The End of an Era

October Term 2004

Erwin Chemerinsky

The biggest story throughout the Supreme Court's October Term 2004 was the story that wasn't to be. While Court-watchers were seemingly obsessed with Chief Justice William Rehnquist's thyroid cancer – and the retirement many predicted it would lead to – in the end we wound up with a much more important development: the retirement and anticipated replacement of Associate Justice Sandra Day O'Connor. On Friday morning, July 1, a few days after the last decisions of the Term were released, Justice O'Connor surprised everyone by announcing her retirement. Any vacancy on the Supreme Court is significant, particularly so because there has not been one in 11 years, since 1994, when Harry Blackmun was replaced by Stephen Breyer. But what makes the announcement even more important is that Justice O'Connor has so often been the swing vote in 5–4 decisions in key areas such as abortion, affirmative action, campaign finance, and religion.

On the other hand, the Term produced remarkably little change in the law. In the most controversial areas – such as whether the government may take private property to increase economic development,[1] whether Ten Commandments displays on government property violate the Establishment Clause,[2] and whether federal law may criminally prohibit and punish private possession of marijuana for medicinal purposes[3] – the Court made no new law. Overall, the Term can be best understood as a continuation, and likely the end, of an unexpectedly moderate era of the Rehnquist Court.

There have been three distinct phases of the Rehnquist Court since William Rehnquist was elevated to Chief Justice in 1986. The first phase, from 1986 to about 1992, was characterized by great deference to the elected branches of government. Rarely dur-

Erwin Chemerinsky is the Alston & Bird Professor of Law and Political Science at Duke University.

1 Kelo v. City of New London, 125 S.Ct. 2655 (2005).

2 McCreary County v. ACLU of Kentucky, 125 S.Ct. 2722 (2005); Van Orden v. Perry, 125 S.Ct. 2854 (2005).

3 Gonzales v. Raich, 125 S.Ct. 2195 (2005).

ing this time did the Court invalidate federal, state, or local laws.[4] The second phase, from 1992 through about 2002, involved the Court frequently striking down federal laws and overruling precedents, perhaps most notably in its federalism decisions limiting Congress's powers and expanding state sovereign immunity.[5]

But in the last few years, the Court has been decidedly more progressive. Two years ago, for example, the Court upheld affirmative action by colleges and universities[6] and invalidated a state law prohibiting private consensual homosexual activity, overruling a relatively recent precedent in the process.[7] Every federalism case in the last few years has been resolved in favor of federal power and against states' rights.[8] October Term 2004 continued this pattern. Many of the most significant cases were resolved in ways associated with progressive, not conservative, positions. For example, the Court struck the death penalty for crimes committed by juveniles,[9] refused to enlarge the constitutional protection afforded property owners,[10] and expanded the conduct prohibited by the federal civil rights statutes.[11]

More often than not this Term, the more liberal wing composed of Justices Stevens, Souter, Ginsburg, and Breyer prevailed by attracting the support of either Justice O'Connor or Kennedy. Indeed, of the 76 decisions, 19 were decided by a 5–4 margin and in only four of these closely divided decisions was the majority composed of Rehnquist, O'Connor, Scalia, Kennedy, and Thomas. This is far different than most years, when this group was most often the majority in 5–4 decisions.

There seems a simple explanation for this most recent phase of the Rehnquist Court: It is easier to get one vote than two. Especially in controversial areas, Justices Stevens, Souter, Ginsburg, and Breyer frequently vote together, as do the bloc of Chief Justice Rehnquist and Justices Scalia and Thomas.[12] Often the former group of four have been able to get either Justice O'Connor or Justice Kennedy and thus produce 5–4 decisions for more progressive results.[13] But, of course,

4 See, e.g., Erwin Chemerinsky, Foreword: The Vanishing Constitution, 103 Harv. L. Rev. 43 (1989) (describing judicial deference during October Term 1988).

