Justice Rehnquist's Original Intent: His Application in Equal Protection and Church/State

Erica Kenney

Introduction

William Rehnquist served as an Associate Justice under Chief Justice Burger from 1972 to 1986 and was promoted to Chief Justice by President Reagan in 1986. Prior to his appointment to the Supreme Court, he expressed an advocacy for original intent while he was a clerk to Justice Jackson in a memo on *Brown v. Board of Education*. Early in his judicial career on the Supreme Court, Rehnquist wrote *The Notion of a Living Constitution* in which he criticizes the concept of an evolving or "living" Constitution and advocates an adherence to original intent jurisprudence. The doctrine of original intent consists of seeking to understand and apply the intent of the Framers of the Constitution and the original meaning of their words in judicial decisions. Rehnquist asserts that the Constitution must be interpreted with respect to the framer's intent, consistent with the "language and intent of the document."[1] From these early documents, adherence to original intent appears foundational to Rehnquist, but how do Rehnquist's statements on original intent in Living Constitution comport or conflict with his actual judicial behavior on the Supreme Court? In other words, was Justice Rehnquist consistent in his proclaimed adherence to the doctrine of original intent? His actions on the Supreme Court reveal that he did not remain as consistent as his early statements would suggest. Justice Rehnquist was consistent only in part, and inconsistent as a whole. In matters of Equal Protection, his judicial behavior was consistent during his terms as Associate Justice, but he deviated from his stated position after his promotion to Chief Justice. In matters of

Church/State, he rarely applied original intent except in a few isolated cases.

Jackson Memo and Living Constitution

Two documents authored by Rehnquist, one written prior to his appointment to the Supreme Court and another from early in his career on the Supreme Court, serve as clear evidence of his stated position on original intent.

The earliest of these documents was written in 1952 while Rehnquist was working as a law clerk to Justice Jackson. He wrote a memo to Jackson regarding *Brown v. Board of Education* (1954)[2] when the decision was still undecided.[3] In his memo, he urged Jackson to adhere to the text of the Constitution and uphold *Plessy v. Ferguson* (1896).[4] He held that the Court was "being asked to read its own sociological views into the Constitution."[5] He frowned upon this notion, stating that "there are standards to be applied other than the personal predilections of the Justices."[6] He asserts that judicial decisions should not be made based on the social values of the times because such standards will fade over time to become nothing but "the sentiments of a transient majority of nine men."[7]

The second document, *The Notion of a Living Constitution*, was written four years after Rehnquist's appointment as Associate Justice. In addressing the concept of a living Constitution, he examines two definitions. The first is the idea that the Framers could not have foreseen all of the events of the future and appropriately they used vague language in the Constitution as would allow it to endure through the ages; in this respect the Constitution may be considered a living document that can be applied to circumstances never envisioned by the Framers. In reference to Justice Holmes' majority opinion in *Missouri v. Holland*,[8] he calls this first definition the "Holmes version."[9] The second definition is the idea that the meaning of the Constitution is dependent upon the ideologies and opinions of the judiciary; that judges interpret the Constitution to solve social problems without respect to popular will or to the framers' intent. In this manner the Constitution is living to the extent that it can be bent by the will of judges. In reference to "a brief filed in a U.S. District Court on behalf of state prisoners"[10] which exemplifies this understanding of the Constitution, Rehnquist calls this the "brief writer's version."[11] The majority of his argument is a critique of the second definition. He considers this view

"the substitution of some other set of values for those which may be derived from the language and intent of the framers,"[12] criticizing any deviation from the "language and intent of the document."[13] His conclusion is essentially that allowing non-elected judges to impose their will in political decisions under the guise of interpreting a "living" document is antithetical to the principles of democratic society as well as in contradiction to the experience afforded by history.

