

Original Intent and Other Cult Classics

When Alexander Hamilton said, in Federalist #78 that the judiciary has “. . . neither FORCE nor WILL, but merely judgment” it was an observation deserving the continued analysis and reflection it has generally gotten. In cases like this it makes sense to consider what the founding generation in the United States had to say. Clearly the generation that wrote the Constitution, and the ones who put it into practice, often merit our attention. When, however, we are asking whether putting a fellow citizen to death is “cruel and unusual,” it intuitively seems to make less sense to look back over two hundred years for guidance as to what is cruel. For one thing, this early America was a place where you could be put to death for messing around with the name of the Christian god or encouraging slaves to revolt.

Some scholars of the Constitution believe that we ought always to consult the Founding Fathers in order to understand how to proceed in matters of constitutional interpretation and public policy. Called “original intent,” this idea has become an important approach to constitutional interpretation. It holds not simply that the founding generation might have something to offer but that its pantheon of patriarchs should rise, as if from the dead, and instruct us in how to understand our polity in the 21st Century. In the case of many conservative constitutionalists, the Founders have achieved cult status. When we venerate great age without regard to all that has changed I think that we have a problem. The revivication of these guys from the 18th Century without regard to how moldy they have become puts “original intent” in the zombie genre.

After discussing the zombie genre and “The Night of the Living Dead,” I will turn to the Straussian jurists of the Reagan Administration and the strange case of Robert Bork to develop the genre for constitutional law. The conclusion looks at the Liberal Dead of the academy, including the Critical Legal Studies Movement and their failure to engage effectively. There is much more to do but this essay is limited in scope and cannot take up all the gory details suggested by the theme.

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The Night of the Living Dead

Classic kinds of films and films with cult status are familiar in popular culture, and my analysis, following the theme of the symposium, looks to a classic genre, the zombie film, and a particular movie, “The Night of the Living Dead,” in an effort to better understand the place of the doctrine of “original intent” in American culture. It is not that many of us often watch zombie movies, but when you think about it, the parallels between the zombie genre and the cult of originalism turns out to be fascinating.

Some of us were reintroduced to zombies or the “living dead” by Michael Jackson’s “Thriller” video from the album of the same name.¹ This work was not frightening in the traditional sense but there were frightening things about the Jackson zombies. One thing was the way they danced and there was the contribution to the emergence of the music video. That was pretty scary. One learns, in exploring this subject, that America has not generally been very receptive to zombies, although mummies, a subcategory,² get some attention every few years. This is as compared to Europe, particularly Spain, where they apparently can’t get enough of corpses stumbling around searching for a bit of live flesh. In Spain, where the mutilated body is a ubiquitous religious icon, people seem fascinated by corpses or cadavers generally.

It is pretty clear, if you search the Web, that zombies are bigger in Europe than in the United States. Europe, of course, has a long history and the dead hand of the past can get pretty intense there. Web searching also lets you compare your interests with those of others who might be looking into zombies. One search I did suggested the always intriguing idea that if I liked “Night of the Living Dead” I might also like “Dawn of the Dead,” “Laughing Dead,” or “Zombie Island Massacre.”³ That is all assuming, of course, that I am checking on zombie films to be scared in the traditional sense.

If one is interested in zombies or “Night” for reasons other than being scared, then a whole different liturgy follows. One can look at the movie for its comment on race relations. There

it is justly praised because it has a black protagonist who is solicitous but not obsequious to white people and who triumphs over evil. In a case of this sort of interest one might have also like “Raisin in the Sun” or “Lillies of the Field.”

Along another track, if one is interested in “Night” because he or she is interested in cultural corollaries to conservative causes and the doctrine of Original Intent in Constitutional law a whole different set of corollaries emerges. Then, one might also enjoy tapes of the Robert Bork or Clarence Thomas nomination hearings or even some of the later John Wayne movies like *True Grit* or *Rooster Cogburn and the Lady*.⁴

In the original 1968 cult classic by George A. Romero, Leonard Maltin’s video guide describes seven people barricaded inside a farmhouse “while an army of flesh eating zombies roam the countryside.”⁵ Although there are no well-known actors in the movie, and the production was decidedly low budget, the film has become a classic. Perhaps as Maltin and the advertising on the box proclaim, it is even a cult classic.

