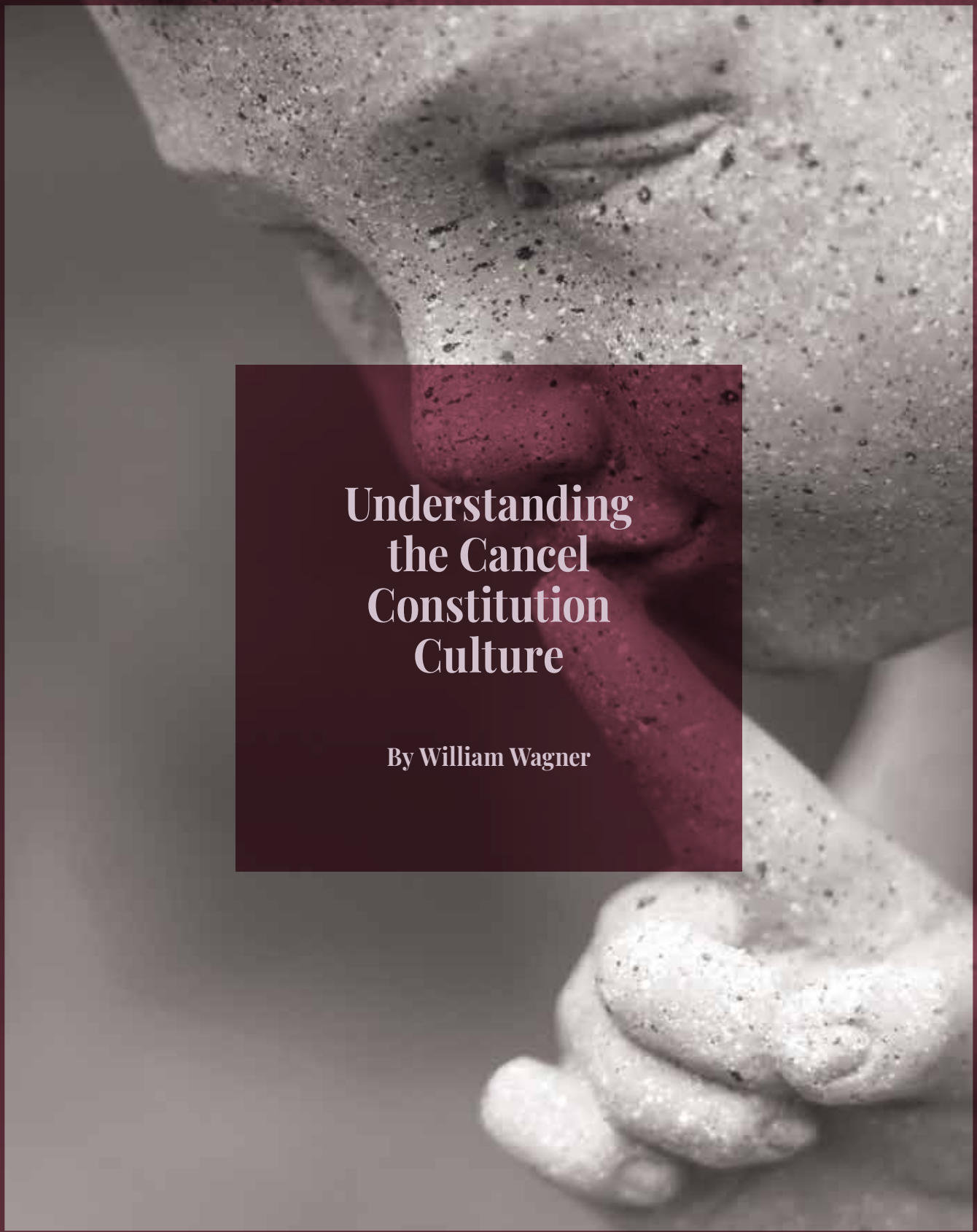

Understanding the Cancel Constitution Culture

By William Wagner

"The natural progress of things is for liberty to yield and government to gain ground." [1]
— Thomas Jefferson

Personal and historical experiences tell us Thomas Jefferson's warning rings true. The basic reason for the phenomenon — the human yearning for power — is similarly uncontroversial. Because liberty and the rule of law hang in the balance, however, the mechanics regarding that yearning merit continuing scrutiny and discussion.