5 See Seth P. Waxman, Defending Congress, 79 N.C. L. Rev. 1073, 1074 (2001) (describing the frequency of Supreme Court invalidations of federal laws during this period).

6 Grutter v. Bollinger, 539 U.S. 306 (2003).

7 Lawrence v. Texas, 539 U.S. 558, 578 (2003), overruling Bowers v. Hardwick, 478 U.S. 186 (1986).

8 See, e.g., Tennessee v. Lane, 541 U.S. 509 (2004); Sabri v. United States, 541 U.S. 600 (2004); Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003).

9 Roper v. Simmons, 125 S.Ct. 1183 (2005).

10 Kelo v. City of New London, 125 S.Ct. 2655 (2005); Lingle v. Chevron USA, Inc., 125 S.Ct. 2074 (2005).

11 Smith v. City of Jackson, 125 S.Ct. 1536 (2005); Jackson v. Birmingham Board of Ed., 125 S.Ct. 1497 (2005).

12 There are notable exceptions, such as Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 124 S.Ct. 2531 (2004), where the majority was composed of Stevens, Scalia, Souter, Thomas, and Ginsburg. Another exception is Van Orden v. Perry, 125 S.Ct. 2854 (2005), where the majority to uphold a Ten Commandments display consisted of Rehnquist, Scalia, Kennedy, Thomas, and Breyer.

13 See, e.g., Jackson v. Birmingham Board of Ed., 125 S.Ct. 1497 (2005) (Justice O'Connor the fifth vote); Roper v. Simmons, 125 S.Ct. 1183 (2005) (Justice Kennedy the fifth vote); Rompilla v. Beard, 125 S.Ct. 2456 (2005) (Justice O'Connor the fifth vote); Kelo v. City of New London, 125 S.Ct. 2655 (2005) (Justice Kennedy the fifth vote); McCreary County v. ACLU of Kentucky, 125 S.Ct. 2722 (2005) (Justice O'Connor the fifth vote).

much may change very soon with Justice O'Connor being replaced.

In this essay, I briefly review the Court's key decisions in a number of areas including criminal law and procedure, takings, the establishment clause, federalism, and civil rights. In many of these areas, the Court did not change the law, but followed and applied precedents. And in many of the cases, the Court reached a more progressive result because Justice O'Connor or Justice Kennedy joined Justices Stevens, Souter, Ginsburg, and Breyer to create the majority. With Justice O'Connor's retirement, October Term 2004 is likely to be remembered less for its decisions, and more for being the last year of this particular era of the Rehnquist Court.

Criminal Law and Procedure

Death Penalty

The Court overturned death sentences in several cases posing a broad array of issues.

In *Rompilla v. Beard*,[14] the Court held that a defense attorney's failure to read the files from the defendant's prior conviction and to investigate the possible abuse and mental retardation of the defendant was ineffective assistance of counsel, invalidating his death sentence. Justice Souter wrote the opinion for the Court, joined by Justices Stevens, O'Connor, Ginsburg, and Breyer.

The case reinforces the Court's holding two years ago in *Wiggins v. Smith*,[15] that courts must closely examine the performance of defense counsel in capital cases. *Rompilla* did not involve an incompetent attorney who slept through the trial. The lawyer had provided a diligent defense, including interviews of family members. But the attorney knew that the prosecutor would rely on a prior conviction as an aggravating factor in sentencing and the Court held that his failure to read that file, and thus to gain key rebuttal evidence, was ineffective assistance of counsel. Furthermore, the Court included in its analysis of the prejudice of the mistake the value of material in the file not directly related to the previous conviction, material that would have allowed the defense to raise Rompilla's childhood and low intelligence as mitigating factors during the sentencing phase.

