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## ZOMBIE FEDERALISM

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Zombie Federalism<sup>1</sup>  
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.<sup>2</sup> There are no similar clues that the term excludes the undead.

Nor is there any good evidence of what James Madison thought about zombies.<sup>3</sup>

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.<sup>4</sup>

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.”<sup>5</sup> If zombies are “other persons” then that would reanimate the 3/5 clause,<sup>6</sup> 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.”<sup>7</sup> 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.<sup>8</sup>

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

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<sup>1</sup> 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).

<sup>2</sup> *Roe v. Wade*, 410 U.S. 113, 157 (1973).

<sup>3</sup> *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”).

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

<sup>5</sup> 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.”).

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

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

<sup>8</sup> *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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1236882).

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