He ultimately asserts that original intent is the only true way of interpreting the Constitution. He holds that the language of the Constitution was not intended to solve modern social problems; rather that it was written to prevent the abuse of the past and cannot be changed by judges today. In both documents he gives a strong statement on how the constitution should be interpreted, but he does not provide a methodology for applying original intent in judicial decisions. The next section seeks to determine whether he upheld this standard in practice.

Rehnquist's Original Intent on the Court

Two areas of constitutional law in which Rehnquist's application of original intent is evident are Equal Protection and Church/State relations. In Equal Protection, he consistently applied original intent during his tenure as Associate Justice but deviated from the practice as Chief Justice. In questions of Church/State relations, he was not consistent even as an Associate in applying original intent. He proclaimed a strong preference for original intent in his dissent in *Wallcae v. Jaffree* (1985), but his argument remained almost entirely isolated to that case and did not reemerge in later decisions.

Equal Protection

Associate Justice

Rehnquist's memo to Justice Jackson in 1952 set the groundwork for his perspective on the Equal Protection Clause of the Fourteenth Amendment. In the memo he stated that Plessy v. Ferguson (1896) was correct and should be upheld.[14] During Senate nomination hearings he responded to controversy over this statement by explaining that it did not reflect his personal opinion but was written to reflect that of Jackson.[15] He nevertheless maintained a narrow interpretation of the amendment and sought to keep it from expanding beyond its origi-

nal application to classifications of race. While an Associate Justice he was consistent in voting and writing opinions in light of an original intent understanding of the Constitution. From 1972 to 1986, the Court faced a number of cases on issues of race, illegitimacy, and gender. In many decisions Rehnquist dissented, often being the lone dissenter; Hudson notes that he "wrote 62 lone dissents during his time on the Burger Court."[16]

In matters of race, the first notable opinion by Rehnquist came in *Moose Lodge No. 107 v. Irvis* (1972) in which a private club discriminated against Irvis, a black guest, by not serving him at the club's restaurant entirely on the basis of his race.[17] Rehnquist wrote the majority opinion, holding that the club's discriminatory policies did not violate the Equal Protection Clause. While he did not reason by original intent, this early decision was an application of his narrow interpretation of the Equal Protection Clause certainly informed by original intent. The following year, Rehnquist dissented from desegregation case *Keyes v. School District No. 1* (1973)[18] and continued to advocate a narrow interpretation of the Equal Protection clause. The case involved an allegation that a school board was intentionally segregating students by controlling attendance zones and through other forms of manipulation.[19] The Court held that the actions of the board unconstitutional. Rehnquist did not see the board's actions as comparable to a state law mandating segregation as in *Brown v. Board of Education*[20] and therefore the actions were insufficient to violate Equal Protection.[21] Sue Davis notes that "Rehnquist has never voted to uphold a school desegregation plan."[22]

While he held a narrow interpretation of Equal Protection in matters of race, he refused to approve of it extending beyond race into classifications of illegitimacy and gender. In *Weber v. Aetna Casualty and Surety Co.* (1972),[23] he articulates a decidedly original intent opinion on illegitimacy. The case involved a man who had died during the course of his employment and his six surviving children: four legitimate, two illegitimate. The state workmen's compensation law did not extend to illegitimate children, so two of his children received no compensation benefits.[24] The Court held that the state law excluding illegitimates violated the Equal Protection Clause and struck down the statute. Rehnquist wrote a strong dissent, stating that the Court's approach was "an extraordinary departure from what I conceive to be the intent of the framers of the Fourteenth Amendment … devoid of any historical or textual support in the language of the Equal Protec-

tion Clause."[25] Further, he held that:

> "Those who framed and ratified the Constitution and the various amendments to it chose to select certain particular types of rights and freedoms, and to guarantee them against impairment by majority action… but the right of illegitimate children to sue in state court to recover workmen's compensation benefits is not among them."[26]

The following year Rehnquist reasserted this position, dissenting from *New Jersey Welfare Rights Organization v. Cahill* (1973)[27] in which the Court relied on the Weber majority to invalidate a New Jersey financial assistance program that excluded illegitimates.