In *Roper v. Simmons*,[16] the Court ruled that it was cruel and unusual punishment to impose the death penalty for crimes committed by juveniles. In the 5–4 decision, Justice Kennedy wrote the opinion for the Court, which was joined by the Stevens-Souter-Ginsburg-Breyer bloc. Like *Rompilla*, the Court's opinion follows the reasoning from a recent decision, *Atkins v. Virginia*,[17] which invalidated the death penalty for the mentally retarded. The Court reaffirmed that "evolving standards of decency" are the proper basis for determining what is cruel and unusual punishment, and for those standards, the Court looked to trends among the states and international practice.

The most controversial aspect of the decision was not the outcome, but rather Justice Kennedy's invocation of foreign practices,[18] a criticism that is misplaced. Justice Kennedy did not base his decision on other countries' law, but instead pointed to it as an indica-

14 125 S.Ct. 2456 (2005).

15 539 U.S. 510 (2003).

16 125 S.Ct. 1183 (2005).

17 536 U.S. 304 (2002).

18 See Roper, 125 S.Ct. at 1226–29 (Scalia, J., dissenting) (arguing that "the basic premise of the Court's argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand"); id. at 1215–16 (O'Connor, J., dissenting) (taking issue with Justice Scalia's argument on

tion of evolving standards of decency. He observed that, as of 2000, only six countries in the world allowed the death penalty for crimes committed by juveniles and none of these are countries whose human rights records are ones that the United States would want to emulate.

In *Deck v. Missouri*,[19] the Court held that using visible shackles on a defendant during the sentencing phase of a capital case violates due process unless there is a showing of a compelling need to restrain him. Justice Breyer's opinion for the Court's 7–2 decision, with Justices Scalia and Thomas dissenting, recognized the importance of ensuring safety in courtrooms. But the Court said that there must be a particularized showing of a need for restraints and that the defendant did not have to show that the jury was prejudiced by seeing him in visible restraints.

Each of these death penalty decisions is notable in itself, but together they show a Court that has become very concerned about how the death penalty is administered in the United States. In the first two phases of the Rehnquist Court, from 1986–2002, rarely was a death sentence overturned. But the cases this Term, like those from the last few years, reveal a Court that is looking closely at capital cases. To be sure, no Justice on the current Court argues that capital punishment is inherently unconstitutional, as Justices Brennan, Marshall, and Blackmun previously did. But a majority of the current Justices obviously have been affected by the work of the innocence projects and are concerned about inadequate representation in capital cases and the reality of innocent people on death row.

Peremptory Challenges

In two separate cases, the Court overturned decisions because prosecutors had impermissibly used race in their exercise of peremptory challenges. In *Johnson v. California*[20] (an 8–1 decision, with only Justice Thomas dissenting), the Court held that criminal defendants need not show that it was more likely than not that race was used as the basis for peremptory challenges in order to make out a prima facie case of a constitutional violation. Instead, a defendant need only produce evidence sufficient to permit the trial judge to draw an inference that race was used.

In *Miller-El v. Dretke*,[21] the Court found an equal protection violation when the defendant showed that a prosecutor's office had a policy of striking black prospective jurors when there was a black defendant; that blacks were struck when whites with similar circumstances were not; that blacks were asked different questions than whites; and that the prosecutor "shuffled" the jury when prospective black jurors were coming up. Justice Souter's opinion for the Court in a 6–3 decision should send a clear message to trial and appellate courts dealing with this issue: They are required to examine the record closely, as the Supreme Court did, to see if race or gender has been impermissibly used in the exercise of peremptory challenges.

Criminal Sentencing

From a practical perspective, the most important rulings of the year were the Supreme Court's two decisions in *United States v. Booker*,[22] which concerned the constitutionality of the federal sentencing guidelines and

foreign and international law while simultaneously arguing that the majority's reliance on foreign and international law was misplaced).

19 125 S.Ct. 2007 (2005).

20 125 S.Ct. 2410 (2005).