What image of humankind do judges and others holding power embrace and how does it influence their determinations concerning life and liberty interests? This author believes that variations in these views — specifically, the increasing shift from an objectivist, spiritually informed view to a materialistic, morally relative outlook — is a critically important component of the liberty drift Jefferson decried.

Many, if not most, framers of the U.S. Constitution viewed God as the source of life and liberty. The Declaration of Independence clearly reflects that view:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.[2]

The core of the framers' understanding is revealed in Noah Webster's seminal dictionary published in the infancy of the republic. Webster defined "unalienable" as "something that cannot be legally or justly alienated" and "right" as

> accordant to the standard of truth and justice or the will of God. That alone is right in the sight of God, which is consonant to his will or law; this being the only perfect standard of truth and justice…that is right which is consonant to the laws and customs of a country, provided these laws and customs are not repugnant to the laws of God….[3]

We see the promise of the Declaration of Independence embodied in the structure and text of the Constitution. The Constitution's framers make clear that *we the people* delegate power to the government to secure our freedom while expressly limiting government's exercise of power in ways that deprive citizens of their unalienable life and liberty interests.[4] Thus, humans grant limited powers to the institution of government; government (including the judiciary) does not grant liberties to individuals. Moreover, unalienable life and liberty interests further limit exercise of government power.

Today, the views of the Constitution's framers differ greatly from the views of many of the nation's current governing authorities. Unalienable rights, long thought of as inviolable absolutes, increasingly clash with government power.[5] Seemingly operating with constitutional authority, unelected judges boldly diminish and actively redefine constitutional liberty.[6] At the same time, legislative and executive authorities promulgate and enforce policies inconsistent with the notion that unalienable liberty exists as a limit on the exercise of governmental power.[7] Rejecting the moral absolutes of unalienable rights, present-day judges and government authorities view liberty as subjective, alienable, evolving, and morally relative.[8]

Why do liberties understood by most Americans as inviolable, unalienable rights increasingly face constitutional irrelevance? Why are other previously prohibited activities now deemed human rights and cloaked with constitutional protection? Some suggest the answer lies in understanding the panoply of approaches to interpreting the Constitution.[9] To be sure, such approaches attempt to analyze exercises of government power and the impact of liberty interests on such power. The threat to unalienable life and liberty interests from government authorities and the courts, however, is better understood in terms of the jurisprudential lens through which those in power view the Constitution; the jurisprudential view one uses determines not only how one views constitutional interpretation but also how one perceives law, liberty, and constitutional governance.

At a Glance

Why do liberties understood by most Americans as inviolable unalienable rights increasingly face constitutional irrelevance? Why are other previously prohibited activities now deemed human rights cloaked with constitutional protection? One's jurisprudential view determines their perception of law, liberty, and constitutional governance.

Unalienable jurisprudence: An inviolable objective standard

The framers saw human laws as reflections of divine or natural law. Such laws may be just or unjust depending on the

clarity with which they reflect those standards.[10] The purpose here is not to entertain in any substantial way the analytical battles involving the many facets of natural law, divine or otherwise. To be sure, however, when natural-law theory dominated Western legal philosophy, American judges, lawyers, and scholars recognized God's existence and referred to his natural law as a source of our law and rights and the U.S. Supreme Court often cited the writings of natural-law scholars.[11]

Likewise, to the Constitution's framers, God's truth was self-evident; he endowed all human beings with unalienable rights.[12] These framers were, for the most part, very religious, informed not only by the Bible but also the writings of classic natural-law thinkers and jurists.[13] Sir Edward Coke, who was cited by the framers, expressed the scriptural principle that God writes his law on our heart:

> God at the time of creation of the nature of man infused into his heart for his preservation and direction; and this is the [eternal law], the moral law…And by this law, written God in the heart of man…before any laws written [and before any] judicial or municipal laws.[14]

Sir William Blackstone, whose "Commentaries on the Law" was considered the leading legal authority at the time, similarly wrote on the nature of law that God, when he created man, "laid down certain immutable laws of human nature… and gave him also the faculty of reason to discover the purport of those laws."[15]