Later, in *Trimble v. Gordon* (1977)[28] the Court struck down a provision of the Illinois Probate Act which denied inheritance to illegitimate children except from their mothers' estate. Petitioner Trimble was unable to inherit her father's estate due to illegitimacy, and the Court held it violated equal protection. As in *Weber* and *Cahill*, Rehnquist again delivered a strong dissent arguing on the basis of the intent of the framers, defining his perspective on the intent of the Equal Protection Clause.[29] He declared that the framers of the Fourteenth Amendment intended it to only apply to classifications of race and national origin[30] and that the equal protection clause "makes sense only in the context of a recently fought Civil War."[31] He sees the court's treatment of equal protection as equating to a council of revision, which was a concept rejected at the Constitutional Convention.[32] Moreover, he holds that "equal protection does not mean that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly."[33]

His reasoning as expressed in Trimble is evident also in issues of gender discrimination. In *Craig v. Boren* (1976),[34] an Oklahoma law discriminating against women in regards to alcohol sales was challenged on equal protection grounds. The court invalidated the law, holding the discrimination based on gender classifications to be unconstitutional. As expected, Rehnquist wrote a lengthy dissent arguing that gender is not a suspect classification to which Equal Protection extends.[35] Rehnquist's response to Craig was not an isolated incident, either. Sue Davis points out that, at least up until 1984 when her article was published, "Rehnquist has disagreed with the majority in seven of the nine cases in which the Court invalidated classifications based on

sex."[36]

Chief Justice

In her 1984 article, Sue Davis suggests that Rehnquist's philosophy could be described as such: "while women may need special protection, such protection is not to be found in the equal protection clause."[37] In light of Rehnquist's opinions as Associate Justice, Davis' statement seems correct; however, after his elevation to Chief Justice, he deviates from that stance. After previously rejecting the notion of expanding equal protection to women, he changes and accepts it in *United States v. Virginia* (1996).[38] The case arose when the United States sued Virginia and the Virginia Military Institute (VMI), an exclusively male state school, claiming that the school's male-only admissions policy violated the Equal Protection Clause. Rehnquist voted with the majority and wrote a concurring opinion. In Virginia, Rehnquist cited the Craig majority favorably[39] and held that VMI violated the equal protection clause because the state had not provided a corresponding equal educational institution for women.[40] He noted: "it is not the 'exclusion of women' that violates the Equal Protection Clause, but the maintenance of an all men school without providing any—much less a comparable—institution for women."[41] Thus it would seem that he extended "similarly situated" to classifications of gender.

He extends equal protection to women again in *Nevada Dept. of Human Resources v. Hibbs* (2003).[42] He wrote the majority opinion upholding the Family Medical Leave Act, which sought "to protect the right to be free from gender-based discrimination in the workplace."[43] He again cites the Craig majority favorably, noting that "…We have held that statutory classifications that distinguish between males and females are subject to heightened scrutiny."[44] He refers to gender discrimination as unconstitutional[45] and held that the FMLA served the purpose of protecting against such discrimination.[46]

Rehnquist's stance on illegitimacy shifted while he was Chief Justice as well. He voted with the majority in *Clark v. Jeter* (1988)[47] in which the Court struck down a state law on Equal Protection grounds. The challenged law contained a 6-year statute of limitations on illegitimates' paternity suits. Justice Sandra Day O'Connor delivered the opinion of the Court, holding "that the 6-year period is not substantially related to an interest in avoiding the litigation of stale or fraudulent

claims"[48] and accordingly was unconstitutional.

As an Associate Justice, Rehnquist's position on equal protection remained consistent with the statements in the Jackson memo and Living Constitution. He advocated judicial restraint and a narrow reading of the Equal Protection Clause. He never supported extending Equal Protection to classifications of gender or illegitimacy. Sue Davis found that "In Rehnquist's view, the fourteenth amendment was not intended to be an affirmative guarantee of equality. Its purpose was simply to prohibit the states from treating blacks and whites differently under the law."[49] He articulated his reliance on original intent interpretation of the amendment in *Trimble v. Gordon* (1977). However, he broke this consistency and abandoned a strict adherence to such a stance after his elevation to Chief Justice, voting and writing opinions that extended Equal Protection beyond the Civil War context of racial classifications only.

