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Review Essay:

A Liberal "Welfare Conservative" Boldly Explains Why Nineteenth-Century Popes Are Relevant to Twenty-First-Century Welfare Reform*

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At a time when some public policy entrepreneurs consider "no labels" to be the most sophisticated and admirable of labels,[1] it is refreshing to see a writer in the ideological bridge-building genre—I am sure Lew Daly would accept that description of this useful new book—who is willing to accept a label. Lew Daly is, he says, a "welfare conservative."

Perhaps his roots are more on the left than this designation lets on, but Daly's key break with the (rest of the) left must make him feel his (new) conservative side more keenly these days. In a word, he is an admirer of George W. Bush's "faith-based initiatives." He was not an admirer of George W. Bush's presidency, which, as most agree, was blown off course by events that denied him the domestic-policy focus that many, including Daly, believe he sought. Of one particular policy that drew so much scorn from the left and some even (Daly chronicles this too) from the right, Daly was a keen admirer.

Daly defends faith-based initiatives against a number of attacks. In following him through these defenses, we visit several different worlds: the Christian mandate to help the poor; Washington think tanks (mostly the conservative ones); the Supreme Court's dizzying but slowly improving Establishment Clause case-law; Popes from Leo XIII (1878–1903) to Pius XI (1922–1939); the life and thought of Dutch Calvinist politician Abraham Kuyper (1837–1920); and, of course, the early days of the George W. Bush White House. The achievement

* Lew Daly, *God's Economy: Faith-Based Initiatives and the Caring State*, Chicago: University of Chicago Press, 2009 (318 pages).

of this book is to bring these threads together to give the reader a sympathetic understanding of what faith-based initiatives are, what they are not, and where to look for their intellectual roots.

What they are: an executive-initiated federal policy of allowing religious social service organizations to receive federal money made available by Congress for welfare purposes, on the same basis as secular organizations might do so, and without requiring them to dilute their religious mission or identity.

What they are not: block grants. In a block grant, the federal government says, in effect, "Here, have back some of the money we took from you in taxes, but use it for eleemosynary purposes that you and/or your state government will determine." Block grants create an illusion of federalism, but of course, in an originalist federalist system, the money would probably not have been taxed away at such high rates in the first place. In addition, some experts, such as Marvin Olasky (with whom Daly carries on a fraternal dispute on this point throughout the book) see block grants as less likely to come with mission-distorting strings attached than are the initiatives Daly admires.

What their intellectual roots are: the Catholic doctrine of subsidiarity and the (similar, but not identical) Calvinist doctrine of sphere sovereignty, and, ultimately, the gospel mandate to feed the poor. This mandate is filtered through the Catholic and Calvinist teachings so as to prevent several possible outcomes seen by Daly as undesirable: that government services to the poor not happen at all; that they happen in a way that marginalizes religious organizations amid an ever-growing government zone (the "crowd out" effect); or that religious organizations, in order to work with the state, pay the price of downplaying or even violating their religious mission.

Faith-based initiatives, Daly believes, contain the seed for reconciling these differences. He further argues that the much-condemned George W. Bush Administration had the right formula and that the Obama Administration has kept them in operation. (The last point might get him an argument at the level of detail, but it does appear to be the case that the present administration had not pulled the plug on the experiment.)[2]

Constitutional Law

Though repeatedly disclaiming expertise in constitutional law, Daly gives a summary of recent trends in the Supreme Court's Establishment Clause jurisprudence that is basically accurate and refreshingly free of overused labels and metaphors. *Everson v. Board*,[3] while narrowly allowing a church-state accommodation that ought never to have been controversial (a state reimbursing student school bus

expenses on an equal basis, whether the student rode the bus to public, secular private, or religious school), also announced, without dissent on this point, that Jefferson's wall of separation metaphor,[4] introduced eleven years after the First Amendment was ratified, was normative for interpreting the Establishment Clause. This ushered in a wave of picayune hair-splitting cases in which the Court detected the insidious stirrings of a Constantinian establishment whenever, for example, a public school admitted clergy into its space to give religious instruction to students whose parents enrolled them for;[5] or when a state lent secular "instructional materials" other than books to a religious school[6] (but books alone were OK).[7]

Daly draws an interesting distinction: in the area of "state" (i.e., public school) endorsement of prayer, the Court has not really changed its stripes. Over repeated Scalia dissents,[8] it keeps the Establishment Clause line tight there. However, in the area most important to Daly's topic—equal access for religious entities to money the government makes available for charitable purposes, without sacrifice of their religious identity—the Court has indeed retreated from its Secular Inquisition stance of the 1970s and early 1980s, even overruling some of the stranger decisions from that era. After the key provouchers decision of *Zelman v. Simmons-Harris*,[9] the Establishment Clause scruples of the Court's majority are satisfied if access to funding is on an equal basis (not deliberately tilted toward religious groups), and if voucher money goes to religious schools as a result of parental choice, not as a result of government choice.

