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EXAMINING JUSTICE BREYER'S CONSTITUTIONAL CONSEQUENTIAL THINKING: CAN JUSTICE SCALIA BE WRONG AND JUSTICE KENNEDY BE RIGHT?

DANIEL GORDON*

INTRODUCTION

United States Supreme Court Justice Stephen Breyer finds a democratic theme in the United States Constitution to which judges should pay more attention.1 This democratic theme in the Constitution emerges from the Constitution's inclusion of active liberty.2 Justice Breyer distinguishes between two liberties: ancient and modern.3 Modern liberty is civil liberty that guarantees freedom from government to individuals,4 while ancient liberty consists of sharing a nation's sovereign authority with that nation's citizens.5 Active liberty, according to the ancients, implicates "the people's right to 'an active and constant participation in a nation's collective power.'"6 Justice Breyer believes that the United States Constitution protects Americans' rights to partici-

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1 See Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 7 (2005) (arguing that the theme that Judges follow in their decisions can impact their constitutional interpretations tremendously).

2 See Breyer, supra note 1, at 5 (suggesting that active liberty is essential to democracy).

3 See Breyer, supra note 1, at 4–5 (stating Benjamin Constant's view that both ancient and modern liberties need to be taken together and balanced in order to create one properly functioning democratic society).

4 Breyer, supra note 1, at 5.

5 Breyer, supra note 1, at 4.

6 Breyer, supra note 1, at 5.
pate in government.\textsuperscript{7} He proposes that judges focus on this right to participate when they interpret the Constitution.\textsuperscript{8} This democratic theme implicates a constitutional and statutory interpretive tradition that views legal texts, including the Constitution, as "driven by purposes."\textsuperscript{9} Justice Breyer also views the active liberty constitutional interpretive tradition as focusing on the consequences of textual interpretation upon the community that will be affected by constitutional interpretation.\textsuperscript{10}

This article focuses on Justice Breyer's emphasis upon consequential thinking in his constitutional analysis.\textsuperscript{11} First, this article will review how Justice Breyer applied his consequential analytical model to the Establishment Clause,\textsuperscript{12} which he emphasizes as implicating strong consequential concerns.\textsuperscript{13} Next, this article analyzes Justice Scalia's consequential style in the context of gay rights,\textsuperscript{14} and Justice Kennedy's consequential style in the context of the death penalty.\textsuperscript{15} Last, the article compares and contrasts all three styles, suggesting that Justice Breyer either rethink his own style or deemphasize the importance of consequential thinking for constitutional interpretation.\textsuperscript{16}

\textbf{I. PURPOSES AND THE NATURE OF BREYER'S CONSEQUENTIAL THINKING}

Justice Breyer believes that most judges approach and decide cases, including constitutional cases, with similar methods and skills because judges are professionals. Judicial training and le-

\textsuperscript{7} See Breyer, \textit{supra} note 1, at 10 (finding that the New Deal and Warren Court expanded the scope of citizens' rights to participate in government by focusing on ways in which the Constitution protected active liberty).

\textsuperscript{8} See Breyer, \textit{supra} note 1, at 11 (concluding that the current Court is guilty of neglecting the importance of active liberty in contemporary society).

\textsuperscript{9} Breyer, \textit{supra} note 1, at 17 (arguing that the active liberty approach encourages judicial restraint by forcing judges to "say what was the underlying purpose expressed in a statute").

\textsuperscript{10} See Breyer, \textit{supra} note 1, at 18 (stating that these consequences on the community include social, political, and industrial conditions).

\textsuperscript{11} See infra Part I.

\textsuperscript{12} See infra Part II.

\textsuperscript{13} See Breyer, \textit{supra} note 1, at 120–24 (analyzing the Establishment Clause of the First Amendment under the consequential analytical model and concluding that the clause preempted government aid to parents of students in parochial schools).

\textsuperscript{14} See infra Part III.A.

\textsuperscript{15} See infra Part III.B.

\textsuperscript{16} See infra Parts IV, V.
gal experience leave judges with analytical methods and skills in examining textual "language, history, tradition, precedent, purpose, and consequences." Though judges may share a similar armory of analytical weaponry, individual judges differ in the emphasis that they give to each of the skills and methods. Some judges emphasize textual language, history, and tradition, while other judges emphasize "purpose and consequence[s]." Justice Breyer emphasizes the use of purposes and consequences in interpreting legal texts, including the Constitution. Justice Breyer prioritizes the use of understanding the purposes of legal texts and understanding the analyses of the consequences of interpreting legal texts in one way or another because he believes that law is tied to life, and textual interpretation is tied to human activity that the law seeks to benefit. Justice Breyer commends the Warren Court for emphasizing the purposes of the Constitution and the consequences of constitutional interpretation and notes that the current Court on which he serves has swung too far away from an emphasis on purpose and consequences in constitutional analysis.

For Justice Breyer, legal texts are driven by purposes. As a whole, the Constitution as a whole furthers basic general purposes. Judges should discern the underlying purposes expressed in legal texts, reading constitutional language as revealing great

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17 BREYER, supra note 1, at 110.
18 BREYER, supra note 1, at 8.
19 See BREYER, supra note 1, at 115 (noting that focusing on the Constitution's purpose promotes liberty by insisting on statutory and constitutional interpretations that are consistent with the people's will, whereas focusing on the Constitution's consequences measures the court's level of success in promoting that will).
20 See BREYER, supra note 1, at 100 (emphasizing the value of purpose-driven interpretations of laws and legal texts in relation to the benefit(s) sought to be provided to people and society by those laws and legal texts).
21 See BREYER, supra note 1, at 10–11 (stating that "[t]he [Warren Court] interpreted the Civil War amendments in light of their basic purposes, thereby directly helping African Americans become full members of the nation's community of self-governing citizens").
22 See BREYER, supra note 1, at 11 ("I will suggest that [the Court] may have swung back too far, too often underemphasizing or overlooking the contemporary importance of active liberty.").
23 See BREYER, supra note 1, at 17 (stating that interpretive "tradition sees texts as driven by purposes").
24 See BREYER, supra note 1, at 115.
purposes "ended to be achieved by the Constitution. Individual constitutional provisions embody highly generalized basic purposes that help judges to understand and apply those specific constitutional provisions. Justice Breyer views the overarching aim of the Constitution as furthering active liberty by creating a form of government in which all citizens share governmental authority and participate in public policy creation. Justice Breyer also views some clauses of the Constitution as possessing more narrow purposes than those of the overall document. For instance, the Equal Protection Clause demands that American law equally respect each individual. Overall, Justice Breyer urges judges to refer to the Constitution's basic democratic purposes, or objectives, to shape constitutional doctrine, reconcile competing constitutional values, and interpret and apply legal text generally.

Justice Breyer related legal textual purposes closely with the consequences of interpreting and applying legal texts, including the Constitution. Because legal texts are connected to the lives of individuals and communities regulated and protected by those texts, judges should consider the consequences of legal textual interpretations, including the impact of textual interpretation on the social, economic, and political conditions of communities. Since law helps communities of individuals democratically to find practical solutions to contemporary problems, judges should con-

25 See Breyer, supra note 1, at 17-18 ("The judge should read constitutional language 'as the revelation of the great purposes which were intended to be achieved by the Constitution' itself, a 'framework for' and a 'continuing instrument of government.'").

26 See Breyer, supra note 1, at 115 (arguing that the "understanding of, and a focus upon, those general purposes will help a judge better to understand and to apply specific provisions").

27 See Breyer, supra note 1, at 33 (describing James Madison's view of the Constitution "as creating a form of government in which all citizens share the government's authority, participating in the creation of public policy").

28 See Breyer, supra note 1, at 77 (noting that "[the view] consequently demands laws that equally respect each individual").

