

THE CONSTITUTIONAL VISION OF ORESTES BROWNSON

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Orestes Brownson (1803–1876) was one-of-a-kind, an American truth seeker and writer whose honesty and integrity were unquestioned but whose intellectual quest led him to embrace virtually the gamut of positions. He was at various times a Congregationalist, Presbyterian, Universalist, Unitarian, erstwhile minister and preacher, even atheist, socialist, and Transcendentalist. Then in mid-life he embraced Catholicism for the remaining thirty-some years of his life.¹ He continued to write and publish extensively and controversially, sparring with Catholic bishops and even John Henry Newman, a contemporary Catholic convert from another English-speaking country.²

In 1866, he published *The American Republic*, his mature thought on the constitution and character of our system of government at the end of the Civil War, in which he lost two sons fighting for the Union.³ The book has been compared to Alexis de Tocqueville's *Democracy in America*, as a comprehensive view of the American system.⁴ Interestingly, both authors viewed Catholicism as a good match for what America needed to sustain its experiment in ordered liberty.⁵

Even though he was a prominent associate of Ralph Waldo Emerson, Henry David Thoreau, Theodore Parker, and other prominent New England

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1. THEODORE MAYNARD, ORESTES BROWNSON: YANKEE, RADICAL, CATHOLIC, at ix–xiv (Macmillan Co. 1943) (discussing Brownson's intellectual journey).

2. *Id.* at 198–99, 248–51, 325 (noting Brownson's disputes with bishops and Newman).

3. *Id.* at 340–45; see also Peter Augustine Lawler, *Introduction* to ORESTES BROWNSON, THE AMERICAN REPUBLIC, at xix–cvii (Isi Books 2003) (1866) [hereinafter Lawler, Preface] (providing an overview of the life and work of Orestes Brownson).

4. Lawler, Preface, *supra* note 3, at xviii.

5. *Id.* at xviii–xx, xxix.

writers and intellectuals, he tends to be forgotten in the history of the times. Because of his conversion to Catholicism and in general his sometimes irritating insistence on following truth and logic wherever it led him, regardless of politics and social propriety, he fell out of prominence and favor with the public during the last half of his life.⁶ That is a shame, because he was always insightful and interesting, and his mature thought and reflections on our Constitution and society are well worth revisiting, which is the purpose of this article.

I think it fair to say that he celebrated the U.S. Constitution and the republic it organized, with its powers dispersed horizontally among the three branches of the federal government and vertically through federalism between the general federal government and the particular state (and local) governments. There is something of perennial interest in this, as the experience of subsequent centuries would indicate. The development of the welfare and administrative state in response to the Great Depression and the expansive use of the war power during the world wars and the Cold War characterized the twentieth century. More recently, the challenge of legislative inertia, if not paralysis, and government by presidential executive orders under Biden and Trump, as well as more frequent recourse to the federal judiciary to police legal boundaries and the excesses of the welfare and administrative state, mean that in the twenty-first century our constitutional framework is more important than ever.

In the twentieth century, no less a political authority than Woodrow Wilson, an erstwhile progressive Democrat whose star has largely dimmed recently because of his racism and sexism,⁷ reportedly called Brownson's *The American Republic* "the most masterly work on the American Constitution."⁸ Of course, Wilson offers dubious praise, since he was the teacher and practitioner as the president of the "living Constitution," as opposed to its original literal meaning.⁹ He also substituted an organic evolutionary model of constitutional interpretation inspired by Darwin—as opposed to the Newtonian checks and balances of the time of the framers.¹⁰ All of this risks

6. MAYNARD, *supra* note 1, at ix.

7. See CHRISTOPHER COX, *WOODROW WILSON: THE LIGHT WITHDRAWN* 10 (Simon & Schuster 2024).

8. MAYNARD, *supra* note 1, at 345 n.104 (citing FELICIA CORRIGAN, *SOME SOCIAL PRINCIPLES OF ORESTES A. BROWNSON* 15 n.1 (Cath. Univ. of Am. Press 1942) (noting report of Wilson's statement)).

9. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 56–57, 60 (1908).