The latter factor—the client-choice "circuit-breaker"—does not apply as obviously to social service and charitable organizations as it does to schools, so the question remains to be decided whether, in the case of such organizations, equal access is enough. With the present Supreme Court, all signs are good. At present writing, the issue has not come up, nor is expected to.

On one point, though, I must dampen Daly's optimism. He celebrates the Court's decision in *Mitchell v. Helms*[10] (allowing state donations of computers to religious schools) as having put an end to the Court's use of the term *pervasively sectarian*. He is right that this put-down phrase had often been used by the Court to justify findings that religious institutions could not receive government aid. He is correct, too, that Justice Thomas, in his opinion in *Mitchell*, denounced the term as "born in bigotry," most particularly against Catholics and their church. Public schools were never denounced as pervasively sectarian; not when they were pervasively pan-Protestant, nor later on when they became pervasively secularist.

However, Thomas was writing in *Mitchell* for a plurality of the Court only: Justice O'Connor concurred on separate, narrower grounds and did not join in the rejection of pervasively sectarian. Moreover, Justice Souter not only used *pervasively sectarian* in his dissent in *Mitchell* (I counted six times, including

footnotes), but he continued to use it in other subsequent opinions (albeit, we may be grateful, mostly dissents) as long as he remained on the Court. Evidently he had no problem using repeatedly, even ostentatiously, an expression that a plurality of the Court had fingered as bigotedly anti-Catholic. Perhaps he will have the last laugh: We do not yet have in hand a majority opinion—a holding of the Court—rejecting the term *pervasively sectarian* and all its bigoted baggage.

At the Think Tanks

Daly's capsule history of how welfare policy fared in the conservative think tank world may reach the more-than-you-ever-wanted-to-know point if you are not an inside-the-beltway policy-wonk sports fan. I am, however, so I was riveted, especially as people I know flitted in and out of Daly's pages. He attributes considerable influence to a 1987 manifesto called *Cultural Conservatism*, by William H. Marshner and William Lind. Marshner is a theologian at Christendom College who has also from time to time lent his formidable mind and pen to the Catholic precincts of the D.C. think-tank world; Lind had worked for both conservative Senator Robert Taft and liberal Senator Gary Hart (on military matters).

My own recollection is that *Cultural Conservatism* generated less discussion than it should have; in Daly's view, even where it was not accepted in full (and after all, it does rather throw the libertarian side of conservatism under the bus), it helped open the door to other, more mainstream discussions about how *welfare* and *helping the poor* could cease to be dirty words among conservatives (if they ever were), and how conservative principles—especially the Richard Neuhaus-Peter Berger theory of mediating institutions[11]—could be deployed toward these ends. Whatever credit is due to Marshner and Lind (and Paul Weyrich, whose Free Congress Foundation published their book), the 1990s were a period of fruitful discussion of these issues among conservatives, in a way the 1980s—dominated by cutting government while also beating the Soviets—had not been.

Daly makes clear that most conservative policy intellectuals did not respond to the end of the Cold War by "looking for new enemies," as is often charged. They responded by investigating what their philosophy could say about other issues. The GOP sweep in 1994 did not derail this discussion: On the contrary, by bringing Bill Clinton to the ideological bargaining table, it produced both welfare reform, about which Daly shows little enthusiasm (please remember, he is *not* a libertarian or a traditional economic conservative), and the charitable choice principle in tax law, which Daly hails as one of the gateways to faith-based initiatives.

The Unknown Nineteenth Century

The part of *God's Economics* that may strike some readers as the most arcane, yet which I would suggest is the most important—and clearly it is quite important to Daly—is that dealing with certain nineteenth-century Catholic and Calvinist discussions of church-state issues. It is not this book's least achievement to show how the thought of Pope Leo XIII and Dutch political leader Abraham Kuyper furnish indispensable background for understanding faith-based initiatives today.