29 See Breyer, supra note 1, at 109 ("I have tried to show how, in varying contexts, reference to the Constitution's basic democratic objectives can help courts shape constitutional doctrine, reconcile competing constitutional values, time judicial intervention, interpret statutory ambiguities, and create room for agency interpretations.").

30 See Breyer, supra note 1, at 115 (noting that "[t]hroughout, I have urged attention to purpose and consequences").

31 See Breyer, supra note 1, at 18 (explaining that a Judge must not only consider his sole views when interpreting such open-ended provisions as the due process and equal protection clauses).
consider practical consequences of constitutional interpretation. Since constitutional purposes operate in the real world of people, judges should not shy away from legal conclusions based on real world consequences, even when judicial critics would prefer judges to avoid consideration of such consequences. For instance, Justice Breyer would have judges consider the practical effects on local democratic self-government of constitutional decisions interpreting and applying principles of federalism. Also, he would have judges analyze the practical effects of technology and privacy law on each other.

Justice Breyer strongly believes that consequential thinking should be an emphasized component of constitutional analysis and warns that a different interpretive approach that deemphasizes consequential thinking exacts a high constitutional price. Justice Breyer worries that textualist and originalist constitutional doctrines that avoid consequential analyses may produce harmful consequences. For instance, a literalist interpretive approach to the Equal Protection Clause could create social divisiveness, impeding the democratic unity required to make constitutionally-created institutions work as intended. For Justice Breyer, the consequences of interpreting and applying the Equal Protection Clause should be the diminution of the risk of serious racial division in the United States.

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32 See Breyer, supra note 1, at 6 (describing practical consequences as “consequences valued in terms of constitutional purposes, when the interpretation of constitutional language is at issue”).
33 See Breyer, supra note 1, at 16 (“And in the real world, institutions and methods of interpretation must be designed in a way such that this form of liberty is both sustainable over time and capable of translating the people’s will into sound policies.”).
34 See Breyer, supra note 1, at 116 (revealing judicial critics’ fear that judges will blend their personal beliefs when decision-making and disregard the history and legal precedent set forth in the Constitution).
35 See Breyer, supra note 1, at 63 (suggesting a need for a more proficient exchange of communication "between Congress and the Court in this area").
36 See Breyer, supra note 1, at 68-69 (conveying the need to balance various societal interests when analyzing the effect of technology on previously existing privacy laws).
37 See Breyer, supra note 1, at 12 (“[I]ncreased attention upon the Constitution’s democratic objective . . . promote[s] re-emphasis of those objectives as an important theme that significantly helps judges interpret the Constitution.”).
38 See Breyer, supra note 1, at 129 (noting that such harmful consequences may outweigh “whatever risks of subjectivity or uncertainty are inherent in other approaches”).
39 See Breyer, supra note 1, at 131 (“Literalism has a tendency to undermine the Constitution’s efforts to create a framework for democratic government . . . .”).
40 See Breyer, supra note 1, at 83–84 (describing such racial division as “a division that exclusion from elite educational institutions would aggravate”).
against overemphasizing eighteenth-century originalist concepts that undermine a twenty-first century Supreme Court applying constitutional values.\textsuperscript{41} He even applauds consequential thinking that radically changes constitutional doctrine,\textsuperscript{42} pointing to \textit{Plessy v. Ferguson}\textsuperscript{43} as a doctrine that needed to change on the basis of consequential analysis.\textsuperscript{44} Justice Breyer noted that \textit{Brown v. Board of Education}\textsuperscript{45} and subsequent racial segregation cases "overruled \textit{Plessy}, and the law changed in a way that profoundly affected the lives of many."\textsuperscript{46}

Justice Breyer's emphasis on consequential thinking evidenced a broader constitutional policy concern about the relevance of constitutional principles to contemporary, always shifting social life in America. For Justice Breyer, \textit{Plessy} and \textit{Brown} serve as two examples of the reasons why measuring consequences is critical to constitutional decision making. In his view, judges must recognize that the Constitution applies to ever-changing subject matters never considered by the framers of the Constitution.\textsuperscript{47} Consequential thinking exposed the fatal flaw of \textit{Plessy} by demonstrating that racial segregation meant inequality and disrespect for African-Americans.\textsuperscript{48} Consequential analysis allows Judges to apply the Constitution by reconstructing past solutions, especially failed ones based on concrete occasions of life that form the contexts for constitutional decision making.\textsuperscript{49}

\textsuperscript{41} \textit{See Breyer, supra} note 1, at 73 (noting that the Court's recent holding that police cannot use thermal imaging devices to monitor household activities "warns against adopting an overly rigid method of interpreting the Constitution—placing weight upon eighteenth-century details to the point at which it becomes difficult for a twenty-first-century court to apply the document's underlying values").

\textsuperscript{42} \textit{See Breyer, supra} note 1, at 119 ("To be sure, a court focused on consequences may decide a case in a way that radically changes the law. But this is not always a bad thing.").

\textsuperscript{43} \textit{See Breyer, supra} note 1, at 119 (stating that \textit{Plessy} led to a "society that was totally unequal, a consequence directly contrary to the purpose and demands of the Fourteenth Amendment").

\textsuperscript{44} \textit{See Breyer, supra} note 1, at 119.

\textsuperscript{45} \textit{See Breyer, supra} note 1, at 18 ("The judge should recognize that the Constitution will apply to 'new subject matter . . . with which the framers were not familiar.'").

\textsuperscript{46} \textit{See Breyer, supra} note 1, at 119 ("[I]t became apparent that segregation did not mean equality but meant disrespect for members of a minority race").

\textsuperscript{47} \textit{See Breyer, supra} note 1, at 18 ("[T]he judge, whether applying statute or Constitution, should 'reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision.'").

\textsuperscript{48} \textit{See Breyer, supra} note 1, at 119 ("[I]t became apparent that segregation did not mean equality but meant disrespect for members of a minority race").
tice Breyer utilizes Establishment Clause analysis to demonstrate his devotion and approach to consequential thinking.

II. BREYER: CONSEQUENTIAL THINKING IN THE CONTEXT OF THE ESTABLISHMENT CLAUSE

The Establishment Clause provides a clear context for Justice Breyer's consequential constitutional analysis. Justice Breyer's view of Establishment Clause public policy also highlights his analytical interlinking of constitutional purposes with constitutional consequences. Justice Breyer urges judges to examine the consequences of constitutional interpretation through the lenses of the constitution's values or purposes. For Justice Breyer, a primary, emphatic purpose of the Establishment Clause is the avoidance of religious strife in American society and political systems by drawing relatively clear lines between church and state, especially where religious core beliefs and practices are at issue. The Establishment Clause protects the "Nation's social fabric from religious conflict." Social divisiveness based on religion would sap the strength of American government and religion, threatening the peaceful dominion that religion exercises in America. The changing immigrant social nature of American society in the twentieth century heightened the need for the separation of church and state, because now the United States serves as home to dozens of religious groups and subgroups from around the world. Breyer warns that the relation between government and religion is one of separation, not social conflict, creating mutual hostility and suspicion. To assure that the Establishment Clause