Church/State

Associate Justice

Derek Davis describes Rehnquist's judicial approach to religion clauses as "accomodationist."[50] Accommodation may be characterized by neutrality that does not completely separate and does not attack religion, consistent with a narrow interpretation of the religion clauses. Prior to *Wallace v. Jaffree* (1985), Rehnquist did not significantly rely on original intent in religion cases. One of his earliest treatments of religion is found in *Meek v. Pittenger* (1975).[51] Pennsylvania residents challenged the constitutionality of state statutes which authorized public school officials to supply educational materials, including lending textbooks, hiring staff, and rendering auxiliary services, to nonpublic elementary and secondary schools including many religious schools.[52] Appellants claimed that the laws violated the Establishment Clause because the majority of schools affected by the laws were religious schools; the laws thus facilitated an excessive government entanglement with religion.[53] The Court struck down all but one provision of the statutes. The Court applied the Lemon test, which requires government action to 1) have a secular legislative purpose, 2) neither advance nor inhibit religion, and 3) not result in an "excessive government entanglement with religion."[54] Rehnquist wrote a dissenting opinion in which he rejects and criticizes the degree of neutrality demanded by

the test and holds that the Court misunderstood the religion clauses. He stated that "Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach to this difficult question,"[55] but he does not argue on the basis of original intent. His reasoning rests predominantly on a narrow interpretation of the Establishment Clause.

In *Stone v. Graham* (1980),[56] Rehnquist dissents from the Court's decision to strike down a Kentucky state law mandating that a copy of the Ten Commandments be posted on the walls of public school classrooms.[57] He echoes his reasoning from Meek, noting that "The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin"[58] However, instead of attacking the Lemon test, he applies the test[59] and accepts a limited understanding of "secular purpose", arguing that Kentucky law did not violate the lemon test.[60]

Rehnquist's use of original intent in Church/State matters emerges a year later in *Thomas v. Review Board of the Indiana Employment Security Div.* (1981)[61] where the Court held that a denial of unemployment benefits to petitioner, who quit his job because it conflicted with his religious beliefs, violated the Free Exercise Clause. Rehnquist argues in dissent that the tension which the court has created between the Establishment and Free Exercise clauses conflicts with the understanding of the drafters of the First Amendment.[62] He holds that incorporating the First Amendment to the states by the Fourteenth Amendment is in conflict with the intent of the drafters of the Bill of Rights. The tension is in part caused by incorporation as well as by the Court's "overly expansive interpretation of both clauses."[63] His argument against incorporation is one of original intent and his argument against the Court's decision is that "it reads the Free Exercise Clause too broadly and it fails to squarely acknowledge that such a reading conflicts with many of our establishment clause cases."[64] Asserting a narrow interpretation in conjunction with original intent is certainly consistent with Living Constitution, but Rehnquist does not maintain this approach.

In *Mueller v. Allen* (1983),[65] Rehnquist writes for the Court and applies the Lemon test, upholding a statute similar to the one challenged in Meek. In *Mueller*, a Minnesota law permitted parents to deduct from taxes the cost of education expenses in elementary and secondary schools; the majority of schools affected were religious.[66] Rehnquist found that the statute was sufficiently neutral to

pass the Lemon test and withstand challenge on Establishment Clause grounds.[67]

The following year Rehnquist voted with the majority in *Lynch v. Donnelly* (1984).[68] In Lynch, respondents sued the mayor of Pawtucket, Rhode Island, alleging that including a nativity scene in the city's Christmas display violated the Establishment Clause. Chief Justice Burger wrote for the court and maintained a loose interpretation of the "wall of separation" to mean accommodation, not complete separation.[69] He applied the Lemon test and held that the nativity display had "legitimate secular purpose" and was otherwise sufficiently neutral to remain constitutionally permissible.[70]