In this worldview, the Creator makes truth and other moral absolutes evident to us; we do not create them. Moreover, the Creator makes us creatures; we are not the Creator and, as such, we are subordinate to, though certainly a part of, that realm of absolutes. A lawful, moral order is, in some sense, inherent in human nature and therefore accessible to us. Therefore, the traditional natural-law view "asserts a person's fundamental obligation (according to one's ability) to recognize reality as it actually exists on its own terms — and to recognize and respect the God-given (and, hence, inviolable) dignity of every human being."[16]

For most Americans, the traditional wisdom of our forebearers is generally reliable,[17] which is why it has endured. If the forebearers correctly perceived and expressed the truth of an issue, we are only able to agree with their conclusions; any changes we make to their findings would not be progress but a perversion of the truth. Clarifications, refinements to fit new developments, and other marginal improvements are frequently possible but by its very nature, truth endures — it does not evolve into "new truths." The laws of moral governments operating under the rule of law reflect this principle. Good government is not immoral or amoral. Good government is moral.[18]

Under an unalienable jurisprudential view, the good that government is designed to do is premised on absolute and objective truths, not subjective and relative feelings. That is ultimately what we must mean when affirming that we are a government of laws, not of men.[19] The tasks of government are, according to this worldview, premised on a morality that predates and transcends that government itself.

Alienable jurisprudence avoids recognizing the real existence of actual good; to imply it exists suggests a moral absolute that might impede political progress.

If one desires to know whether a law or judicial opinion is genuine law, we must have some standard against which to measure the law or opinion other than the law or opinion itself.[20] Blackstone observed that when judges erroneously opine about law and later correct the error, the original opinion was never law in the first place.[21] Other authors have observed that Blackstone's conviction to the objective nature of law was rooted in the concept of immutable divine standards, not arbitrary, man-made rules.[22] This objective truth viewed through an unalienable jurisprudential lens is seen as worthy of serving as a standard because it corresponds to reality and conforms to fundamental laws of logic.

The idea of an objective higher law dominated Western legal history until Darwinian evolution nudged such views to the side in favor of a subjectivist, humanistic legal philosophy.[23]

Alienable jurisprudence: Substituting evolving subjective moral relativism for the inviolable objective standard

Contrasting the worldview in which lawmakers perceive a sacred, objective standard for life and liberty is an alienable jurisprudential lens through which contemporary legal minds deem into existence evolving laws and fundamental liberties with a subjectivist, humanism-centered worldview. Viewed through this lens of moral relativism, individuals determine whether liberty exists based on circumstance and personal convenience or autonomy and — without looking to any objective standard of right or wrong — create law accordingly.[24] Law, as viewed through this subjectivist lens, holds no moral absolute value as an objective standard; instead, it is seen as a "temporally and spatially conditioned phenomenon" that is "subject to historical change" as desired.[25]

Contrary to the foundational unalienable jurisprudence of the Constitution's framers, subjective alienable jurisprudence cuts us off from objective reality. It has no place for divine standards — rather, it puts man in place of such standards. There is no objective truth or good; humans are the source of all rights and laws and concepts of truth, good, and justice. Subjectivist alienable jurisprudence cannot compare human laws to objective standards of truth, good, or justice because everyone defines those concepts based on their own power of reason (apart from any objective moral reference point.)

Alienable jurisprudence avoids recognizing the real existence of actual good; to imply it exists suggests a moral absolute that might impede political progress. English author G.K. Chesterton recognized this more than a century ago, writing:

> Every one of the popular modern phrases and ideals is a dodge in order to shirk the problem of what is good. We are fond of talking about 'liberty' that, as we talk of it, is a dodge to avoid discussing what is good. We are fond of talking about 'progress'; that is a dodge to avoid discussing what is good.... The modern man says, 'Let us leave all these arbitrary standards and embrace liberty.' This is, logically rendered. 'Let us not decide what is good, but let it be considered good not to decide it.' He says, 'Away with your old moral formulae; I am for progress.' This, logically stated, means, 'Let us not settle what is good; but let us settle whether we are getting more of it.' He says, 'Neither in religion nor morality, my friend, lie the hopes of the race, but in education.' This, clearly expressed, means, 'We cannot decide what is good, but let us give it to our children.'[26]

Thus, Ezekiel Emanuel, senior fellow at the Center for American Progress, writes:

> [I]nvoking a conception of the good...is not possible within the framework of a liberal political philosophy.... [L]aws and policies cannot be justified by appeals to the good. To justify laws by appealing to the good would violate the principle of neutrality and be coercive, imposing one conception of the good on citizens who do not necessarily affirm that conception of the good.[27]

Today, we are fond of talking about neutrality; the modern dodge to avoid having to deal with the existence of good as a moral absolute. Making laws and liberty interests adhere to a subjective notion of neutrality while dismissing the possibility of an objective moral standard of good enables those in power to define law and liberty according to their evolving and morally relative evolving views.