50 See Breyer, supra note 1, at 120 ("The judge must examine the consequences through the lens of the relevant constitutional value or purpose.").
51 See Zelman v. Simmons-Harris, 536 U.S. 639, 722-23 (2002) (Breyer, J., dissenting) (concluding that the Establishment Clause can be interpreted to avoid religious conflict by creating clear separation between church and state when primary religious education is at issue).
52 Id. at 717.
53 See Van Orden v. Perry, 545 U.S. 677, 698 (Breyer, J., concurring) (noting the negative effect of religious divisiveness and importance of First Amendment religion clauses on peace among religions existing in the United States).
54 See Breyer, supra note 1, at 121 (suggesting that the nature of twentieth-century society makes it necessary to interpret the First Amendment broadly).
55 See Zelman, 536 U.S. at 723 (Breyer, J., dissenting) (highlighting the fact that America has more than fifty-five different religious groups and subgroups).
maintains the delicate balance between neutrality toward religion, not hostility toward religion, Establishment Clause cases remain exercises in legal judgment based not only on the social conflict avoidance purpose of the Establishment and Free Exercise Clauses, but also on consequences measured in light of that social conflict avoidance purpose.\textsuperscript{56}

Justice Breyer develops and utilizes in his Establishment Clause analysis three styles of consequential thinking. First, he utilizes a macroscopic style of consequential analysis in which he provides a vague broad-brush historical overview of the social consequences of the failure to include an Establishment Clause or its equivalent within foreign legal systems. Justice Breyer strongly implies that religious war and strife were the consequences of having no Establishment Clause and no wall of separation in eighteenth-century and pre-eighteenth-century Europe; he notes the seventeenth century to have included decades of religious war.\textsuperscript{57} In addition to war, a lack of separation of state and religion engendered religious intolerance. Specifically, the history of governmentally-established religion in England evidenced the inevitability of hatred, disrespect and contempt for those who held religious beliefs contrary to the governmentally-preferred form of religion.\textsuperscript{58} Justice Breyer vaguely implies that even in twenty-first-century Britain and France, the lack of an American-style constitutional Establishment Clause creates a legal void where a newly-emerging religious heterogeneity results in religious strife.\textsuperscript{59} Overall, the macroscopic consequential analysis is sweeping, vague, implicit at most, and generally historical, involving foreign cultures.

Justice Breyer's second type of consequential thinking is a mid-range thinking between a macroscopic, broad view of general consequences and a microscopic, focused view of specific consequences. The mid-range consequential thinking is more specific

\textsuperscript{56} See Van Orden, 545 U.S. at 700 (Breyer, J., concurring) (concluding that Establishment Clause judgments must account for consequences measured in light of the clause's underlying purpose).

\textsuperscript{57} See Zelman, 536 U.S. at 718 (Breyer, J., dissenting) (noting that the First Amendment religion clauses represent the understanding that liberty and social stability demand a religious tolerance respecting those different views).

\textsuperscript{58} See id. at 718–19 (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)) (describing the effect of governmentally-established religion in England).

\textsuperscript{59} See id. at 725 (noting that "recent waves of immigration have begun to create problems of social divisiveness").
and focused than the macroscopic thinking. For one, Justice Breyer's mid-range thinking focuses geographically on the consequences of a weak application of the Establishment Clause in the United States when the wall of separation between state and religion was a low one. Justice Breyer recognizes the existence of governmentally-established religion in the United States. See id. at 718 (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)).


Early-American separation of church and state was less clear-cut, but that weak separation of church and state failed to recognize the growth of a large American Catholic minority in the mid-to-late nineteenth century. See id. at 719–20 ("[A]n earlier American society might have found a less clear-cut church/state separation compatible with social tranquility.").

Catholics faced discrimination from a Protestant-controlled government structure, and they fought back for religious equality. See id. at 720 ("By 1850, 1.6 million Catholics lived in America, and by 1900 that number rose to 12 million." (citing John C. Jeffries, Jr. & James E. Ryan, A Political History of the Establishment Clause, 100 MICH. L. REV. 279, 299–300 (2001))).

As a result, Establishment Clause law adapted to new social circumstances, and twentieth-century Establishment Clause doctrine now allows for governmental support of secular, non-sectarian aspects of religious education such as transportation, computers, and texts, and the consequences are little or no religious turmoil and strife. See id. at 720–21 (discussing Protestant discrimination and how Catholics fought back by pursuing "equal government support for the education of their children").

Overall, Justice Breyer's mid-range consequential thinking is less expansive and generalized than his macroscopic consequential thinking. Justice Breyer focuses only on the Establishment Clause and its impact on American society. He describes more specific religious strife and conflict between identified religious groups, but he also remains expansive and sweeping in his historical overview capturing eighteenth, nineteenth, and twentieth-century American social group relations in a few sentences and paragraphs.

Justice Breyer's third consequential thinking style focuses on the specific, focused results of identifiable and identified govern-
ment programs that seek to further religion. If those programs are allowed to exist in the context of the Establishment Clause wall of separation between church and state, very specific and identifiable negative consequences will occur. The Ten Commandments posted on government property and school vouchers paid by public monies for children attending religious schools result in very specific negative consequences. The display of the Ten Commandments in a state courthouse convinced Justice Breyer that "the display sought to serve its sponsors' primarily religious objectives and that many of its viewers would understand it as reflecting that motivation." Justice Breyer points to the history of the courthouse display as a stormy history that is likely to continue to prove divisive. Justice Breyer also points to the school vouchers and Establishment Clause acceptance and legitimization of those school vouchers as risking the creation of "a form of religiously based conflict potentially harmful to the nation's social fabric." For school vouchers, Justice Breyer creates a long list of very specific divisive issues and problems. Vouchers will create divisiveness because different religious groups will fight to influence the legal criteria that public policy makers will use to distribute billions of dollars of public monies to religious schools. Different religions will clash while reviewing the implementation of public programs that provide the monies. Religions will clash over religious doctrines that cast members of religions in negative terms. The American public will react negatively to religious school coverage of current events such as the conflict in the Middle East. Taxpayers who do not want to fund religious education will be antagonized and small religious

66 Breyer, supra note 1, at 122–23.
67 See Van Orden, 545 U.S. at 703 (Breyer, J., concurring) ("[T]he short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them .... And, in today's world, in a Nation of so many different religious .... beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive .... ").
68 See Zelman, 536 U.S. at 728–29 (Breyer, J., dissenting) ("[G]overnment funding of this kind of religious endeavor is far more contentious than providing funding for secular textbooks, computers, vocational training, or even funding for adults who wish to obtain a college education at a religious university.").
69 See id. at 723 (questioning how the "equal opportunity" principle will work "without risking the 'struggle of sect against sect'").
70 See id. at 724–725 ("[A]ny major funding program for primary religious education will require criteria. And the selection of those criteria, as well as their application, inevitably pose problems that are divisive.").
minors unable to establish their own religious schools will be marginalized along with those who hold religious beliefs that forbid them from taking public monies to support religious education.\textsuperscript{71} Even more generally, a conflict will arise between those parents who support public schools and those parents who support religious schools because taxpayer dollars will be shifted from public schools to private schools. Justice Breyer notes that generally, history evidences government involvement in religious primary education as far more divisive than more neutral governmental preferences for religious institutions such as tax exemptions.\textsuperscript{72}

Overall, in his microscopic consequential analysis, Justice Breyer develops very specific causes of social division and very specific clashes between different American groups. However, as Justice Breyer becomes more specific with his concerns about social divisiveness, he becomes more speculative and futuristic. His lists of social chaos center around what could or will happen in the future—not what has already occurred. Even his use of history is vague, generalized, and conclusive. History conclusively and generally shows that government involvement with religious education is more divisive than other types of government support for religion. Justice Breyer is so speculative and futuristic in developing his lists of social horribles that he uses Socratic methodology in framing his specific concerns. For instance, he asks, "[w]hy will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools?"\textsuperscript{73} He asks more than one such focused question.\textsuperscript{74} The closest he comes to very specific microscopic consequences is the history of a lack of litigation evidencing a lack of religious and social divisiveness. Justice Breyer found a lack of social divisiveness where a Ten Commandments monument stood outside a state capitol building for forty years without anyone

\textsuperscript{71} See id. at 728 (arguing that parental choice does not help taxpayers who do not want to finance religious education, religious minorities that are unable to create their own private schools, and fringe religious groups that are ineligible for funding).