21 125 S.Ct. 2317 (2005).

thus affect sentencing in every federal court on a daily basis. Five years ago, in *Apprendi v. New Jersey*,[23] the Court held that any factor, other than a prior conviction, that leads to a sentence greater than the statutory maximum must be proven to a jury beyond a reasonable doubt. There was an unusual split among the Justices in *Apprendi*: Justice Stevens wrote for the Court and was joined by Justices Scalia, Souter, Thomas, and Ginsburg. Last year, in *Blakely v. Washington*,[24] the same majority (with Justice Scalia writing) extended *Apprendi* to any factor, other than a prior conviction, that leads to a sentence greater than that which could be based on either the jury's verdict or the defendant's admissions.

In *United States v. Booker* the Court granted review to decide the constitutionality of the federal sentencing guidelines. The Court produced two separate 5–4 decisions. First, the Court held that the principles of *Apprendi* and *Blakely* apply to the federal sentencing guidelines. Justice Stevens wrote for the Court and was joined by the four other Justices who were in the *Apprendi* and *Blakely* majorities: Scalia, Thomas, Souter, and Ginsburg. In a second opinion, backed by the *Apprendi* and *Blakely* dissenters joined by Justice Ginsburg, the Court concluded that the appropriate remedy is to keep the sentencing guidelines but to make them advisory rather than mandatory, with appellate review to ensure that the sentence is reasonable. Only Justice Ginsburg was in the majority in both *Booker* decisions and, unfortunately, she did not write an opinion.

It is yet to be seen what it means for the sentencing guidelines to be advisory rather than mandatory and how appellate courts are to decide what is a reasonable sentence. In the six months since *Booker*, these questions are causing great confusion and will undoubtedly require more involvement by the Supreme Court to clarify them. The core principle behind all three cases must be must be that it is wrong to convict a person of one crime and sentence him for another; judges should not be able to impose punishments for additional crimes for which the defendant has not been convicted. But it is too soon to know whether courts will follow this principle or what role the Sentencing Guidelines will have now that they are advisory.

Fourth Amendment

One area where the Rehnquist Court has not become more progressive is with regard to the Fourth Amendment. Over the last two years, there have been ten Fourth Amendment decisions and nine have been decided in favor of the police. Law enforcement won all three Fourth Amendment cases this year.

In *Illinois v. Caballes*,[25] the Court held that the Fourth Amendment does not require reasonable, articulable suspicion to justify using drug-detection dogs to sniff a vehicle during a legitimate traffic stop. In *Muehler v. Mena*,[26] the Court held that when police search a dwelling, they may detain in handcuffs and question anyone who is present, even if the person is not suspected of any crime. Moreover, the Court said that additional questioning, beyond the scope of the search, is not a violation of the Fourth Amendment. In *Devenpeck v. Alford*,[27] the Court held that an arrest is lawful, even if the

22 125 S.Ct. 738 (2005).

23 530 U.S. 466 (2000).

24 542 U.S. 296 (2004).

25 125 S.Ct. 834 (2004).

26 125 S.Ct. 1465 (2004). I was co-counsel in the Supreme Court for Iris Mena.

grounds for the arrest turn out to be baseless, so long as there is some other permissible basis that could have been used for the police action. The Court followed its decision in *Whren v. United* States[28]: The subjective intentions of the officers don't matter under the Fourth Amendment; the focus is entirely on whether there is objective probable cause for the search or arrest.

Takings

Many conservatives undoubtedly hoped that the Rehnquist Court would bring about a revival of judicial protection of economic liberties. The decisions this Term showed that this will not be the legacy of the Rehnquist Court and that instead it will continue the deference to government economic regulations that has been the rule since 1937.

Perhaps the most controversial case of the year, and definitely the most mis-reported, was *Kelo v. City of New London*.[29] The takings clause of the Fifth Amendment allows the government to take private property for "public use" so long as it pays "just compensation." In *Kelo*, an economically depressed city sought, through a private economic development corporation, to take private property for purposes of a new economic development project. The owners, who did not want to sell their property, objected that the taking was not for "public use."