Being more familiar with the Catholic side of this corpus, I will focus attention thither. Daly does a simply outstanding job of setting the nineteenth-century Catholic polemic on separation of church and state in its historical context, without which it will be poorly misunderstood. As Americans, we think that separation of church and state, whatever it is, is to be found somewhere between the permissive[12] Scalia-Thomas version and the restrictive Souter version. Altogether absent from our field of vision is the French Revolution (state authority imposed on Catholic clergy, nuns martyred, Catholic rebels in the Vendée put down through industrial-capacity slaughter);[13] the aggressive European liberalism of the nineteenth century (including the anticlericals who carried out the unification of Italy); Bismarck's *Kulturkampf* against the Catholic Church (the literal and original culture war); and the ambiguous embrace of Mussolini, who restored some power and privileges to the Church in the 1929 Lateran Pact, yet also asserted her subordination to the state and actively campaigned against Catholic youth groups (which competed with Fascist ones).[14]

In short, we think of separation of church and state as something inevitably benign, even when we disagree about its meaning. Quite apart from new historical research that draw its basic benignity into question even in the American context,[15] from a nineteenth-century European Catholic point of view, it could have, and did, mean only one thing—The *sans-culottes* are coming; escape if you can.

Daly shows us why this is so and—more importantly for his overall thesis—why the groundbreaking social theory of Leo XIII, including the theory of subsidiarity, has to be seen as part of a larger vision of restoring a world in which church and state respect each other's boundaries, even if these occasionally overlap. As Daly sees it (and, if I may, I will draw on my prelaw-school training as a medievalist[16] to say that I think he is probably right), the best Catholic church-state theory was the one articulated by Pope Gelasius I: *Duos sunt*, "there are two" or "they are two"; that is, two powers, two "swords,"[17] the sacred and the secular, a theory derived from Jesus's own distinction concerning "the things that are Caesar's."[18]

Serving the poor is among the church's missions. For Daly, the welfare conservative, it is also a traditional function of the state. If the state were to prohibit or crowd out the role of the church in this area or, if the state and religious organizations were to work together in such a way that the church(es) had to make faith-denying compromises, the *Duos sunt* balance would be upset. Faith-based initiatives, Daly shows, deliver aid to the poor without upsetting this balance—or have the potential to do so if given more than the perfunctory try that has so far been their lot (despite the credit given here to both the Bush and Obama administrations).

Critiques and Conclusion

Some weak points in Daly's book should be pointed out. While he discusses the distinctly American form of subsidiarity, federalism, at several points, he appears not much interested in whether federalism implies inherent limits to what the national government may do to assist the poor. To some extent these debates may be behind us, but Justice Thomas, in his concurrence in *Lopez v. United States*,[19] has suggested that overturning long-held precedents and allowing broad national power in economic regulation is not unthinkable; cutting-edge libertarian constitutional scholars press similar arguments (e.g., Randy Barnett[20] and David Bernstein[21]); and two federal judges have recently held that a crucial element of President Obama's health care reform is not, in fact, within Congress's power to regulate interstate commerce.[22] Daly is of course free to determine the parameters of his book, but given the centrality he gives subsidiarity as a theme, more discussion of a radically subsidiated welfare system—one that might not have made the Founders blanch (as I am afraid today's would) as a matter of national power—would have been welcome.

Another constitutional point is that a question could be raised about the extent of *executive* power to carry out faith-based initiatives in the absence of legislation. As Daly narrates, the faith-based initiative bill that President Bush advocated *never became law*. Bush was therefore confined to what he could do by executive order—and of course, like all modern presidents, he did not take a narrow view of this power. Did he stay within proper constitutional boundaries of *executive power*, never mind the Establishment Clause issues, already discussed? In "taking care that the laws be faithfully executed," the president undoubtedly has much leeway. Is the wholesale reorientation of the federal welfare contracting process that Daly credits Bush with within that leeway? As a constitutional executivist, I would be happy to argue that it is; but, as a law professor, I have to note that it is at least an *issue*.[23]

For present purposes, these are minor quibbles about a book I can recommend. I would like to add that *God's Economy* is not nearly as statist a book as the subtitle implies. One is reminded, reading it, that conservatives in the late 1980s and early 1990s, and also some liberals,[24] were especially concerned about the "therapeutic state," that aims to transform the lives of those it tries to "help," "for their own good" of course but as coercively and invasively as might be "needed." The words "caring state" may well summon up this Frankenstein for many potential readers.

Subtitle to one side, however, Daly actually shares this apprehension. Not only is his book entirely about the superiority of nonstate, faith-based services over those provided by the state directly, the author even takes as his epigraph these words from conservative sociologist (and expert of French counter-revolutionary thought) Robert Nisbet (whom he also discusses at some length in the book): "The state is a refuge for those escaping the moral consequences of individualism." Clearly Daly, like Nisbet, would like to see these consequences diminished, but above all he would like to see better refuges than the unalloyed state makes available for those who need escape from them. So should we all.