\textsuperscript{72} See id. at 727 (noting that property tax exemptions for religious institutions are less divisive than government involvement in religious primary education).

\textsuperscript{73} Id. at 723.

\textsuperscript{74} See id. at 723–24 ("Why will they not want to examine the implementation of the programs that provide this money -- to determine, for example, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program's criteria?").
challenging the existence of the document.\textsuperscript{75} Even then, Justice Breyer becomes futuristic and speculative when he notes that forcing the removal of such a monument would itself create social and religious contentiousness.\textsuperscript{76}

Justice Breyer uses three styles of consequential thinking. His macroscopic style focuses on a broad view of social impact in a sweep of history, specifically for Establishment Clause analysis of European history. His observations of consequences are generalized and often implicit. Justice Breyer's mid-range consequential analysis is more focused and specific concentrating in the context of Establishment Clause analysis in American social history, but his observations remain relatively generalized. Again, he focuses on a broad sweep of eighteenth, nineteenth, and twentieth-century American history viewing social conflict between very large social groups, Protestant versus Catholic. When Justice Breyer utilizes a microscopic consequential analysis, he finds very specific social clashes over particular issues such as the use of public monies to support religious schools. However, even his microscopic analysis remains vague as it focuses on speculative social crises possible in the future. Justice Breyer's consequential thinking differs from that of other Supreme Court Justices.

III. SCALIA AND KENNEDY: CONSEQUENTIAL THINKING IN THE CONTEXT OF GAY RIGHTS AND TEENAGE MURDERERS, RESPECTIVELY

Both Justices Scalia and Kennedy utilize consequential thinking in their constitutional analyses. However, each Justice utilizes a distinct style and form of consequential thinking.

\textsuperscript{75} See Van Orden, 545 U.S. at 702 (Breyer, J., concurring) (arguing that the presence of the religious monument for more than forty years shows that few people understood their presence as "a government effort to favor a particular religious sect").

\textsuperscript{76} See id. at 704 (noting that the removal of the tablets might induce hostility towards religion in the law and encourage disputes concerning the removal of other "longstanding depictions of the Ten Commandments from public buildings across the Nation").
A. Justice Scalia and the Gay Destruction of American Democracy and Tradition

Justice Scalia decries the consequences of recognizing the constitutional equal protection of gays to be free from discrimination based on sexual orientation\(^7\) and the constitutional due process right of gays to engage in acts of sexual intimacy.\(^7\) Justice Scalia pinpoints three negative consequences of constitutional protection of gay rights and sexual behavior. In fact, he sees far-reaching implications beyond any single case.\(^7\)

First, he identifies a massive disruption of the current American social order.\(^8\)

The constitutional protection of gay sexuality threatens the end of all morals legislation, because the promotion of majoritarian sexual morality is no longer recognized as a legitimate state interest.\(^8\) As a result, the American legal system will no longer be authorized through majority vote in the state and federal legislatures to prohibit bigamy, same sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.\(^8\) The majority's belief that the immorality of gay sexuality is no longer a rational basis for statutory law means that a variety of judicial decisions and enactments remain endangered, including the prohibition of the sale of sex toys, the lack of a right to commit adultery and regulation of public indecency.\(^8\) Justice Scalia implicitly lists an array of American insti-

\(^7\) See generally Romer v. Evans, 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting) (commenting on the interplay between the Constitution and homosexuality and that since the Constitution says nothing about homosexuality, the Supreme Court has no business forcing citizens to hold the view that hatred towards homosexuality is evil).

\(^8\) See Lawrence v. Texas, 539 U.S. 558, 586–605 (2003) (Scalia, J., dissenting) (arguing that sodomy is not a fundamental right protected by the Due Process Clause).
tutions threatened by the constitutional protection of gay sexuality and the consequent disregard for majoritarian morality that condemns gay sexuality as criminal. These institutions include the United States Armed Forces, local fire departments, police departments, prisons, and grandchildren.  

The second type of consequence identified by Justice Scalia resulting from the constitutional protection of gays implicates the American political order. Constitutional protections for gays, according to Justice Scalia, frustrates majoritarian efforts to preserve traditional American moral values and places the American courts in the position of taking sides in the culture wars between heterosexuals and gays. This system implicitly awards gays advantages in those culture wars. Justice Scalia implies that gays gain favored legal status when the Constitution protects gay rights and behavior, making it difficult for the American mainstream that harbors anti-gay attitudes to discriminate legally against gay people. Justice Scalia notes, "Many Americans do not want persons who openly engage in homosexual conduct . . . . They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive." Gays possess political power much greater than their minority status numbers and they devote their vast political power to achieving full social acceptance instead of living with grudging social toleration. Gays enhance their power with aid of

84 See id. at 590 n.2 (explaining that society has relied upon the idea that homosexual sodomy is not a fundamental right).
85 See Romer v. Evans, 517 U.S. 620, 651 (Scalia, J., dissenting) (opining that failing to perceive the social harm of homosexuality stunts state efforts to uphold "traditional American moral values").
86 See id. at 652 (arguing that the majority's holding invented "a novel and extravagant constitutional doctrine" in order to "take the victory away from traditional forces" in the war between heterosexual and homosexual culture).
87 See id. at 644 (discussing that homosexuals can gain the same favored status as other citizens such as racial minorities and senior citizens and that by finding the Colorado statute, barring the favoring of homosexuals merely because they are homosexuals, to be constitutional, homosexuals are gaining an additional favored status simply because they engage in homosexual acts).
88 See Lawrence, 539 U.S. at 602-03 (Scalia, J., dissenting) (explaining that what the Court calls "discrimination" is often legal practice in many states, and in some circumstances this alleged discrimination is even "a constitutional right").
89 Id. at 602.
90 See Romer, 517 U.S. at 645–46 (Scalia, J., dissenting) (noting that homosexuals tend to reside in disproportionate numbers in certain communities, thus giving them greater power to push acceptance of homosexuality than would commonly be expected of minority groups).
the American legal profession that “has largely signed on to the so-called homosexual agenda.” The American lawyer class and its law schools seek to recast majoritarian moral opposition to homosexuality into homophobic prejudice; in doing so, the elite lawyer class seeks to stamp out plebeian, mainstream social attitudes. Accordingly, constitutional rights for gays results in the imposition of legal and moral standards by a governing elite that undermines the majority law by making prerogatives of the American majority.

Justice Scalia identifies a third consequence of constitutional protection of gay rights and sexuality: the legal legitimization and recognition of new forms of marriage. First, he sees the future substantive Due Process Constitutional validation of gay marriage. In an opinion, the Supreme Court explicitly distinguished the constitutional protection of gay sexuality from the constitutional recognition of the validity of gay marriage. Justice Scalia writes, “Do not believe it. . . . Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions . . . .” In addition, Justice Scalia sees the constitutional protection of gay rights as weakening the prohibitions against polygamy. If a majority of voters cannot preserve their views of homosexual immorality by means of majoritarian law making, then other immoral minorities, such as polygamists, should be constitutionally protected. According to Justice Scalia, polygamists have no fewer constitutional rights than gays.

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91 Lawrence, 539 U.S. at 602 (Scalia, J., dissenting) (discussing the majority's decision as reflecting the “law-profession culture” that is motivated by homosexual activist agenda “directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct”).

92 See Romer, 517 U.S. at 652–53 (Scalia, J., dissenting) (arguing that the majority's declaration of unconstitutionality merely reflects views and values of the lawyer class, and that such opinion “of what 'prejudices' must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws”).