The Supreme Court, in a 5–4 decision, ruled in favor of the city. Justice Stevens wrote for the Court, joined by Justices Kennedy, Souter, Ginsburg, and Breyer. The Court relied on long-standing precedents holding that a taking is for public use so long as the government acts out of a reasonable belief that the taking will benefit the public.[30] The Court said that the taking was for public use because the city reasonably believed that its action would create over 1,000 new jobs and increase economic growth.

The media presented this case as a dramatic change in the law, while in reality the Court applied exactly the principle that had been articulated decades ago: A taking is for public use so long as the government acts out of a reasonable belief that the taking will benefit the public. Certainly there can be disagreement over whether the government should take private property for purposes of economic development, and some states already have laws that prohibit doing so. But the Court did not change the law in this area; "public use" was already a very deferential test under established precedent.

The other case concerning the takings clause, *Lingle v. Chevron USA, Inc.*,[31] did change the law of the takings clause, but it did so by giving more discretion to the government. Twenty-five years ago, in *Agins v. City of Tiburon*,[32] the Court said that a government regulation must "substantially advance" legitimate interests in order to avoid being a taking. In *Lingle*, the Court upheld a state rent control law, saying that the regulation need only be reasonably related to a legitimate interest. Throughout the Term, the Court reaffirmed the judicial deference to government economic regulations that has been central to post-1937 constitutional law.

27 125 S.Ct. 588 (2004).

28 517 U.S. 806 (1996).

29 125 S.Ct. 2655 (2005).

30 See, e.g., Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

31 125 S.Ct. 2074 (2005).

32 447 U.S. 255 (1980).

First Amendment

The Supreme Court likely took two different cases involving Ten Commandments displays in the hope of offering clarity to lower courts on an issue that is arising in litigation across the country: When may the government place religious symbols, such as Ten Commandments displays, on government property? Unfortunately, the decisions in *McCreary County v. ACLU of Kentucky*[33] and *Van Orden v. Perry*[34] did little to clarify the law in this area.

In *McCreary County*, the Court, by a 5–4 decision, ruled that Ten Commandments displays in Kentucky county courthouses were unconstitutional because the government had the impermissible purpose of advancing religion. The counties were clear that they wanted the Ten Commandments posted because of the religious content and significance of the Decalogue. In *Van Orden*, the Court, in a 5–4 decision without a majority opinion, upheld the constitutionality of a six-foot-high, three-foot-wide Ten Commandments monument that sits between the Texas State Capitol and the Texas Supreme Court. Chief Justice Rehnquist wrote a plurality opinion joined by Justices Scalia, Kennedy, and Thomas, and declared that the government may place religious symbols on government property. Justice Breyer concurred in the judgment and stressed that the presence of the monument for over 40 years, the surrounding secular displays and monuments, and its donation by the Fraternal Order of Eagles, all convinced him that the government was not impermissibly endorsing religion.

In trying to make sense of these decisions it is important to remember that only one Justice – Stephen Breyer – saw a distinction between them. Four Justices – Rehnquist Scalia, Kennedy, and Thomas – would have upheld both displays. Four Justices – Stevens, O'Connor, Souter, and Ginsburg – would have outlawed both. Only Breyer would both prohibit the Kentucky display and allow the Texas monument.

What conclusions can be drawn from these decisions? First, the test articulated in *Lemon v. Kurtzman*[35] retains its vitality as the test for courts to use in establishment clause cases. Under the *Lemon* test, the government violates the Establishment Clause if it has the purpose of advancing religion, if the primary effect of the government action is to advance or inhibit religion, or if there is excessive government entanglement with religion. For many years, conservatives such as Justice Scalia have urged the overruling of the *Lemon* test.[36] But in *McCreary County*, Justice Souter's majority opinion emphatically reaffirms and applies the *Lemon* test.

Second, the government is limited in its ability to display religious symbols on government property. The cases leave no question that the government cannot place religious symbols on government property in a manner that symbolically endorses religion.