However, 1985 was the golden year for Rehnquist and original intent, without which one could hardly claim that he applied original intent in Church/State relations. *Wallace v. Jaffree* (1985)[71] marked a significant contrast from his previous opinions and is the height of his use of original intent. In *Wallace*, the Supreme Court struck down an Alabama law that permitted prayer in public school classrooms, ruling that it violated the Establishment Clause. Justice Rehnquist wrote a lengthy dissent advocating original intent interpretation of the Establishment Clause. Rehnquist argues against the Court's reliance on maintaining a "wall of separation" of religion and state as articulated in *Everson v. Board of Education* (1947).[72] He holds that Thomas Jefferson's statement on a "wall of separation between church and state" in 1861 was not intended to be a controlling and guiding principle.[73] The Framers expressed no intent that the government should be "absolutely neutral between religion and irreligion."[74] He concludes that the intent of the Establishment Clause was to forbid "[E]stablishment of a national religion, and […] preference among religious sects or denominations."[75] Further, he sternly attacks and rejects the Lemon test, holding it entirely invalid.[76] He asserts that the test is unpredictable and weak because it is not founded on history or on the declared purposes of Framers.[77]

Rehnquist's reasoning in Wallace is carried over into his dissents in religion clause cases *Aguilar v. Felton* (1985),[78] *Grand Rapids School District v. Ball* (1985),[79] and presumably in *Thornton v. Caldor* (1985),[80] though he did not write an opinion. In Aguilar and Grand Rapids, he states that he dissented for the same reasons as in Wallace.[81]

Chief Justice

In 1986 Rehnquist was elevated to Chief Justice by President Reagan. Based on Rehnquist's dissents in 1985 it might appear that he would shift away from applying the Lemon test, but he did not take that route.

In *Zobrest v. Catalina Foothills School District* (1993),[82] he makes a large departure from his assertions in Wallace, instead employing reasoning far more consistent with *Mueller* and *Stone*. Rehnquist wrote the majority opinion, holding that allowing the school district to provide a sign language interpreter to a deaf student enrolled in a Catholic school did not violate the Establishment Clause.[83] He came to this conclusion not by original intent, but by applying the Lemon test (which he recently rejected in Wallace) and finding that the challenged action was sufficiently neutral to pass the test.[84]

In *Zelman v. Simmons-Harris* (2002)[85] the Court was confronted with the Pilot Project Scholarship Program, an Ohio tuition aid program that affected public, private, secular, and religious schools. Ohio taxpayers challenged the program on Establishment Clause grounds claiming that it was advancing religion[86] because the aid could be directed toward religious schools.[87] Rehnquist, writing for the Court, held that the program did not violate the Establishment Clause. He relied on Supreme Court precedent, including *Mueller* in that the aid was made neutrally available and not directed exclusively to religious schools, and on *Zobrest* in that "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge."[88] Similar to the sign language service in *Zobrest*, he notes that "the Ohio program is neutral in all respects toward religion."[89] He distinguished between the government's "disbursement of benefits" and the individual's decision to direct it toward religious schools.[90] Here Rehnquist relied on precedent in which he applied the Lemon test and he made no use of original intent. He did not mention Wallace or any line of reasoning from his dissent.

Near the end of his career, he still did not resurrect his argument in Wallace. In *Van Orden v. Perry* (2005),[91] Thomas Van Orden sued Texas state officials on Establishment Clause grounds, requesting an injunction to remove a monument of the Ten Commandments from the premises of the Texas state capitol. As Chief Justice, Rehnquist had the opportunity to bring the reasoning from his dissent in *Stone v. Gra-*

ham (another Decalogue challenge) into a majority opinion. However, he did not attack the majority in *Stone* but distinguished the challenged monument from the classroom placards.[92] While he notes that the monument would pass the Lemon test, he found the test inapplicable,[93] but nevertheless ruled that it did not violate the Establishment Clause. He made reference to "the intent of the Framers"[94] but his reasoning in the decision rested on a narrow interpretation of the Establishment Clause.