Notes

1. However, not columnist George F. Will, who describes and critiques this movement at George F. Will, "The Political Fantasyland of the 'No Labels' Movement," *The Washington Post*, December 19, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/17/AR2010121704195.html.

2. See, for example, CNN, "Obama Revamps Faith-Based Office," February 5, 2009, http://articles.cnn.com/2009-02-05/politics/obama.faith_1_faith-based-groups-faith-based-initiatives-religious-groups?_s=PM:POLITICS.

3. *Everson v. Board*, 330 U.S. 1 (1947).

4. As most know, this metaphor originated in a letter from Thomas Jefferson, when he was President, to the Baptist Assocation of Danbury, Massachusetts. Important further details are given in Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (New York: New York University Press, 2002), chap. 2.

5. Illinois ex rel. *McCollum v. Board of Education of School District*, 333 U.S. 203 (1948).

6. *Wolman v. Walter*, 433 U.S. 229 (1977).

7. *Board v. Allen*, 393 U.S. 236 (1968); *Meek v. Pittinger*, 421 U.S. 349 (1975).

8. See especially Scalia's dissent in *Lee v. Weisman*, 505 U.S. 577 (1992).

9. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

10. *Mitchell v. Helms*, 530 U.S. 793 (2000).

11. Peter L. Berger and Richard John Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* (Washington: American Enterprise Institute for Public Policy Research [AEI], 1977).

12. That is, permissive with regard to what government can do to allow or perhaps even foster a public role for religion.

13. A history of the French Revolution that covers all these is Simon Schama's *Citizens: A Chronicle of the French Revolution* (New York: Alfred A. Knopf, Inc., 1989), and Schama is no conservative. Recent conservative French historians such as François Furet have also been active.

14. Michael Burleigh covers much of this ground in *Earthly Powers: The Clash of Religion and Politics in Europe, from the French Revolution to the Great War* (Toronto: HarperCollins Canada, 2005), and its sequel, *Sacred Causes: The Clash of Religion and Politics, from the Great War to the War on Terror* (New York: HarperCollins Publishers, 2007).

15. Philip Hamburger, *Separation of Church and State* (Cambridge: Harvard University Press, 2002).

16 For the curious: I received a master of arts degree at Yale in medieval studies, having already taken as an undergraduate all of Yale's medieval history courses that my schedule allowed for.

17. Luke 22:38.

18. Matthew 22:21.

19. *United States v. Lopez*, 514 U.S. 549 (1995)

20. See, for example, Randy Barnett, "Trumping Precedent with Original Meaning: Not as Radical as It Sounds," 22 *Constitutional Commentary* 257 (2006), and "New Evidence of the Original Meaning of the Commerce Clause," 55 *Arkansas Law Review* 847 (2003).

21. See for example, David Bernstein, "Roots of the Underclass: The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation," 43 *Am. U. L. Rev.* 85 (1993), and *Rehabilitating* Lochner (Chicago: University of Chicago Press, 2011).

22. *Virginia v. Sebelius*, U.S. Dist. Ct, Eastern Dist. of Virginia, Civil Action No. 3:10CV188-HEH, available at http://www.vaag.com/PRESS_RELEASES/Cuccinelli/Health%20Care%20Memorandum%20Opinion.pdf; and Florida v. Dept. of HHS,

U.S. Dist. Ct, Northern Dist. of Florida, Case No. 3:10-cv-91-RV/EMT, http://online.wsj.com/public/resources/documents/013111healthcareruling.pdf. Of course, as of this writing, three federal district courts have upheld the same statute.

23. Two overly neglected Supreme Court decisions that set the parameters for much subsequent debate on executive power were *In re Neagle*, 135 U.S. 1 (1890), finding that the executive branch does not need statutory support in order to deploy a temporary federal marshal to protect a Supreme Court Justice (was there any chance the Supreme Court would deny the Executive *that* power? Nonetheless, there was a dissent!), and *Myers v. U.S.*, 272 U.S. 52 (1926), finding that the power to fire executive branch political appointees rests exclusively with the President. Though the Constitution gives the Senate a role in the appointment of high executive officials, it gives it no role in their removal, and it cannot vote itself one without upsetting the separation of powers.

24. See, for example, Andrew Polsky, *The Rise of the Therapeutic State* (Princeton: Princeton University Press, 1992).