Third, in determining whether a particular display is a symbolic endorsement of religion, courts must look at the display's history, pur-

33 125 S.Ct. 2722 (2005).

34 125 S.Ct. 2854 (2005). I should disclose that I was counsel of record for Van Orden and argued the case in the Supreme Court.

35 403 U.S. 602 (1971).

36 See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

pose, and context. For Justice Breyer, these were the key factors that distinguished the Kentucky and the Texas displays. But this means that every religious symbol on government property will have to be analyzed based on its unique facts and circumstances.

American society is deeply divided over issues of religion and government. Some believe strongly that government should be strictly secular and that religious symbols rarely, if ever, belong on government property. Others believe that excluding religious symbols is impermissible hostility to religion and that religious symbols should be allowed on government property essentially without limits. These contrasting, strongly held views ensure that this issue will continue to divide the Court, and society, for years to come.

With four Justices – Rehnquist, Scalia, Kennedy, and Thomas – eager to overrule the *Lemon* test and allow a much greater presence of religion in government, this is an area where Justice O'Connor's successor could have an immediate and dramatic effect on the law.

Commerce Clause

In *Gonzales v. Raich*,[37] the Court held that Congress constitutionally may use the interstate commerce power to prohibit the cultivation and possession of small amounts of marijuana for medicinal purposes. California created an exemption to its state marijuana laws for medical uses, but no such exemption exists in the federal law. In a 6–3 decision, with the majority opinion written by Justice Stevens, the Court upheld the federal law. Justices Kennedy, Souter, Ginsburg, and Breyer joined the majority opinion, and Justice Scalia concurred in the judgment. Justice Stevens explained that, for almost seventy years, Congress has had the authority to regulate activities that have a substantial effect on interstate commerce. The Court concluded that marijuana looked at cumulatively (including that grown privately for medical purposes) has a substantial effect on interstate commerce. Justice Stevens's opinion relied on a case from over 60 years ago, *Wickard v. Filburn*,[38] which held that Congress may regulate the amount of wheat that farmers grow for their own household consumption.

It was not surprising that Justices Stevens, Souter, Ginsburg, and Breyer voted to uphold this law. They have dissented in all of the Rehnquist Court's decisions limiting the scope of Congress's commerce power.[39] Undoubtedly, they were concerned that restricting Congress's authority to regulate narcotics would also jeopardize federal environmental laws and civil rights laws adopted under the commerce power. More surprising was that Justice Kennedy was the fifth vote for the majority and that Justice Scalia concurred in the judgment. Perhaps they were concerned that invalidating this law would put other federal criminal statutes, including drug laws, in jeopardy of being struck down as exceeding the scope of Congress's power.

Civil Rights

Civil rights plaintiffs were remarkably successful this year, usually by attracting one other Justice to join with Justices Stevens, Souter, Ginsburg, and Breyer. The civil rights case with the greatest practical impact will be *Smith v. City of Jackson*,[40] which held that disparate impact employment discrimination claims may be brought under the Age Discrimination in Employment Act. Justice

37 125 S.Ct. 2195 (2005).

38 317 U.S. 111 (1942).

39 See United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

Stevens wrote the plurality opinion in the 5–4 decision, with Justices Souter, Ginsburg, and Breyer concurring and Justice Scalia concurring in the judgment. Because it is so much easier to prove a disparate impact than it is to show a discriminatory intent, this case will significantly increase the number of claims brought under the federal age discrimination statute.

