; some have been converted directly from the living.⁴

What’s the best constitutional solution to this problem? Zombie Federalism. The Constitution does not resolve the question of zombie personhood, so we should understand it to leave that question to state law. That is, states can choose to recognize zombie personhood, making them constitutional persons, or not.

This allows *states* to deal with the difficult moral and ethical line-drawing problems about the boundaries of life and death. We would gain the usual benefits of state experimentation. And to the extent that zombies are ambulatory, it will allow them to vote with their feet by shambling to states that recognize zombie personhood.

(One minor wrinkle is whether zombie persons would be “free persons” or “other persons.”⁵ If zombies are “other persons” then that would reanimate the 3/5 clause,⁶ which had previously been thought to be made irrelevant by the constitutional abolition of slavery.)

While the whole idea of letting states define constitutional personhood may seem bizarre, it’s not as strange as it seems. In many places, the Constitution has been understood to let states define some of its terms—called “interstitial law.”⁷ States define “property” under the Takings and Due Process Clauses; they define suffrage in House elections; and most relevantly, they once defined citizenship. Until the 14th Amendment was enacted, the Constitution granted benefits to federal citizens without defining federal citizenship. Instead, it drew in part upon *state* definitions of citizenship.⁸

Unless and until a future Zombie Civil War leads us to adopt new constitutional amendment, we should use federalism for zombie personhood as well.

¹ This presentation was delivered at a panel on “Undeath and Taxes,” by the Stanford Center for Law and Neuroscience on April 15, 2013 (rescheduled from April 1).

² *Roe v. Wade*, 410 U.S. 113, 157 (1973).

³ *Cf.* Oral Arg. Tr 16, *Schwarzenegger v. Entertainment Merchants Association*, No 08-1448 (Nov 2, 2010) (“I think what Justice Scalia wants to know is what James Madison thought about video games”).

⁴ These are canvassed in Adam Chodorow’s pathbreaking *Death and Taxes and Zombies*, 98 IOWA L. REV. 1207, 1210-1213 (2013).

⁵ U.S. CONST. art I, sec. 2, cl. 3 (“Representatives and direct taxes shall be apportioned . . . by adding to the whole number of free persons . . . three fifths of all other persons.”).

⁶ *See* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 256 (1845) (arguing that “other persons” in the Three-Fifths Clause is not directed at slaves).

⁷ William Baude, *Beyond DOMA: State Choice of Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1423-1427 (2012)

⁸ *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 582 (1856) (Curtis, J., dissenting); *see also* Stephen E. Sachs, *John McCain’s Citizenship: A Tentative Defense*, at 11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1236882.

Readers with comments may address them to:

Professor William Baude
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
william.baude@gmail.com

The University of Chicago Law School
Public Law and Legal Theory Working Paper Series

For a listing of papers 1–400 please go to <http://www.law.uchicago.edu/publications/papers/publiclaw>.

401. Gary Becker, François Ewald, and Bernard Harcourt, “Becker on Ewald on Foucault on Becker” American Neoliberalism and Michel Foucault’s 1979 *Birth of Biopolitics* Lectures, September 2012
402. M. Todd Henderson, Voice versus Exit in Health Care Policy, October 2012
403. Aziz Z. Huq, Enforcing (but Not Defending) “Unconstitutional” Laws, October 2012
404. Lee Anne Fennell, Resource Access Costs, October 2012
405. Brian Leiter, Legal Realisms, Old and New, October 2012
406. Tom Ginsburg, Daniel Lnasberg-Rodriguez, and Mila Versteeg, When to Overthrow Your Government: The Right to Resist in the World’s Constitutions, November 2012
407. Brian Leiter and Alex Langlinais, The Methodology of Legal Philosophy, November 2012
408. Alison L. LaCroix, The Lawyer’s Library in the Early American Republic, November 2012
409. Alison L. LaCroix, Eavesdropping on the Vox Populi, November 2012
410. Alison L. LaCroix, On Being “Bound Thereby,” November 2012
411. Alison L. LaCroix, What If Madison had Won? Imagining a Constitution World of Legislative Supremacy, November 2012
412. Jonathan S. Masur and Eric A. Posner, Unemployment and Regulatory Policy, December 2012
413. Alison LaCroix, Historical Gloss: A Primer, January 2013
414. Jennifer Nou, Agency Self-Insulation under Presidential Review, January 2013
415. Aziz Z. Huq, Removal as a Political Question, February 2013
416. Adam B. Cox and Thomas J. Miles, Policing Immigration, February 2013
417. Anup Malani and Jonathan S. Masur, Raising the Stakes in Patent Cases, February 2013
418. Ariel Porat and Lior Strahilevits, Personalizing Default Rules and Disclosure with Big Data, February 2013
419. Douglas G. Baird and Anthony J. Casey, Bankruptcy Step Zero, February 2013
420. Alison L. LaCroix, The Interbellum Constitution and the Spending Power, March 2013
421. Lior Jacob Strahilevitz, Toward a Positive Theory of Privacy Law, March 2013
422. Eric A. Posner and Adrian Vermeule, Inside or Outside the System? March 2013
423. Nicholas G. Stephanopoulos, The Consequences of Consequentialist Criteria, March 2013
424. Aziz Z. Huq, The Social Production of National Security, March 2013
425. Aziz Z. Huq, Federalism, Liberty, and Risk in *NIFB v. Sebelius*, April 2013
426. Lee Anne Fennell, Property in Housing, April 2013
427. Lee Anne Fennell, Crowdsourcing Land Use, April 2013
428. William H. J. Hubbard, An Empirical Study of the Effect of *Shady Grove v. Allstate* on Forum Shopping in the New York Courts, May 2013
429. Daniel Abebe and Aziz Z. Huq, Foreign Affairs Federalism: A Revisionist Approach, May 2013
430. Albert W. Alschuler, *Lafler* and *Frye*: Two Small Band-Aids for a Festering Wound, June 2013
431. Tom Ginsburg, Jonathan S. Masur, and Richard H. McAdams, Libertarian Paternalism, Path Dependence, and Temporary Law, June 2013
432. Aziz Z. Huq, Tiers of Scrutiny in Enumerated Powers Jurisprudence, June 2013