While Rehnquist is not consistent in original intent, he is consistent with a narrow interpretation of the religion clauses: he dissents from decisions taking a broad view and joins those that rely on a narrow understanding. While a narrow interpretation is not inconsistent with original intent, it is clearly not the same as reasoning by original intent. He uses original intent on a few occasions while Associate Justice and only in dissents, but never while Chief Justice. Thomas, Wallace, and the other 1985 cases remain an anomaly in his judicial career

Analysis and Conclusion: Selective Use of Original Intent

The Jackson memo and Living Constitution might suggest that Rehnquist advocates an all-encompassing original intent approach to judicial reasoning, but an examination of his behavior on the court shows otherwise. He does maintain strict original intent in Equal Protection as Associate Justice, but he departs from the approach after his promotion to Chief Justice. In both Equal Protection and Church/State, whenever he applied original intent he was 1) dissenting and 2) an Associate Justice. It appears that his behavior can in part be explained by his position on the court. As an Associate Justice, he had the ability to write lengthy, pointed, and often lone dissents. He was not in a controlling position so he did not need to be concerned with whether or not other justices joined his opinions. When he writes for the Court (both as an Associate, as in *Mueller* and Chief Justice, as in Hibbs) he employs reasoning that affords greater agreement on the Court. Since no one joined his dissents in Wallace and Trimble, when writing a majority opinion there would be little sense in repeating unpopular arguments when writing for the majority. As Chief Justice he was responsible for governing the entire Court and no longer used original intent to achieve his ends.

In Equal Protection, his consistency with original intent as

associate directly is broken after his promotion on the Court. It appears that once he was elevated to Chief Justice he recognized that he could no longer write unpopular opinions as before. His new position required greater responsibility and less freedom; his responsibility extended beyond his position as Justice to the Court as a governmental institution. Given that other justices rarely joined his dissents, he likely recognized that he would have to alter his strategy in order to ensure five votes and preserve some sense of unity on the Court. Sue Davis argues that Rehnquist is guided by original intent,[95] but her assumption only analyzes a limited portion of his time on the Court. Under her perspective in 1984, she may not have anticipated Rehnquist joining Clark or concurring in Virginia. In Clark the Court struck down a restriction affecting illegitimacy. By joining the majority, Rehnquist relaxed his stance on Equal Protection. If he voted in opposition to extending Equal Protection to illegitimacy as he did in Weber and Trimble, he would likely have written another lone dissent and be in a position with no influence on the majority. By joining the majority as Chief Justice he at least would have the ability to assign opinion-writing and select a justice who may reflect his views more closely. As an Associate Justice in Trimble, voting with the majority would have given him no potential advantage. It is certainly possible that he wrote the majority in Hibbs for similar reasons: to control the scope of the outcome by choosing who writes the opinion (in this case writing it himself), even if he may have preferred to vote against extending Equal Protection to women as he did previously in Craig.

In Church/State, it is relevant that Wallace is a dissent. It is not clear why he chose to assert original intent and write in opposition to the Lemon test as a whole, given that he accepted the Lemon test both prior to and after Wallace. Perhaps he never intended the approach to be put into judicial practice, but simply wished to voice a personal opinion. Regardless of his motivations, it seems fair to conclude that he used original intent not as a governing philosophy, but as a strategic tool in achieving the result of narrow Constitutional interpretation. It seems that he dissented from Wallace not because the Court used the Lemon test, but because it read the test too broadly, interpreting it to require complete separation. His problem appears to be not with the Lemon test itself (contrary to what he stated in dissent from Wallace) but with a broad interpretation of the test. When he does apply the test (as in *Mueller* and *Zobrest*), he interprets it consistent with a narrow interpretation of the religion clauses to achieve the same result as he