93 See Lawrence, 539 U.S. at 603–04 (Scalia, J., dissenting) (“But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. . . . But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.”).

94 Id. at 604.

95 See Romer, 517 U.S. at 648 (Scalia, J., dissenting) (“The Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted
Justice Scalia's consequential thinking results in a very broad sweeping picture of America weakened by a gay-lawyer elite attack on mainstream-American traditional morality. On the other hand, Justice Kennedy utilizes a vastly different approach to consequential thinking.

B. Justice Kennedy and the Consequences of Constitutionalizing the Execution of the Young

Justice Kennedy utilizes consequential thinking when he analyzes whether the Eighth Amendment prohibits the execution of teenagers who are convicted of committing murder between the ages of sixteen and eighteen. For this Eighth Amendment issue, Justice Kennedy utilizes a constitutional interpretive style that is very similar to Justice Breyer's style. Justice Kennedy notes that the Eighth Amendment "must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design." Justice Breyer similarly finds that for constitutional interpretation "most judges agree that these basic elements—language, history, tradition, precedent, purpose, and consequence—are useful . . . ." Justice Kennedy focuses on the purposes of the Eighth Amendment to protect individuals from excessive sanctions by assuring that punishment for crime remains graduated and proportioned to the offense.

Although Justice Kennedy mentions purpose in his list of basic elements of textual interpretation, he omits consequences. However, he makes consequences a major component of his Eighth in these States on a state-legislated, or perhaps even local option, basis -- unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.

See Roper v. Simmons, 543 U.S. 551, 564 (2005) ("The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures . . . . This data gives us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.").

Id. at 560.

Breyer, supra note 1, at 8. Justice Breyer discusses judges' implementation of similarly fundamental techniques when interpreting a statute or constitutional provision and states, "All judges use similar basic tools to help them accomplish the task." Id. at 7.

See Roper, 543 U.S. at 560–61 ("To implement this framework we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion))).
Amendment analysis when he writes, "We then must determine . . . whether the death penalty is a disproportionate punishment for juveniles." First, Justice Kennedy reviews whether a consensus exists among the states as to whether older teenagers who commit murder should be put to death. Then, Justice Kennedy gauges the consequences of allowing under the Eighth Amendment the execution of sixteen to eighteen-year-old teenagers who commit murder.

Justice Kennedy measures the consequences of executing older teenage murderers in the light of proportionality of punishment. The Eighth Amendment requires only those whose extreme culpability makes them the most deserving of execution to be put to death, and Justice Kennedy tests the consequences, or impact of execution upon the moral capabilities of older teenagers. If older teenage murderers faced execution, the consequences would be negative and constitutionally impermissible, because "[r]etribution is not proportional if the law's most severe penalty [(execution)] is imposed on one whose culpability or blameworthiness is diminished . . . by reason of youth and immaturity." Justice Kennedy observes that young people lack maturity and a developed sense of responsibility. Not only does this mean that capital punishment retribution is visited on those with diminished blameworthiness, but the deterrent effect of capital punishment is weak because older teenagers remain incapable of the kind of cost-benefit analysis implied by capital punishment as de-

100 Id. at 564. "When a juvenile offender commits a heinous crime . . . the State cannot extinguish his life . . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." Id. at 573–74.

101 See id. at 564–68 (noting that even in those “20 states” without a prohibition on the juvenile death penalty, “the practice is infrequent”).

102 See id. at 568–76 (noting that the majority of states has prohibited the execution of juveniles under eighteen and that even if it were allowed it would be imprudent because deterrence and retribution is not as strong with minors as it is with adults).

103 Id. at 568 (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002))).

104 Id. at 571.

105 See id. at 569 (“[L]ack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.” (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))).
Overall, Justice Kennedy finds that the consequence of subjecting older teenagers to capital punishment is the execution of the immature, irresponsible, and the intellectually weak.

Justice Kennedy posits his consequential analysis of subjective teenage murderers to the death penalty on more than just his own observations about the nature of children and childhood. Though Justice Kennedy recognizes that parents know the lack of maturity and responsibility of children, he primarily relies upon the results of social scientific research about children to support his conclusions. Justice Kennedy identifies a number of behaviors observed in social scientific exploration of adolescent minds and behavior. First, social science has observed teenagers to be statistically overrepresented in reckless behavior. Justice Kennedy cites to social scientific sources to support this assertion. Second, Justice Kennedy finds that children are vulnerable and susceptible to outside pressures, especially peer pressures, because children possess little control over their environments. Again, Justice Kennedy finds social scientific support for his characterization of children. Finally, Justice Kennedy observes that the "character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." Once again, Justice Kennedy bases his knowledge of teenagers on social scientific thinking.

Justice Kennedy utilizes a style of consequential thinking that identifies very specific consequences of capital punishment for older teenagers, the execution of immature, psychologically weak people; he further enunciates disciplined, observable bases for his consequences. These characteristics of Justice Kennedy’s conse-

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106 See id. at 571–72 (noting that the probability that teenagers have made the cost-benefit analysis with respect to capital punishment "is so remote as to be virtually non-existent" (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988))).

107 Id. at 569 (quoting Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 DEVELOPMENTAL REV. 339, 339 (1992)).

108 Id. at 569 (citing Arnett, supra note 107, at 339).

109 See id. at 569 (noting "that juveniles are more vulnerable or susceptible to negative influences and outside pressures").

110 Id. at 569 (citing Lawrence Steinberg & Elizabeth S. Scott, Less Guilt by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

111 Id. at 570.

112 Id. at 570 (citing ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (W. W. Norton 1968)).
sequent thinking mark it as very different and more persuasive than Justice Breyer and Justice Scalia.

IV. JUSTICE KENNEDY'S CONSEQUENTIAL THINKING AS THE MEANINGFUL ALTERNATIVE TO JUSTICE BREYER'S AND JUSTICE SCALIA'S CONSEQUENTIAL THINKING

At first glance, Justice Scalia's consequential thinking style is very similar to Justice Breyer's microscopic consequential thinking style. Like Justice Breyer, Justice Scalia is very specific in identifying the consequences flowing from discrete constitutional protections, namely that a constitutional protection of sexual orientation will undermine majoritarian morality leading to the legalization and prevalence of traditionally-proscribed behaviors. The constitutional protection of gay rights will result in the domination of the electoral mainstream majority by a gay agenda-driven alliance of lawyers and gay rights activists. Justice Breyer sees the rise of religious and social divisiveness resulting from the constitutional legitimization of governmental financial support for religious education, while Justice Scalia sees the oppression of the American majority by the constitutional acceptance of gays. However, Justice Scalia's consequential thinking is very different from Justice Breyer's thinking.

While Justice Breyer is speculative and futuristic in his vision of social and religious discord, Justice Scalia is fantastical in his view of the impact of equal rights for gays and lesbians on American society. For Justice Scalia, it is not a vision of what might happen in the future, but a view of what exists in America today. Justice Scalia views the constitutional protection of gay sexual intimacy as entailing a massive disruption of the current social order. He does not envision a potential future disruption; he writes as if the disruption exists today. Justice Scalia writes about the current existence of an antidemocratic gay-lawyer elite.

113 See supra notes 17–49 and accompanying text (outlining Justice Breyer's emphasis on examining purpose and consequence to interpret legal texts).

114 See supra notes 69–74 and accompanying text (positing Justice Breyer's arguments against school voucher programs and the sociopolitical consequences of government-funded religious education).