Indeed, the name of the movie was so familiar to me, even though I hadn’t seen it, that I thought it was probably made in the 1930s or 1940s, a period that says “classic” in my film book. But the late 1960s appear to be long enough ago to take the movie back to the cinematic dark ages where films were still made in black and white. It also appears to be a time where at least some people were frightened by a bunch of white people hobbling awkwardly about chasing (mostly) a black man and a bunch of other white folks while weird music plays in the background. Things have certainly changed.

“The Night of the Living Dead” is also a relatively early zombie movie. This genre, which we have indicated is not the kind of horror film Americans are usually drawn to, has unattractive creatures who disgust as much as cause a fright as they are driven by a need to rejuvenate themselves by eating the flesh of the more recently dead. But it is because zombies have returned from the grave, because they consume the flesh of ordinary people, and because they lumber about in a twilight zone that they are linked to the doctrine of Original Intent.

Original Intent

The connection here between “the living dead” and the constitutional doctrine of “original intent” is a matter of historicizing the jurisprudential record. Notions of living documents and the authority of “dead white men” have become a big part of our constitutional life lately. Ever since the American Constitution

came alive in the 1930s, in response to the “dead” hand of the old men on the Supreme Court, there has been a life or death struggle over the status of the text and who deserved to be held out as an authority on it.

I first learned about the vital status of the Constitution from Prof. C. Herman Pritchett, who is best known for the way he demonstrated the notion that judges are political. He had looked closely at the dissenting behavior on the Supreme Court and saw correlations between that behavior and what he identified as the ideological orientations of the justices. Pritchett taught that the Constitution was “alive” and driven by the choices judges make.

He seems to have come to this conclusion because he reached academic maturity during the Roosevelt years at the Court, the

period that followed the struggle over the status of New Deal legislation. The notion that the Constitution was a living document was developed in response to those on the Supreme Court and their academic advisors who claimed that the document was an unchanging instrument that should be set against the winds of radicalism blowing from the legislatures. Edward S. Corwin, one of Pritchett’s predecessors in teaching constitutional law, described some of the dead hand of the past as the “Higher Law” background of American constitutional law.

The New Deal liberals held their own on the Supreme Court from 1937 until the early 1970s. During this time, the Bill of Rights was incorporated into state criminal law, legal segregation was abolished and abortion was legalized. For a period, even the Death Penalty was held to be unconstitutional. The liberals had brought the Constitution to life and they had given a better life to many Americans along with it. They had also made the text, particularly the Bill of Rights, pretty attractive to the rest of the world.

Originalism, or the doctrine that the dead should speak to the living about matters constitutional, emerged in response to that fruitful, liberal period. It was a backlash that began with the administration of Richard Nixon. The doctrine that constitutional meaning should come from the text as it was written or at least ratified spread to the judiciary and the law schools and made a cult out of the ideas and predispositions of the men who gathered in Philly in 1787 to reconstruct the American polity.

Strauss and Reagan

As a dimension of this theme of coming back from the dead I’d like to bring in Leo Strauss and his followers. The creators of Original Intent were of course not the founders but more con-

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temporary figures who sought to enlist the dead in their causes. Adding to the drama, we should note that during the period of liberal life at the Supreme Court a group of dissident academics were left to wander in the wilderness because they were frighteningly conservative and their methodology was dramatically at odds with the dominant traditions in the academy. From this wilderness the Reagan administration brought them back to life and they were to play a central role in a grand rethinking of the judicial project.

These were the Straussians and they presented an important challenge to the living Constitution. The father was Leo Strauss (1899–1973) an émigré from Europe who came to the United States before World War II and, like Pritchett, taught most of his life at the University of Chicago. He taught the central importance of the text and beyond that was a source for the “great books” curriculum that challenged liberal orthodoxy and the equally troubling cult of public opinion.

There is a “living dead” quality to the émigrés who fled the complex and thoughtful cultures in Europe as they succumbed to fascism and the Holocaust. But their contribution to America was so stunning and their place so fully recognized that they quickly transcended the barely human status accorded some current refugees on our shores. It is also easy to think of the Straussian struggle against relativism and for a kind of interpretive certainty as analogous to a retreat to the past in order to come to terms with the meaninglessness of modern life. There is at least the logic of zombieness in that story.