could by original intent: accommodation. He joins in Lynch where the Court rejected complete separation and upheld the legitimacy of the nativity display. Derek Davis argues that Rehnquist's decisions are informed by original intent, but nearly the only case Davis relies on is Wallace.[96] Davis' statement is insufficient in describing Rehnquist's judicial philosophy as a whole. In order to reach this result of narrow interpretation he employs varying methods, of which original intent is but one. Therefore, the most accurate characterization of Rehnquist's legacy in Establishment Clause matters appears to be one of "neutrality and private choice"[97] in pursuit of "a limited reading of the Establishment Clause." [98]

END NOTES

1. William H Rehnquist, "The Notion of a Living Constitution," *Harvard Journal of Law and Public Policy* 29.2 (2006): 401-415; 403
2. *Brown v. Board of Education* 347 U.S. 483 (1954)
3. Earl M. Maltz, "The Intractable Problem of Race," in *The Rehnquist Legacy*, ed. Craig Bradley (New York: Cambridge University Press, 2006) 369.
4. *Plessy v. Ferguson* 163 U.S. 537 (1896)
5. Rehnquist, "Memo: Random Thought on the Segregation Cases," Government Printing Office Access.
6. "Segregation Cases."
7. "Segregation Cases."
8. *Missouri v. Holland* 252 U.S. 416 (1920)
9. Rehnquist, "Living Constitution," 402.
10. Rehnquist, "Living Constitution," 403.
11. Rehnquist, "Living Constitution," 403.
12. Rehnquist, "Living Constitution," 403.
13. Rehnquist, "Living Constitution," 403.
14. Maltz, "Intractable Problem," 369; "Segregation Cases."
15. Maltz, "Intractable Problem," 369.
16. David L. Hudson, *The Rehnquist Court: Understanding Its Impact and Legacy* (Connecticut: Praeger Publishers, 2007), 15.
17. *Moose Lodge No. 107 v. Irvis 407* U.S.163, 165 (1972).
18. *Keyes v. School District No 1* 413 U.S. 189, 254 (1973) (Rehnquist J., dissenting)
19. Hudson, *The Rehnquist Court*, 15.
20. 413 U.S. 189, 254-255 (1973)
21. 413 U.S. 189, 256-257 (1973)
22. Sue Davis, "Justice Rehnquist's Equal Protection Clause: An Interim Analysis," *Nebraska Law Review* 63.288 (1984): 712-737; 732.
23. *Weber v. Aetna Casualty and Surety Co.* 406 U.S. 164, 177 (1972) (Rehnquist J., dissenting)
24. 406 U.S. 164, 166-167 (1972)
25. 406 U.S. 164, 179-181 (1972)
26. 406 U.S. 164, 179-182 (1972)
27. *New Jersey Welfare Rights Organization v. Cahill* 411 U.S. 619, 622 (1973) (Rehnquist J., dissenting)
28. *Trimble v. Gordon* 430 U.S. 762, 777 (1977) (Rehnquist J., dissenting)
29. 430 U.S. 762, 777 (1977)
30. 430 U.S. 762, 777 (1977)
31. 430 U.S. 762, 779 (1977)
32. 430 U.S. 762, 778 (1977)
33. 430 U.S. 762, 780 (1977)
34. *Craig v. Boren* 429 U.S. 190, 217 (1976) (Rehnquist J., dissenting)
35. 429 U.S. 190, 220-221 (1976)
36. S. Davis, "Interim Analysis," 721.
37. S. Davis, "Interim Analysis," 722.
38. *United States v. Virginia* 518 U.S. 515, 588 (1996) (Rehnquist J., concurring)
39. 518 U.S. 515, 558-559 (1996)
40. 518 U.S. 515, 562 (1996)
41. 518 U.S. 515, 565 (1996)
42. *Nevada Dept. of Human Resources v. Hibbs* 538 U.S. 721 (2003)
43. 538 U.S. 721, 728 (2003)
44. 538 U.S. 721, 728 (2003)