At least Justice Breyer relies on history, albeit sweeping and vague history, to support his view of constitutional consequences that existed or exist, or Justice Breyer is openly speculative about future consequences. Justice Scalia constructs an ahistorical current or seemingly near future world with only the support of his own subjective observations. He latches onto a limited social phenomenon to prove the existence of a macroscopic social order in America when he points to equal rights law school employment recruitment guidelines with respect to sexual orientation of the Association of American Law Schools, which Justice Scalia finds emblematic of the whole American legal profession’s commitment to the gay agenda. The Association of American Law School anti-bias policies reflect the law-profession culture that has incorporated what Justice Scalia describes as the homosexual agenda. Though on the surface Justice Scalia’s consequential thinking appears to be detailed, specific and concrete, his lack of any historical support or empirical bases other than reference to a small emblematic phenomenon casts Justice Scalia’s consequential thinking as broad and vague. He is more vague and more subjective than Justice Breyer. Justice Kennedy differs from both Justices Breyer and Scalia in his consequential thinking. Justice Kennedy utilizes a more concrete and clearer style of consequential thinking. For instance, he identifies specific, focused consequences that will follow from the constitutional legitimization of executing teenage murderers such as the use of capital punishment to deter people who are psychologically unfit

116 See supra notes 57–65 and accompanying text (commenting on Justice Breyer’s use of historical and foreign examples to support his view of consequential constitutional interpretation).
117 See supra notes 68–72 and accompanying text (highlighting Justice Breyer’s arguments regarding religion in schools).
118 See Romer v. Evans, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting) (“This law-school view of what ‘prejudices’ must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws.”).
119 See Lawrence, 539 U.S. at 602 (Scalia, J., dissenting) (arguing that the Court is not aligned with “mainstream” America, which views homosexuality as immoral and destructive, and should not impose its judgment, but rather leave the issue to the democratic process).
to perform an adequate cost-benefit analysis of their behavior.\textsuperscript{120} He bases his observations about consequences on social scientific observations or thinking.\textsuperscript{121} Unlike the speculative or fantastical style of Justices Breyer or Scalia, Justice Kennedy utilizes observable, citable phenomenon. While Justice Breyer cites to history and is specific in its use, he sweeps across many decades and between centuries, describing in generalities the clash between Catholics and Protestants in America.\textsuperscript{122} Justice Scalia avoids specificity and utilizes a narrow example to paint a broad picture of the threat activist gays and their lawyer allies pose to America.\textsuperscript{123}

Justice Kennedy's style of consequential thinking is more understandable and therefore ultimately more persuasive than that of Justice Breyer and Justice Scalia. Justice Kennedy's style is a more concrete, tangible, and supportable description of consequences flowing from constitutional doctrine, allowing the legal thinker and practitioner to appreciate the validity of the insights about the consequences. For instance, Justice Kennedy faced the problem of a teenager's brutality in analyzing the proportionality of imposing the death sentence on teenage killers.\textsuperscript{124} The factual context of his constitutional analysis provides a stark example of such brutality. A seventeen-year-old boy and an accomplice broke into a home, awoke the victim, covered the victim's eyes, bound her and drove her to a nearby state park, where they tied her hands and feet together, wrapped her face in duct tape and threw her from a railroad trestle into a river.\textsuperscript{125} This brutality fits within the traditional standard for capital punishment that

\textsuperscript{120} See Roper v. Simmons, 543 U.S. 551, 572 (2005) (posing, for example, that immature and undeveloped juveniles will be less susceptible to deterrence because their culpability is lower than that of adults).

\textsuperscript{121} See supra notes 103–12 and accompanying text (discussing Roper, 543 U.S. at 568–72).

\textsuperscript{122} See Zelman v. Simmons-Harris, 536 U.S. 639, 718–21 (2002) (Breyer, J., dissenting) (outlining religious history in America, beginning with the passing of the First Amendment to the influx of immigrants in the 20th century).

\textsuperscript{123} See Romer, 517 U.S. at 652–53 (Scalia, J., dissenting) (stating that lawyers are freely able to reject interviewees because of several personal reasons, but cannot freely refuse to hire on the basis of sexual orientation).

\textsuperscript{124} See Roper, 543 U.S. at 569–71 (reasoning that the developmental and cognitive differences between juveniles and adults yield the "diminished culpability of juveniles" that makes it "evident that the penological justifications for the death penalty apply to [juveniles] with lesser force than to adults").

\textsuperscript{125} Id. at 556–57 (describing the details of murder committed by Christopher Simmons, then age seventeen, and his accomplice, Charles Benjamin, age fifteen).
Justice Kennedy describes as befitting a narrow category of the most serious criminals whose extreme culpability makes them the most deserving of execution.\textsuperscript{126}

The death sentence is reserved for the brutal; children occasionally can be, and are, brutal. Justice Kennedy had to contend with a middle-ground position that allows juries to weigh the brutality of the crime against the immaturity and irresponsibility of the offender. In the context of proportionality, Justice Kennedy could balance this logical view of brutality and immaturity against a concrete and objectively supportable model of child-offenders as inherently different from adult offenders. He could point to the transient immaturity of teenagers and the American Psychiatric Association rule that forbids psychiatrists from diagnosing patients under eighteen as having antisocial personality disorder. Justice Kennedy observes, “[i]f trained psychiatrists with the advantage of clinical testing and observation refrain... from assessing any juvenile... as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation...”\textsuperscript{127}

Justice Kennedy’s theory about the constitutional consequences that result from allowing children to face execution enables the advocate to examine the validity of those theories. His theory implies that the consequences are real and believable. Other observers may come to a different conclusion about those constitutional consequences. At a minimum, the counter-conclusions must be based on the tangible and supportable concepts. The consequences Justice Breyer focuses on are based on vague historical references,\textsuperscript{128} or Socratic questions about speculative outcomes.\textsuperscript{129} The advocate has very little to search to test the validity of those observations. Vague history and speculative

\textsuperscript{126} See id. at 568 (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002))).

\textsuperscript{127} Id. at 573.

\textsuperscript{128} See Zelman v. Simmons-Harris, 536 U.S. 639, 719–21 (2002) (Breyer, J., dissenting) (“When [the United States Supreme Court] decided [the twentieth century] Establishment Clause cases, the Court did not deny that an earlier American Society might have found a less clear-cut church/state separation compatible with social tranquility.”).

\textsuperscript{129} See id. at 724 (“How are state officials to adjudicate claims that one religion or another is advocating, for example, civil disobedience in response to unjust laws, the use of illegal drugs in religious ceremony, or resort to force to call attention to what it views as an immoral social practice?”).
questions describe very little. Consequently, the religious person who wants the government to financially support religious education will have difficulty concretely understanding why government-funded religious education will cause religious divisiveness. Unfortunately, such advocates are challenged to develop a vague counter historical view.¹³⁰

Justice Scalia is even more vague than Justice Breyer. According to Justice Scalia, a culture war is raging in America, and gay Americans are viewed as leading immoral and destructive lives. There are many Americans who need to avoid gay American business partners because somehow their gay agenda will undermine the traditional moral opprobrium attached to homosexual conduct.¹³¹ Justice Scalia never defines well the parameters of the so-called “culture wars.” At best, he identifies gay activists and lawyers as the warriors of one side, but fails to more fully define the warriors on the other side. They are only identified as part of a nebulous American mainstream that includes business people, teachers, and scoutmasters. Justice Scalia fails to provide any citation to support his propositions about the culture war. He never provides historical, social, scientific, or public-opinion evidence about the referenced culture war. In addition, he never tests whether gay Americans actually do threaten American morality and whether the consequences of constitutionally protecting gay sexuality contribute to those threats. Justice Scalia leaves the advocate with little or nothing to counter. There is no way to demonstrate a more positive consequence to constitutional protection of gay sexuality because there is no way to know or understand the bases of any negative consequence.

Justices Breyer and Scalia utilize consequential thinking in analyzing constitutional doctrine and application of constitutional doctrines. However, their style is vague and speculative, rendering this consequential thinking useless to the constitutional advocate. This weakness in consequential analysis is especially problematic for Justice Breyer.