That is exactly the perspective of the second-generation students of Strauss who would not, I believe, yet take on the cult moniker “Straussian” but for whom identification with the leader and development of characteristic approaches to matters of theoretical interest was clearly beginning to be cultish. This second generation, Joseph Cropsey, Martin Diamond, Herbert Storing, and Alan Bloom, among a surprisingly large group of others, began to take on a certain zombie quality. They repeated the mantra ‘the meaning is in the text’ for all who would listen and taught political theory as if everything of importance had already been said. Almost always, we came to note, the important telling was by some dead white male. In fact both the male bonding and the dead texts seemed a little out of it, but that was sort of the point.

Walter Berns, who I consider one of that second generation, went on to prominence in Political Science and transcended the marginal life of the Straussians in the academic wilderness that

was the lot of many of his contemporaries. He was a drinking, smoking conservative who gave the religious new right fits along with liberals. He played cards with influential conservative jurists throughout the 1980s, including Supreme Court Justice Antonin Scalia as he defended the death penalty and his belief that there could be certainty in the academy.

The third generation came into the academy struggling and reached maturity running the government in one of the most amazing intellectual coups of all time. Gary McDowell and John Agresto led this group. The later was for a short time head of the National Endowment for the Humanities and then President of St. John’s College in Santa Fe. The former advised the Attorney General of the United States. I never know how to count

George Anastaplo, whose famous struggles over constitutional freedom in the immediate post-World War II period place him at least in the second generation but whose youthful enthusiasm and failure to complete his dissertation made him seem perennially like a graduate student.⁶

It was McDowell who became the ideologue of the Justice Department and eventually led Edwin Meese to offer the embarrassingly interesting observation that the Constitution is not what the judges say after all but what is written in the text. Clearly the cultivation of the

bodies inhabiting the Reagan White House was made easier by the fact of relatively vacuous spaces above the collective shoulders at the top. I’m not sure about Meese but its clear that the President had other things on his mind short of thinking about where meaning comes from. Indeed, his effectiveness clearly depended on that sort of straightforward engagement on the level America likes and a perspective that is easy to find refreshing.

For the Straussians, being resurrected by the Reagan presence in the White House was a remarkable development and far more significant than we might have imaged possible.

The Bork Nomination

The living dead of original intent is also “personified” by Robert Bork, who had an intellectual kinship with the Straussians and was an unlikely media star of his nomination process. Bork was a strange nominee. His red hair stood somewhat awkwardly in thin tufts, and his goatee gave the judge an odd, slightly manic look. There was an academic’s pallor to his complexion that, given the theme of this essay, is easy to associate with being embalmed.

Ronald Reagan nominated Bork in the early summer of 1987. Hearings would be held until the end of the summer. Interestingly,

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this particular summer marked the 200th Anniversary of the period when the Constitution was written in a closed room in Philadelphia. During the Bicentennial Summer, the scattered legatees of the New Deal period came together for an increasingly rare public performance, rising from the disarray of the 1960s, to keep Bork from taking a seat on the Supreme Court. The success of the denial of this opportunity, which the jurist gave the appearances of believing was rightfully his, should not have been surprising since liberalism is a dominant article of faith. It's just that liberals themselves had been remarkably inept in establishing their influence in matters of public policy.

One aspect of the hearings was that the critical commentary came from Senator Edward Kennedy of Massachusetts. Senator Kennedy has had a number of lives and has been closely associated with death himself. Given the legitimate concern we have for the life of a Kennedy, continuing majorities in Massachusetts are quite pleased that he has been able to continue as our senior senator.

I also like to think that the spirit of Watergate came to life during the hearings. In this view, Bork was held accountable for having stepped in to do the dirty work requested by the Nixon Administration and fire Special Prosecutor Archibald Cox. By that time Cox was quite old himself and somewhat hard of hearing but he remained an Olympian presence for the way in which he sensed that history would judge him favorably. Asked to comment on Bork at a session organized by Clemson University, Cox simply smiled.

What we can say with assurance is that the doctrine of originalism, the doctrine of the living dead, along with a dose of even more bizarre "literalism" brought him down. When asked whether he believed the constitution protected a right to privacy, Bork's technical, juridical answer that it did not could not carry the day. Thus, adding to his links to the living dead is the fact that he was impaled on the privacy doctrine.

It is one thing, it seems, to argue in the halls of academe, that the word privacy does not appear in the Constitution and that indeed the concept is a relatively new development in American law. It is quite another to say, in public, that the Constitution does not protect a right to privacy. This zombie was not going to make it to the Temple of Karnack.