45. 538 U.S. 721, 730 (2003)
46. 538 U.S. 721, 737 (2003)
47. *Clark v. Jeter* 486 U.S. 456 (1988)
48. 486 U.S. 456, 464 (1988)
49. S. Davis, "Interim Analysis," 736.
50. Derek Davis, *Original Intent: Rehnquist and the Course of American Church/State Relations* (New York: Prometheus Books, 1991) 50.
51. *Meek v. Pittenger* 421 U.S. 349, 388 (1975) (Rehnquist J., dissenting)
52. 421 U.S. 349, 356 (1975)
53. 421 U.S. 349, 358 (1975)
54. *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
55. 421 U.S. 349, 395 (1975)
56. *Stone v. Graham* 449 U.S. 34, 43 (1980) (Rehnquist J., dissenting)
57. 449 U.S. 34, 42-43 (1980)
58. 449 U.S. 34, 46 (1980)
59. 449 U.S. 34, 45-46 (1980)
60. 449 U.S. 34, 46 (1980)
61. *Thomas v. Review Board of Indiana Employment Security Division* 450 U.S. 707, 721 (1981) (Rehnquist J., dissenting)
62. 450 U.S. 707, 720 (1981)
63. 450 U.S. 707, 720 (1981)
64. 450 U.S. 707, 727 (1981)
65. *Mueller v. Allen* 463 U.S. 388 (1983)
66. 463 U.S. 388, 405 (1983)
67. 463 U.S. 388, 395, 401, 403 (1983)
68. *Lynch v. Donnelly* 465 U.S. 668 (1984)
69. 465 U.S. 668, 672-673 (1984)
70. 465 U.S. 668, 680-685 (1984)
71. *Wallace v. Jaffree* 472 U.S. 38, 91 (1985) (Rehnquist J., dissenting)
72. *Everson v. Board of Education* 330 U.S. 1 (1947)
73. 472 U.S. 38, 92-98 (1985)
74. 472 U.S. 38, 98 (1985)
75. 472 U.S. 38, 106 (1985)
76. 472 U.S. 38, 92; 110 (1985)
77. 472 U.S. 38, 110 (1985)
78. *Aguilar v. Felton* 473 U.S. 402, 420 (1985) (Rehnquist J., dissenting)
79. *Grand Rapids School District v. Ball* 473 U.S. 373, 400 (1985) (Rehnquist J., dis senting)
80. *Thornton v. Caldor* 472 U.S. 703 (1985) (Rehnquist J., dissenting)
81. 473 U.S. 402, 420 (1985); 473 U.S. 373, 400 (1985)
82. *Zobrest v. Catalina Foothills School District* 509 U.S. 1(1993)
83. 509 U.S. 1, 13-14 (1993)
84. 509 U.S. 1, 13-14 (1993)
85. *Zelman v. Simmons-Harris* 537 U.S 639 (2002)
86. 537 U.S 639, 648 (2002)
87. 537 U.S 639, 649 (2002)
88. 537 U.S 639, 651 (2002)
89. 537 U.S 639, 653 (2002)
90. 537 U.S 639, 652 (2002)
91. *Van Orden v. Perry* 545 U.S. 677 (2005)
92. 545 U.S. 677, 703 (2005)
93. 545 U.S. 677, 703-704 (2005)
94. 545 U.S. 677, 693 (2005)

95. S. Davis, "Interim Analysis," 713.
96. D. Davis, *Original Intent*, 35; 95-97.
97. Daniel O. Conkle, "Indirect Funding and the Establishment Clause: Rehnquist's Triumphant Vision of Neutrality and Private Choice," in *The Rehnquist Legacy*, ed. Craig Bradley (New York: Cambridge University Press, 2006) 54.
98. Conkle, "Indirect Funding," 78.