¹³⁰ See Van Orden v. Perry, 545 U.S. 677, 683–84 (2005) (stating that the history of the Establishment Clause and United States’ heritage require the Court to maintain clear division between church and state).

¹³¹ See Lawrence v. Texas, 539 U.S. 558, 602 (Scalia, J., dissenting) (expressing concerns about the appearance of the Court taking sides and illuminating the views of many threatened Americans).
V. RETHINKING AND RECASTING JUSTICE BREYER'S CONSEQUENTIAL ANALYSIS

Justice Breyer explicitly writes that consequences are important to his thinking about legal texts including the Constitution. He links his emphasis on active liberty,132 the constitutional protection of democratic involvement in governmental decision-making,133 with "a broader interpretive approach that places considerable importance upon consequences . . . ."134 Justice Breyer criticizes judges who undervalue the use of consequential thinking in their legal, textual, and constitutional analyses, accusing those judges of exacting a high constitutional price by undervaluing purpose and consequential thinking.135 Likewise, his utilization of vague, sweeping, consequential thinking136 undermines his own commitment to the importance of consequential thinking for interpreting legal texts including the Constitution. Justice Kennedy's clearer style of consequential thinking would strengthen Justice Breyer's consequential thinking, demonstrating for Justice Breyer the utility of consequential thinking.

Justice Breyer points to the Establishment Clause and the separation of church and state as a prime constitutional doctrine where the consequences of doctrine matter.137 Justice Kennedy's identification of focused consequences and utilization of specific citable sources138 would assist Justice Breyer in making his consequential points much clearer. For instance, to support his macroscopic view of the consequences of not separating church and state,139 he points to the sweeping history in the seventeenth

132 See BREYER, supra note 1, at 11 (introducing the theme of active liberty and "how increased emphasis upon that theme can help judges interpret constitutional and statutory provisions").

133 BREYER, supra note 1, at 21 (describing active liberty as "the right of individuals to participate in democratic self-government").

134 See BREYER, supra note 1, at 11–12.

135 See BREYER, supra note 1, at 12 (expressing his thesis of focusing "increased attention upon the Constitution's democratic objective").

136 See Zelman v. Simmons-Harris, 536 U.S. 639, 718–26 (Breyer, J., dissenting) (analyzing historical Court decisions surrounding the Establishment Clause).

137 See BREYER, supra note 1, at 120–24 (explaining how considering consequences helped him formulate opinions concerning cases implicating the Establishment Clause).

138 See supra notes 103–12 and accompanying text (discussing Roper v. Simmons, 543 U.S. 551, 568–72 (2005)).

and eighteenth centuries. In order to make a point about the early context of the Establishment Clause, Justice Breyer not only clarifies the objectives of the Establishment Clause, but also the effects it has upon quelling religious war and contentiousness. Justice Breyer does cite to some general sources about American law and religion and law in America. However, unlike Justice Kennedy, he remains vague in his description of purposes and consequences and the sources that support both. He goes on to assert that in American and English history, "[t]he history of governmentally established religion... showed that whenever government had allied itself with one particular form of religion, the inevitable result has been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." Justice Breyer is not only vague and general about the consequence of no Establishment Clause or the weak application of the separation of church and state, but he cites as a source for the proposition another Supreme Court case, Engel v. Vitale, even quoting from it.

Justice Breyer could likely make his point about the negative consequences of not separating church and state by focusing on twentieth-century German history. Justice Breyer has no objection to utilizing non-American and non-English social circumstances to demonstrate religious divisiveness, as he points to contemporary France to demonstrate religious divisiveness in a

140 See Zelman, 536 U.S. at 718 (Breyer, J., dissenting) (commenting that during the seventeenth and eighteenth centuries, the Establishment Clause was understood as promoting the objectives of the First Amendment, and embody that view that religious tolerance was essential to a free society).

141 See BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY 24 (1993) (highlighting that Congress in 1789 enacted the First Amendment in order to forbid the establishment of a national church to avoid the religious wars that plagued Europe); see also LORD RADCLIFFE, THE LAW & ITS COMPASS 70-71 (1960) (stating that the founding fathers believed that "they were entitled to worship God in their own way and to teach their children and to form their characters in the way that seemed to them calculated to impress the stamp of the God-fearing man"); see also Paul A. Freund, Public Aid to Parochial Schools, 82 HARV. L. REV. 1680, 1692 (1969) (explaining that while political debate normally helps to reach compromise, the First Amendment was not intended to divide individuals by their religion).

142 Zelman, 536 U.S. at 718-19 (Breyer, J., dissenting) (quoting Engel v. Vitale, 370 U.S. 421, 431 (1962)).


144 Id. at 431 ("The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.").
society that has been historically socially homogeneous. Certainly, Germany in the twentieth century demonstrates the divisive consequences when the elite ally with governmental power to support particular forms of religion and oppose other forms of religion.

Justice Breyer could utilize the Nazi regime's involvement with Christian religion as an example of the negative consequences that occur when state and religion intertwine, especially in the first years of the Nazi government in Germany. Chancellor Hitler created a Ministry of Church Affairs, which helped one segment of the German Evangelical Church to regroup in order to increase control over church issues. The Nazi leadership endorsed a candidate for Reich Minister in a newly created Reich Church, which Hitler supported as a means to unify German Protestants. The small group of German Evangelicals who regrouped continued to control over German Protestantism and had already dominated the process of unifying the regional Protestant churches into one Reich church. This group maintained power over the Protestant churches during the Nazi government's rule, holding important positions that controlled revenues and decision-making. Those German Protestants who protested a centralized regime dominated by the Protestant Church faced opposition, including harsh reprisals from the govern-

145 See Zelman, 536 U.S. at 725 (Breyer, J., dissenting) (noting that France has reconciled school funding and religious freedom without creating serious problems because it is more religiously homogenous than the United States, but recently there has been problems due to recent waves of immigration).

146 See DORIS L. BERGIN, TWISTED CROSS: THE GERMAN CHRISTIAN MOVEMENT IN THE THIRD REICH 18 (1996) ("In July 1935, Hitler created the new Ministry for Church Affairs under Hans Kerrl. Unintentionally, that attempt by Nazi authorities to increase their control of church issues signaled the onset of German Christian efforts to regroup.").

147 RICHARD STEIGMANN-GALL, THE HOLY REICH: NAZI CONCEPTIONS OF CHRISTIANITY, 1919-1945 159 (Cambridge Univ. Press 2003) ("Hitler's candidate to head a newly created Reich Church in the position of Reich Bishop was Muller.").

148 See STEIGMANN-GALL, supra note 147, at 158 (stating that Hitler made Frick his official liaison and informed him that he was interested in reaching "an agreement with institutional Protestantism").

149 See BERGIN, supra note 146, at 15 (describing how the German Christians unified the twenty-nine regional Protestant churches into "the Protestant Reich Church").