Thus, under alienable jurisprudence, terms such as "truth," "good," or "justice" are treated as subjective, relativistic viewpoints and not absolute standards. We cannot "know" truth or good so we must make it up as we go. The absurd result of this approach, of course, is that one who holds it (even if characterized in terms of neutrality) cannot claim it is true or good — or neutral, for that matter. In the relativist sense, it may be true or good or even neutral for the speaker but need not be for the listener, which is effectively no meaningful truth at all. For those using alienable jurisprudence, truth that corresponds to reality or conforms to fundamental laws of logic is, therefore, unnecessary. Author Dick Keyes notes:

> [T]he cutting edge of relativism's critique is to say that all ultimate religious and philosophical beliefs are properly understood not as possible sources of true knowledge about God or ultimate truth, but as only products of their culture's groping to name the unnamable. But at the same time relativism claims for itself immunity from the force of its own critique. We are meant to believe that it alone is not just a product of the relativizing factors in its own (modern, Western, academic, tenure-seeking) culture, but that it is in some mysterious sense, objectively, timelessly true. It comes to us through an epistemological immaculate perception, whereby it miraculously escapes the acid bath of relativizing analysis....[28]

Contemporary philosophers J.P. Moreland and William Lane Craig expose the ironic nature of the relativist position:

> [R]elativism itself is either true or false in the absolutist sense. If the former, relativism is self-refuting, since it amounts to the objective truth that there are no objective truths. If the latter, it amounts to a mere expression of preference or custom by a group or individual without objective, universal validity. Thus it cannot be recommended to others as something they should believe because it is the objective truth of the matter....[29]

For those viewing the world through a morally relative, alienable jurisprudential lens, interpreting the Constitution digresses to an agenda-driven instrument of government power to achieve some preferred end — irrespective of whether that end comports with the will of the citizenry. In this revolt against reality, those in power create new rights and often make irrelevant, in a constitutional sense, inviolable unalienable rights.

The collision of the two jurisprudential views threatens the continued existence of America's constitutional republic. One thing seems certain: compromise on any significant issues is unlikely. Someone once said that politics is the art of compromise. If true, then compromise is conceivable on any given political question assuming the parties are willing to negotiate in good faith. Because judges, legislators, and other government officials do not share the same jurisprudential views, they rarely (if ever) agree on the question.

Thus, two judges looking at the same facts will likely see two different questions depending on the jurisprudential lens through which they view the world. A judge using an unalienable jurisprudential lens might see the issue before the court as whether the government ought to protect the right to life of an unborn child, while a judge with an alienable jurisprudential

view may see the issue as whether a woman has a right to reproductive freedom. Compromising on the answer to a question requires you to first agree on what the question is. If no agreement exists on the question, it is unlikely — if not impossible — for a compromise that results in a political solution or unanimous court decision.

We are amid a high-stakes jurisprudential battle over the character of our legal institutions. In essence, this battle is about defining the questions — important questions such as whether free exercise of religious conscience continues as a protected constitutional liberty of the highest order or transforms into discrimination. The extent that one view prevails over the other will determine whether unalienable liberty retains relevance as an objective limit on government action or whether government replaces the rights-bestowing God of our nation's framers with itself, manufacturing or diminishing liberty according to the desires of whoever holds power. ■

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ENDNOTES

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4. E.g., US Const, art I, II, and III and US Const Ams I–X.
5. E.g., *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973); *Employment Div v Smith*, 494 US 872; 110 S Ct 1595; 108 L Ed 2d 876 (1990); and *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015).
6. *Id.* See also, *Lemon v Kurtzman*, 403 US 602; 91 S Ct 2105; 29 L Ed 2d 745 (1971).
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