The Liberal Dead

In the end and in part because of the success of the conservative onslaught, there are liberals that appear to be among the living dead. Indeed, the conservatives have been so successful that they have altered the constitutional landscape in the last

decade. Emerging from the wilderness, the conservatives have come to dictate the terms of constitutional politics in major institutions from the Supreme Court to the Harvard Law School. Or maybe they have translated their consciousness and passed on a spirit and consciousness to others.

Two examples of these victims, the liberal dead, are worth noting. The first in time and tragic state are the liberal constitutionalists. These are scholars whose identity was formed by the New Deal Supreme Court. They either came to consciousness during the period or learned from the myriad that did and they look to appellate litigation as an agent for social change in America. They are artificially maintained by tenure and jobs that allow them to continue to think in the categories of the 1960s.

These zombies teach that *Brown v. Board of Education* is the key to progressive politics and that civil rights are protected on appeal. These are the liberal dead. Most have not even embraced "the myth of rights" and the opportunity for progressive politics in movement litigation strategies.⁷

The liberal dead, in the end, are the ones who one would think would be nearing retirement shortly. They might have been permitted to teach liberal constitutionalism with a straight face as late

as 1973 and if they completed a dissertation then at around 30 years of age, they would be nearing sixty-five now. Of course, you can't expect scholars to notice institutional change of this sort right away and given the scholarly time lag perhaps its fair to imagine that at least until William Rehnquist was joined by Antonin Scalia on the High Court in the mid-80s, liberal hope in the Court still made some, albeit diminished, sense. The youngest of these liberals would be in their fifty's, and though still teaching, they are not adding to the literature as they once did. For them liberalism still resides in the hope of a Supreme Court populated by New Deal constitutionalists. Although if pressed they will acknowledge that this is no longer the case, they tend to act as if it is. This failure to deal with reality and the reality of a pretty conservative judiciary may be two of the reasons the liberals have generally failed to multiply in the fashion of the conservatives.

There are also the leftists of a Critical Legal Studies bent who are similarly limited in their conception of constitutional interpretation. During the 1980s they turned away from litigation strategies in favor of the insular world of the American law school, barricading themselves in a peculiar place from which to lead a popular movement. For a decade they allowed a group of jurists with the only sinecure more substantial than their own to dictate what the Constitution means and narrow the range of their politics.

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This wasn't only because of who was on the courts. They also had strange notions of where to look for inspiration on radical social change in America. They invariably took meaning from some other culture, usually Europe or the Third World. This was the case of the deconstructionist bent they tried to offer as a successor to realism, the homegrown theory that had been offered as a liberal critique of academic legal thought in the preceding generation. CLS produced effete theories that one might not expect would be likely to take root in American soil.

As in the movie, the heroes on the left in this story are not the elites but the activists. They come from labor, poverty, and movements of people of color who work with what they have, their numbers and their experience. And, like the good guys in the movie, they refuse to barricade themselves in a room with no exit.

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Endnotes

1. Issued in 1982, the video received an MTV Music Award in 1984 and the video "The Making of Thriller" won a Grammy in 1985.

2. From Boris Karloff to Brendan Fraser mummies have been more often a hit in the USA, perhaps because their rotting flesh is all bandaged up.

3. See also "Plan 9 from Outer Space", "Re-Animator", "Blood Feast", "Blood Sisters", "Bloodsucking Freaks", "Children Shouldn't Play With Dead Things".

4. John Wayne was a heroic figure in post-World War II America who identified with various conservative causes. In his last movies Wayne played aging cowboys who came back to fight again. President Ronald Reagan ended his eulogy for Wayne quoting him in the *The Alamo*: "There's right and there's wrong," Duke said. "You gotta do one or the other. You do the one and you're living. You do the other and you may be walking around but in reality you're dead." *Reader's Digest* published the eulogy in 1979.

5. New York: Penguin, 1999: 973. Romero concentrated in scary movies but none stand out although he wrote the script for the 1990 sequel and acted in *Silence of the Lambs*. Although the failure of the sequel is interesting from a jurisprudential point of view, I couldn't bring myself to rent it.

6. Mark Blitz, "Straussians in Government," in Kenneth L. Deutsch and John A. Murley, eds. *Leo Strauss, the Straussians, and the American Regime* Lanham, MD: Rowman and Littlefield, 1999.

7. Not for instance Michael McCann, Stuart Scheingold, Helena Silverstein or not certainly myself.