150 See BERGIN, supra note 146, at 2 (stating that German Christians desired "to retain their religious traditions while supporting the Nazi fatherland").

ment.\textsuperscript{152} The German Minister of Church Affairs worked to bring unity to the Protestant Churches,\textsuperscript{153} which resulted in the Godesberg Declaration.\textsuperscript{154} The declaration specifically rejected a universal Christianity, labeled Christianity in irreconcilable religious opposition to Judaism, and announced the establishment of a new institute to research the elimination of the Jewish influence in German Church life.\textsuperscript{155}

That the Nazi Government would side with Christianity should be no surprise as the Nazi Party official program Article 24 read: "The Party . . . stands for a positive Christianity, without binding itself denominationally . . . . It fights against the Jewish-materialistic spirit at home . . . ."\textsuperscript{156} Hitler envisioned Nazism as a Christian movement casting it as religious politics.\textsuperscript{157} As Reich Chancellor, Hitler advocated for active Christianity.\textsuperscript{158} The Third Reich implemented a Christian agenda struggling against Godlessness.\textsuperscript{159} Much of the top leadership of the Nazi government sustained an allegiance to positive Christianity by celebrating Martin Luther and positioning themselves as Luther's successors.\textsuperscript{160} Martin Luther had expressed a strong anti-Semitic hatred of Judaism.\textsuperscript{161} Hitler, working within a Christian anti-Semitic context, stated that anti-Semitic legislation had done a

\begin{itemize}
\item \textsuperscript{152} See GERLACH, supra note 151, at 113–14 (noting that this includes imprisonment).
\item \textsuperscript{153} See BERGIN, supra note 146, at 18–19 (positing that under Hanns Kerrl, the Ministry for Church Affairs fermented the consolidation of various subgroups which formed the League of German Christians).
\item \textsuperscript{154} See BERGIN, supra note 146, at 19 (highlighting the pledge of solidarity of both German and non-German Christian groups).
\item \textsuperscript{155} See BERGIN, supra note 146, at 24 (listing the Declaration's four main points, three of which addressed race).
\item \textsuperscript{156} See BETRAYAL: GERMAN CHURCHES AND THE HOLOCAUST 215 n.2 (Robert P. Ericksen & Susannah Heschel eds., 1999) (quoting Article 24 from the official program of the NSDAP).
\item \textsuperscript{157} See STEIGMANN-GALL, supra note 147, at 60–61 (summarizing Hitler's speech at Passau).
\item \textsuperscript{158} See STEIGMANN-GALL, supra note 147, at 116 (explaining the difference between positive and active Christianity).
\item \textsuperscript{159} See STEIGMANN-GALL, supra note 147, at 117 (stating that the Third Reich was not only fighting for purer morality, but also targeting the decomposition of Christianity).
\item \textsuperscript{160} See STEIGMANN-GALL, supra note 147, at 154 (noting that those who "sustained their allegiance" to positive Christianity "celebrated Luther as a national hero, and positioned themselves as his inheritors").
\item \textsuperscript{161} See DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONER'S: ORDINARY GERMANS AND THE HOLOCAUST 53 (Alfred A. Knopf 1996) (highlighting that Martin Luther was placed "in the pantheon of antisemites" because of his ferocious and influential anti-Semitic views).
\end{itemize}
great service to Christianity by pushing Jews to the margins of German society.\textsuperscript{162} Hitler conceived marginalizing the Jews himself as the Catholic Church had done for 1,500 years.\textsuperscript{163} Certainly, some Protestants saw the Nazi anti-Jewish eliminationist policy, particularly Kristallnacht and Martin Luther's anti-Semitic religious belief, as a continuation of Christian theological attitudes aimed at the Jews.\textsuperscript{164}

The relationship between the German state and German religions during the 1930's and 1940's provides Justice Breyer a clear example of the negative consequences related to religious and social divisiveness. Such an example is within the living memory of some Americans. Justice Breyer would rely upon the research of historians to support his example of the negative consequences that result when church and state mingle.\textsuperscript{165} Justice Breyer can relate his twentieth century German example to his vague statements about seventeenth-century Europe, prior to the writing of the American Constitution.\textsuperscript{166} The German experience, in the twentieth century, certainly evidences a continuing problem with religious divisiveness in Europe into modern times.\textsuperscript{167} Justice Breyer also could relate this relatively recent continuing social chaos in Europe to the more peaceful, flexible social circumstances in America into which many religious Europeans

\textsuperscript{162} See STEIGMANN-GALL, \textit{supra} note 147, at 118 (“Hitler suggested that the antisemitic legislation being taken was in line with Christian principle . . . ”).

\textsuperscript{163} See GUENTER LEWY, THE CATHOLIC CHURCH AND NAZI GERMANY 51–52 (McGraw Hill Book Co. 1964) (discussing that Hitler found National Socialism and Catholicism to be in “fundamental agreement” as the Church banished Jews into the ghetto because they considered them to be parasites).

\textsuperscript{164} See GOLDHAGEN, \textit{supra} note 161, at 111 (suggesting that “many prominent Church leaders threw their moral weight behind anti-Jewish measures” as a result of the “eliminationist antisemitism” that permeated the Protestant churches).

\textsuperscript{165} For Example Doris L. Bergin has taught history at the University of Vermont and Richard Steigman–Gall has taught history at Kent State University. Daniel Jonah Goldhagen has taught Government and Social Studies at Harvard University, and Wolfgang Gerlach completed his doctoral studies at the Evangelical Theological Faculty at the University of Hamburg.

\textsuperscript{166} See Zelman v. Simmons-Harris, 536 U.S. 639, 718–19 (Breyer, J., dissenting) (noting that the Constitutional understanding “that liberty and social stability demand a religious tolerance that respects” all religious views was not reached until after “decades of religious war” in the seventeenth century).

\textsuperscript{167} See ARNO J. MAYER, \textit{WHY DID THE HEAVENS NOT DARKEN? THE “FINAL SOLUTION” IN HISTORY} 30–31 (Pantheon Books 1988) (emphasizing “the myth and lore of holy war” of the Thirty Years War of the seventeenth century was “revitalized and exploited three hundred years later, during the General Crisis and Thirty Years War of the twentieth century”).
moving. The Establishment Clause became a twentieth-century American bulwark against the transport of European religious strife to the United States.

**CONCLUSION**

Justice Breyer places great emphasis on the use of consequential thinking in interpreting legal texts including the Constitution. He especially emphasizes consequential thinking in his Establishment Clause analyses. However, when Justice Breyer utilizes consequential thinking, he is vague and sweeping in describing the consequences of constitutional doctrine and interpretation. His style of consequential thinking is not much different from that of Justice Scalia, who is vague to the point of fantastical in describing the consequences of constitutional protection of gay sexuality. Justice Breyer's consequential thinking would be stronger and clearer if he utilized the consequential thinking style of Justice Kennedy, who identified very specific, focused, understandable, and tangible consequences of constitutionally permitting children to face execution as criminal punishment. Instead of using vague references to history to demonstrate the socially divisive consequences of intermingling governmental power with religion, Justice Breyer could clearly and tangibly demonstrate the negative consequences of a weak...

168 See Zelman, 536 U.S. at 720 (Breyer, J., dissenting) ("The [twentieth] century Court was fully aware . . . that immigration and growth had changed American society dramatically since its early years.").

169 See id. at 721–22 (suggesting that the Court concluded that the Establishment Clause required "separation" because in many places there were too many religions, and "[t]his diversity made it difficult, if not impossible, to devise meaningful forms of 'equal treatment' by providing an 'equal opportunity' for all to introduce their own religious practices into the public schools").

170 BREYER, supra note 1, at 11–12.

171 See BREYER, supra note 1, at 120–24 (giving two examples of cases concerning the Establishment Clause and stating that in both of those cases the consideration of likely consequences "helped produce a legal result").

172 See supra notes 57–65 and accompanying text (discussing Zelman, 536 U.S. at 718–26 (Breyer, J., dissenting)).

173 See supra notes 118–19 and accompanying text (noting previous United States Supreme Court holdings).


175 See Zelman, 536 U.S. at 718–21 (Breyer, J., dissenting) (citing multiple cases where the court loosely referred to history in order to show the negative occurrences associated with nationally sponsored religion).
wall of separation between church and state by describing the involvement with religion by the Nazi controlled German state.¹⁷⁶

¹⁷⁶ See supra notes 147–70 and accompanying text (discussing the Justice’s approach to consequential thinking).