In *Jackson v. Birmingham Board of Ed.*,[41] the Court ruled that the male coach of a girls high school basketball team had a valid retaliation claim under Title IX of the federal civil rights laws when he was removed from his position for complaining that his team was not given equal access to facilities and other resources. Justice O'Connor wrote for the majority in the 5–4 decision and was joined by the familiar combination of Justices Stevens, Souter, Ginsburg, and Breyer. Justice O'Connor continued a pattern present throughout her tenure on the Court: being a consistent vote to remedy gender discrimination, often as author of majority opinions in 5–4 cases.[42]

In *Johnson v. California*,[43] the Court held that the routine racial segregation of prisoners must meet strict scrutiny. California Prison Authority regulations require that inmates arriving at a new institution be held for 60 days in an evaluation area. During this time, they are never celled with inmates of a different race. The Supreme Court reversed the Ninth Circuit, which upheld this policy using rational basis review, and remanded the case for the application of strict scrutiny.

One important civil rights case where plaintiffs did not succeed was *Town of Castle Rock v. Gonzales*.[44] The case had truly tragic facts. A woman obtained a restraining order against her estranged husband, limiting his contact with their three daughters. One night she discovered that the girls were missing and immediately suspected that her husband had taken them. She called the police repeatedly, but they refused to help even though the restraining order was written in mandatory language and even though Colorado had a statute requiring police to enforce restraining orders. That night, her husband killed the three girls before dying himself in a shoot-out with the police.

The United States Court of Appeals for the Tenth Circuit, in an *en banc* decision, ruled that the mandatory language of the restraining order and the state statute created a property interest and that the mother was denied of this property without due process of law.[45] The Supreme Court, in a 7–2 decision with Justice Scalia writing for the Court, reversed. Justice Scalia's opinion explained that police have discretion in enforcing any law, including a restraining order, and thus the mother did not have an entitlement or a property interest protected under the due process clause.

Sixteen years ago, in *DeShaney v. Winnebago County Department of Social Services*,[46] the Court held that the government generally has no duty to protect people from privately inflicted harms. In *DeShaney*, the Court rejected a claim by a four-year-old boy who

40 125 S.Ct. 1536 (2005).

41 125 S.Ct. 1497 (2005).

42 See, e.g., Davis v. Monroe County Board of Education, 526 U.S. 629 (1999); Mississippi University of Women v. Hogan, 458 U.S. 718 (1982).

43 125 S.Ct. 1141 (2005).

44 125 S.Ct. 2796 (2005).

45 366 F.3d 1093 (10th Cir. 2004) (en banc).

46 489 U.S. 189 (1989).

suffered irreversible brain damage after being severely beaten by his father. The Court concluded that the county's failure to respond to complaints of child abuse over a two-year period did not violate the Constitution because the government had no duty to protect Joshua DeShaney from his father.

Castle Rock must be understood together with *DeShaney* as rejecting a constitutional duty to provide protection except in circumstances where the government literally creates the danger. It doesn't matter whether the claim is labeled substantive or procedural due process, the Court is unwilling to impose a constitutional duty on the government. Perhaps this reflects the general orientation of constitutional law toward protecting negative liberties that limit government actions rather than imposing affirmative duties on the government to act. Perhaps, too, it reveals a Court unwilling to impose burdens on law enforcement. Justice Scalia concluded his majority opinion by saying that states have the choice to create state-law tort liability for police failures to act, but there is no enforceable right under the United States Constitution.

The biggest story during October Term 2004 was not the cases the Court decided, it was Chief Justice William Rehnquist's battle with thyroid cancer. There were constant rumors of his imminent retirement and what it would mean for the future of constitutional law. Replacing Rehnquist, though, likely would have little short-term effect on constitutional law. Anyone appointed by President George W. Bush likely would be similar to Rehnquist in ideology and voting behavior on the Court. Replacing Rehnquist simply would mean that seat on the Court would continue to be held by conservatives for decades to come.

By contrast, the resignation of Sandra Day O'Connor offers the prospect of change in many areas of constitutional law. The Court currently maintains a moderate balance on many core issues, a balance in which Justice O'Connor is an integral part. In the months and years ahead, each time the Court considers a case concerning abortion rights, affirmative action, campaign finance, the establishment clause, or any of a host of other politically divisive issues, there will be the prospect for a major change in the law. October Term 2004 almost surely will be remembered as the end of an era.