433. Bernard Harcourt, Beccaria's *On Crimes and Punishments*: A Mirror of the History of the Foundations of Modern Criminal Law, July 2013
434. Zachary Elkins, Tom Ginsburg, and Beth Simmons, Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice, July 2013
435. Christopher Buccafusco and Jonathan S. Masur, Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law, July 2013
436. Rosalind Dixon and Tom Ginsburg, The South African Constitutional Court and Socio-Economic Rights as 'Insurance Swaps', August 2013
437. Bernard E. Harcourt, The Collapse of the Harm Principle Redux: On Same-Sex Marriage, the Supreme Court's Opinion in *United States v. Windsor*, John Stuart Mill's essay *On Liberty* (1859), and H.L.A. Hart's Modern Harm Principle, August 2013
438. Brian Leiter, Nietzsche against the Philosophical Canon, April 2013
439. Sital Kalantry, Women in Prison in Argentina: Causes, Conditions, and Consequences, May 2013
440. Becker and Foucault on Crime and Punishment, A Conversation with Gary Becker, François Ewald, and Bernard Harcourt: The Second Session, September 2013
441. Daniel Abebe, One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs, September 2013
442. Brian Leiter, Why Legal Positivism (Again)? September 2013
443. Nicholas Stephanopoulos, Elections and Alignment, September 2013
444. Elizabeth Chorvat, Taxation and Liquidity: Evidence from Retirement Savings, September 2013
445. Elizabeth Chorvat, Looking Through' Corporate Expatriations for Buried Intangibles, September 2013
446. William H. J. Hubbard, A Theory of Pleading, Litigation, and Settlement, November 2013
447. Tom Ginsburg, Nick Foti, and Daniel Rockmore, "We the Peoples": The Global Origins of Constitutional Preambles, March 2014
448. Lee Anne Fennell and Eduardo M. Peñalver, Exactions Creep, December 2013
449. Lee Anne Fennell, Forcings, December 2013
450. Jose Antonio Cheibub, Zachary Elkins, and Tom Ginsburg, Beyond Presidentialism and Parliamentarism, December 2013
451. Nicholas Stephanopoulos, The South after Shelby County, October 2013
452. Lisa Bernstein, Trade Usage in the Courts: The Flawed Conceptual and Evidentiary Basis of Article 2's Incorporation Strategy, November 2013
453. Tom Ginsburg, Political Constraints on International Courts, December 2013
454. Roger Allan Ford, Patent Invalidity versus Noninfringement, December 2013
455. M. Todd Henderson and William H.J. Hubbard, Do Judges Follow the Law? An Empirical Test of Congressional Control over Judicial Behavior, January 2014
456. Aziz Z. Huq, Does the Logic of Collective Action Explain Federalism Doctrine? January 2014
457. Alison L. LaCroix, The Shadow Powers of Article I, January 2014
458. Eric A. Posner and Alan O. Sykes, Voting Rules in International Organizations, January 2014
459. John Rappaport, Second-Order Regulation of Law Enforcement, April 2014
460. Nuno Garoupa and Tom Ginsburg, Judicial Roles in Nonjudicial Functions, February 2014
461. Aziz Huq, Standing for the Structural Constitution, February 2014
462. Jennifer Nou, Sub-regulating Elections, February 2014
463. Albert W. Alschuler, Terrible Tools for Prosecutors: Notes on Senator Leahy's Proposal to "Fix" *Skilling v. United States*, February 2014

464. Aziz Z. Huq, Libertarian Separation of Powers, February 2014
465. Brian Leiter, Preface to the Paperback Edition of Why Tolerate Religion? February 2014
466. Jonathan S. Masur and Lisa Larrimore Ouellette, Deference Mistakes, March 2014
467. Eric A. Posner, Martii Koskenniemi on Human Rights: An Empirical Perspective, March 2014
468. Tom Ginsburg and Alberto Simpser, Introduction, chapter 1 of *Constitutions in Authoritarian Regimes*, April 2014
469. Aziz Z. Huq, Habeas and the Roberts Court, April 2014
470. Aziz Z. Huq, The Function of Article V, April 2014
471. Aziz Z. Huq, Coasean Bargaining over the Structural Constitution, April 2014
472. Tom Ginsburg and James Melton, Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty, May 2014
473. Eric A. Posner and E. Glen Weyl, Cost-Benefit Analysis of Financial Regulations: A Response to Criticisms, May 2014
474. Paige A. Epstein, Addressing Minority Vote Dilution Through State Voting Rights Acts, February 2014
475. William Baude, Zombie Federalism, April 2014