10. MAYNARD, *supra* note 1, at 56–58; see also G. Edward White, *The Transformation of the Constitutional Regime*, 85 VA. L. REV. 1, 146–50 (1999) (describing the interplay between foreign relations and constitutional interpretation).

making the actual words of the Constitution a dead letter, and its original meaning, as understood at the time of ratification, something simply to be overridden by creative judges and executives.¹¹

Arthur Schlesinger, Jr., while an undergraduate at Harvard College in the late 1930s, wrote a senior honors essay on Orestes Brownson which, at his father's suggestion, he turned into a book published in 1939: *Orestes A. Brownson: A Pilgrim's Progress*.¹² Schlesinger would become famous for his multi-volume history on Franklin Roosevelt and the New Deal, and as speech writer and in-house historian for the first Catholic President, John F. Kennedy, who also published around the same time his Harvard honors essay, *Why England Slept*.¹³ Previously, another one-time Harvard faculty member named Daniel Sargent, from the illustrious Massachusetts Sargent family, another Yankee who had converted to Catholicism like Brownson, had published a book in 1935 titled *Four Independents*, the last of which was Orestes Brownson.¹⁴

There is also a very extensive biography of Brownson written by Theodore Maynard, an English professor and British convert to Catholicism. It was published during the Second World War, in 1943, and is titled *Orestes Brownson: Yankee, Radical, Catholic*.¹⁵ Although Brownson was never entirely forgotten, with his voluminous writings, I think it fair to say he was largely sidelined from public discourse in this country.¹⁶

Another president, this time from the nineteenth century, Brownson's own, also had something to say about him. Martin Van Buren, who succeeded Andrew Jackson as a Democratic president, was defeated for re-election in 1840, even though he was the candidate that Brownson supported.¹⁷ In July 1840, Brownson had written an article titled "The Laboring Classes," which Schlesinger wrote "deserves a high place in revolutionary literature."¹⁸ Brownson had argued for the abolition of the right to bequeath property at death.¹⁹ This socialist view was a step too far for the country.

11. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–53 (1989).

12. ARTHUR M. SCHLESINGER, JR., *A PILGRIM'S PROGRESS: ORESTES A. BROWNSON*, at ix–x (Little, Brown & Co. 1939).

13. *Id.* at ix–xi; see also ARTHUR M. SCHLESINGER, JR., *A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE* (1965) (recounting the successes and challenges of President Kennedy's tenure in office).

14. DANIEL SARGENT, *FOUR INDEPENDENTS 187–243* (1935).

15. MAYNARD, *supra* note 1.

16. *Id.* at ix.

17. SCHLESINGER, *supra* note 12, at 110.

18. *Id.* at 95.

19. *Id.* at 94.

That a prominent Democrat should write as Brownson did was taken as proof positive that the party was made up of 'Marat democrats,' as old John Quincy Adams confided to his diary . . . After Van Bureau [sic] had been beaten by the hard-cider and log-cabin slogan and a song chanted by drunken mobs, he fastened the cause of his defeat upon Brownson.²⁰

One sees from this episode in Brownson's life, at a time when he was a socialist bordering on Marxism, both his honesty about what he thought and his lack of political savvy.²¹ Truth for him was everything, and he would not sacrifice it to garner votes or popularity.²² In this regard, he reminds me of the Yankee Adams family, particularly John Adams and John Quincy Adams, who tended to write and speak the truth as it struck them, regardless of politics. That helps explain why they were both one-term presidents. As such, Orestes Brownson was always a somewhat dubious political ally.²³

Returning to *The American Republic*, published right after the end of the Civil War, here is Brownson's own belated assessment of the book, written in 1873:

The work, of which a new Edition has just been published, was not received, except by a very few, with much favor. It was condemned at the North as southern, at the South as northern; it was abused both North and South because it was dedicated to my old friend George Bancroft, by Protestants because written by a Catholic, and by Catholics because it did not favor their political prejudices. As nobody took up its defence, its success was not flattering.²⁴

He would die in 1876.²⁵ "I am not and shall never be a saint' had been Brownson's saying fifteen years before his death. He would have said the same on his death-bed."²⁶

For Brownson, it is important to situate the American Constitution in a larger context than simply the written text. In this, he exemplifies a kind of Catholic approach to the text. *Sola scriptura*, the idea that all revelation is contained in the written text of the Bible, and only written Biblical authority

20. MAYNARD, *supra* note 1, at 92–93.

21. SCHLESINGER, *supra* note 12, at 101.

22. MAYNARD, *supra* note 1, at 94.

23. *Id.* at 92, 99 n.40.

24. *Id.* at 345.

25. SARGENT, *supra* note 14, at 243.

26. *Id.* at 242.

is to be followed, is a distinctly Protestant notion.²⁷ The Catholic and Orthodox view is that Scripture arose in the Church, that it came out of a living tradition, and that it should be interpreted according to the mind of the Church, in line with the Church's teaching authority.²⁸ The Protestant tendency to treat the written text of the Constitution in the same way is part of our history. Justice Hugo Black, for example, who had a long tenure on the Supreme Court in the twentieth century, was almost a fundamentalist when it came to interpreting the Constitution. Rights were only what were specified in the Bill of Rights, and due process protected none other, certainly not the natural law nor "fundamental fairness." Black, who had been a member of the Ku Klux Klan before his appointment to the Supreme Court, though he evolved in favor of the civil rights legislation of the 1960s, has been characterized as a persistent anti-Catholic.²⁹

Well, Brownson's view of the Constitution was more Catholic. The Constitution arose within the territorial democracy of the thirteen former British colonies. As he says:

[T]here is no sovereign people or existence of the United States distinguishable from the people or existence of the particular States united. . . . The solidarity of the members constitutes the unity of the body. The difference between this view and Mr. Madison's is, that while his view supposes the solidarity to be conventional, originating and existing in compact . . . this supposes it to be real, living, and prior to the convention.³⁰

I think it fair to say that this departs from the standard, social-compact theory of the Constitution, held by the framers, that located legal authority in the consent of the governed. Brownson had a broader, deeper view, that ultimately all authority comes from God, not via the so-called Divine Right of Kings, which was a pretension of the Stuart monarchs, but through the people organized as a territorial democracy and republic. Thus, both personal freedom (and the rights of the minority) as well as governmental authority are all safeguarded.

On that basis, Brownson lays to rest John C. Calhoun's secessionist theory. Since the Republic was not created by contractual adhesion to the

27. *Second Vatican Council, Dei Verbum* ¶¶ 9–10 [Dogmatic Constitution on Divine Revelation] (1965), reprinted in *THE SIXTEEN DOCUMENTS OF VATICAN II* 373 (Nat'l Cath. Welfare Conf. trans., 1967).

28. *Id.* ¶¶ 9–12.

29. HUGO L. BLACK, JR., *MY FATHER: A REMEMBRANCE* 104, 216 (1975).

30. MAYNARD, *supra* note 1, at 347 n.107 (citing BROWNSON, *supra* note 3, at 158).

Constitution, but rather preceded it and qualifies it, there is no right for states to secede or to nullify valid federal law. Of course, the American Civil War was fought over this question. Practically speaking, irrespective of constitutional theory, it had been settled on the battlefields of that war.³¹

What makes this rejection of Calhoun by Brownson so powerful is that during the 1840s Brownson was a Calhoun supporter, backing his run for President.³² At this period Brownson thoroughly approved his [Calhoun's] theories and was an extremist with respect to "state's rights." He lost no opportunity of asserting that the states were severally sovereign and that the federal government enjoyed no more than delegated powers—a position he was to abandon completely under the impact of the Civil War.³³

Brownson believed that there was an unwritten constitution before and behind the written constitution, a set of legal principles and rights, natural and comprising the common good of the people of this country, which inherited England's unwritten constitution and common law, with its legacy of due process and habeas corpus.³⁴ Unlike Enlightenment principles, which applied to every human being by virtue of being human, they were particular to place and time.³⁵ "Brownson opposes, above all, the abstract universalism that animated the French Revolution, a universalism that collapsed the real distinctions separating the economic, political, and spiritual conditions that constitute human existence."³⁶

Indeed, Brownson calls this unwritten constitution a providential constitution:

[G]iven by God himself, operating through historical events or natural causes. Lawler quotes Brownson as calling the providential constitution '[t]he law of all possible developments' for the nation (112), which are present at the nation's beginning. They must be understood to have been given by God, because they certainly were not created by human beings. No nation can create itself, or give itself a government or written constitution out of nothing: 'The nation must exist, and exist as a political community, before it can give itself a constitution' (91).³⁷

31. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA*, at vii–viii (1988).

32. MAYNARD, *supra* note 1, at 103.

33. *Id.*

34. Lawler, Preface, *supra* note 3, at xxxi–xxxiv.

35. *Id.* at xxxiv–xxxv.

36. *Id.* at xxxv.

37. *Id.* at xlviii.

I think it clear that Brownson's view of the providential unwritten constitution fits in well with the current emphasis in some circles on "common good constitutionalism" or even natural law foundations to the constitution, even more than the currently prevailing originalist understanding. Though as a person who valued historical facts and truth, Brownson would have respected the originalist understanding of the Constitution as written and enacted, albeit within a larger context.

No government, whose workings are entrusted to men, ever is or can be practically perfect—secure all good, and guard against all evil. In all human governments there will be defects and abuses, and he is no wise man who expects perfection from imperfection. But the American constitution, taken as a whole, and in all its parts, is the least imperfect that has ever existed, and under it individual rights, personal freedom and independence, as well as public authority or society, are better protected than under any other; and as the few barbaric elements retained from the feudal ages are eliminated, the standard of education elevated, and the whole population Americanized, moulded by and to the Americansystem, it will be found to effect all the good, with as little of the evil, as can be reasonably expected from any possible civil government or political constitution of society.³⁸

When Brownson writes of the *Federalist*, he calls those essays 'masterly and profound.' Catholic statesmen throughout the world, in fact, ought to be chastened by the fact that what the Protestant and politically atheistic American founders built was more in accord with Catholic principles than anything they themselves have ever accomplished.³⁹

Part of the genius of America, which the Thomistic philosopher Jacques Maritain also highlighted, was its departure from the European model of having an established religion and instead allowing religious freedom. Religions would advance through persuasion and conviction rather than coercion and government benefits.

[A] church establishment, or what is called a state religion, would be an anomaly, or a superfluity. The true religion is in the heart of the state, as its informing principle and real interior life . . . neither of which can

38. O.A. BROWNSON, *THE AMERICAN REPUBLIC* 85 (N.Y., P. O'Shea 1866).

39. Lawler, Preface, *supra* note 3, at xli–xliii.

be forced, because both must, from their nature, be free-will offerings to God.⁴⁰

“[F]or she can advance no farther than she wins the heart and convinces the understanding. A spiritual work can, in the nature of things, be effected only by spiritual means. The church wants freedom in relation to the state.”⁴¹ This understanding of the importance and significance of religious freedom would come to be recognized by the Catholic Church only at the Vatican II Ecumenical Council, which published its decree *Dignitatis Humanae* on religious freedom in 1965.

He is also prophetic about the country’s future: “The United States must henceforth be a great military and naval power, and the old hostility to a standing army and the old attempt to bring the military into disrepute must be abandoned.”⁴² This of course became true in the twentieth century with the dominant role this country’s armed forces played in the two world wars and the cold war. A standing army did of course ensue.

There is an excellent radical point which Brownson makes about the role of wealth in our democracy and which Maynard has highlighted:

The men of wealth . . . are the men who exert the worst influence on government in every country, for they always strive to use it as an instrument for advancing their private interests. They act on the beautiful maxim, ‘Let the government take care of the rich, and the rich will take care of the poor,’ instead of the far safer maxim, ‘Let government take care of the weak, the strong can take care of themselves.’ Universal suffrage is better than restricted suffrage, but even universal suffrage is too weak to prevent private property from having an undue political influence.⁴³

One need only think of the current debates on the role of money in political campaigns, or the outsized role billionaires are playing in our politics and government, irrespective of party affiliation, in order to recognize the truth of Brownson’s critique and warning for our country.

Federalism, separation of powers, religious freedom, a strong military, global influence, and solicitude for the poor all characterize Brownson’s view of our polity. By modern standards, he is both conservative and liberal, and prescient when it comes to the eventual development of Catholic social

40. BROWNSON, *supra* note 38, at 125.

41. *Id.* at 127.

42. *Id.* at 117.

43. MAYNARD, *supra* note 1, at 346 (quoting BROWNSON, *THE AMERICAN REPUBLIC* 383 (2003)).

doctrine, which, in its modern garb, originated after he died in Pope Leo XIII's famous social encyclical of 1891, *Rerum Novarum*.⁴⁴ Brownson did not use the terms subsidiarity or preferential option for the poor, or even secularity and a healthy anti-clericalism, but he advanced the substance of these ideas in his writings, as his frequent friction with various Catholic bishops over his writings illustrates. He could be cantankerous and difficult to get along with, but he was often right. He was always honest and true to his views, even if they evolved significantly over his life. As our new Doctor of the Church, Saint John Henry Newman wrote: "[T]o live is to change; and to be perfect is to have changed often."⁴⁵ The one thing he did not change, however, was his allegiance both to the Catholic Church and to his country.

In sum, Orestes Brownson's constitutional views help us to keep the American Republic as the representative government it was designed, may I even suggest, was willed by God to be. Benjamin Franklin reportedly said that the constitutional convention established a "republic . . . if you can keep it."⁴⁶ In the end, there can be no lasting substitute for an informed, vigilant citizenry—such as Orestes Brownson continually strived to achieve through his voluminous writings.

44. See generally Pope Leo XIII, *Rerum Novarum* [*Encyclical Letter on Capital and Labor*] (1891) (explaining the teaching of the Catholic Church on social issues such as the rights of the worker, the right to private property, and the errors of socialism).

45. JOHN HENRY CARDINAL NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE 40 (6th ed. 1845).

46. 3 RECORDS OF THE FEDERAL CONVENTION OF 1785, at 85 (Max Ferrand ed., rev. ed. 1966).