TOWN OF CASTLE ROCK v. GONZALES: THE SUPREME COURT GOES TO GREAT LENGTHS TO ENSURE POLICE DISCRETION, BUT AT WHAT COST?

Ryan C. Hasanbasic*

I. INTRODUCTION

In an average year approximately four million American women experience "a serious assault by an intimate partner."[1] One-third of women seeking hospitalization in America do so because of such domestic violence.[2] Many women feel that a restraining order is an effective way to combat abusive behavior at the hands of their boyfriends, spouses, or partners.[3] Thus women constitute a majority of the beneficiaries of all restraining orders granted in this country. In fact, in protection order cases involving spouses or dating couples, ninety percent of the defendants are male.[4]

On May 21, 1999, Jessica Gonzales acquired a restraining order against her husband on behalf of herself and her three minor daughters, which mandated that her husband "not [ ] 'molest or

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 Associate, *Stetson Law Review*. B.S., University of Massachusetts, Amherst, 2004; J.D., Stetson University College of Law, 2007. I would like to thank Professor Allen, Professor Piccard, and Paula Bentley for all of their helpful insights, and "Scoop" for her patience.

1. *See* ABA Commn. on Dom. Violence, *Domestic Violence Crosses Ethnic, Racial, Age, National Origin, Sexual Orientation, Religious and Socioeconomic Lines*, http://www.abanet.org/domviol/stats.html (accessed June 6, 2005) (quoting a study conducted by the American Psychological Association entitled *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996)).

2. Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?* 4 Wyo. L. Rev. 271, 275 (2004).

3. *Id*. at 277.

4. *See* ABA Commn. on Dom. Violence, *supra* n. 1 (quoting Sandra Adams & Anne Powell, *The Tragedies of Domestic Violence: A Qualitative Analysis of Civil Restraining Orders in Massachusetts* (Off. Commr. Probation (1995)).

disturb the peace of [Ms. Gonzales] or of any child.'"[5] The restraining order further mandated that the husband remain at least 100 yards from the Gonzales' family home at all times.[6] The reverse side of the order contained a "NOTICE TO LAW ENFORCEMENT OFFICIALS," which included the following language:

> YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER. . . .[7]

On June 22, 1999, the husband abducted Ms. Gonzales' children from her backyard while they were playing.[8] Ms. Gonzales called the police, who dispatched two officers.[9] She showed them a copy of her restraining order, but they told her "there was nothing they could do," and to wait until 10:00 p.m. and call again if the husband had not brought the children back.[10] She then called the husband's cell phone, and he confirmed that he had indeed taken the children to a specified amusement park.[11] After Ms. Gonzales notified the police of this fact, they reiterated the advice to "wait until 10:00 p.m. and see if [he] returned the girls."[12] Just after 10:00 p.m. she called the police again, as previously instructed, but the police now told her to wait until midnight.[13] She called again when the children had not been returned at midnight and was promised that an officer would be dispatched, but none came.[14] At 12:50 a.m. she went to the police station to submit an

5. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 751 (2005).
6. *Id.*
7. *Id.* at 752. The notice essentially restated Colo. Rev. Stat. § 18-6-803.5 (2002).
8. *Id.* at 753.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

incident report, but instead of taking action, the officer on duty "went to dinner."[15] Later that night, the husband drove to the police headquarters and opened fire on police officers, who shot back and killed him.[16] Inside his truck police found the bodies of the three minor daughters whom he had killed earlier that night.[17] Ms. Gonzales then filed a civil lawsuit, alleging that the town had deprived her of due process because its police department had "an official policy or custom of failing to respond properly to complaints of restraining order violations."[18]

In this tragic case—*Town of Castle Rock v. Gonzales*[19]—the United States Supreme Court was asked to decide whether a person has a constitutional property entitlement to police enforcement of a judicially granted restraining order. The issue before the Court was framed under the procedural aspect of due process, rather than substantive due process, because of a 1989 ruling from the Supreme Court barring the use of substantive due process to enforce government protective action.[20] Because the claim was grounded in procedural due process, the respondent could not argue that the state was *categorically obligated* to protect her and her children from her husband intruding upon their personal security because this would be a substantive due process "liberty" claim.[21] Instead, Ms. Gonzales argued that she had a "property interest" in the enforcement of the restraining order, and that the

15. *Id*. at 753–754.

16. *Id*. at 754.

17. *Id*.

18. *Id*.

19. 545 U.S. 748 (2005).

20. *DeShaney v. Winnebago County Dept. of Soc. Servs*., 489 U.S. 189, 201 (1989). For a brief overview of the legal precedent set forth in *DeShaney*, see *infra* Part II(A) and accompanying footnotes.

21. As noted by the Tenth Circuit, Ms. Gonzales' original complaint encompassed both substantive and procedural due process, but the substantive aspect was summarily dismissed due to *DeShaney*. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1099 (10th Cir. 2004). For a discussion of procedural versus substantive due process, see *DeShaney*, 489 U.S. at 194–195 (articulating why the petitioner's claim in that case was substantive and not procedural). *But see Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (stating that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause"). In *Youngberg*, the Court held that a mental patient who suffered serious injuries while institutionalized could state a claim under substantive due process because he had substantive rights to "adequate food, clothing, shelter and medical care" while he was involuntarily committed. *Id*. at 324.

state arbitrarily deprived her of this property right by having an unofficial policy of refusing to enforce such orders.[22]

The United States District Court for the District of Colorado dismissed Ms. Gonzales' complaint, holding that because the restraining order required police to have probable cause, which "implicitly requires . . . discretion," the Colorado restraining order statute was discretionary, and thus Ms. Gonzales had no Fourteenth Amendment "property" interest in its enforcement.[23] The United States Court of Appeals for the Tenth Circuit reversed, holding that the restraining order imposed a mandatory enforcement duty on police officers, and that Ms. Gonzales had a constitutional property entitlement to have it enforced, of which she was deprived without procedural due process.[24] In a split 7–2 decision, the Supreme Court reversed the Tenth Circuit's decision and held that the Colorado police officers did not have a duty to enforce the restraining order, that Ms. Gonzales had no property interest in having the restraining order enforced, and that the police officers did not infringe upon Ms. Gonzales' due process rights by their refusal to enforce the order.[25]

This Article will examine the Court's analysis in *Castle Rock* and attempt to dispute persuasively the findings of the majority. Part II will provide an overview of past caselaw that either directly or indirectly affected the issues confronted by the Court in *Castle Rock*. Part III will discuss the reasoning of the majority, concurrence, and dissent in *Castle Rock*. Part IV will critically analyze the Court's findings, arguing that the majority misconstrued the effect of the restraining order and decided a federal constitutional issue with very little legal support or precedent.

22. *Castle Rock*, 545 U.S. at 755.

23. *Gonzales v. City of Castle Rock*, 2001 U.S. D. LEXIS 26018 at *14 (D. Colo. Jan. 22, 2001). Notably, the district court did not find that the enforcement order was discretionary due to its statutory language. Although the district court made the same judgment as the Supreme Court in *Castle Rock*, the district court's analysis of the Colorado restraining order provision did not mirror the Supreme Court's analysis at all. In fact, the district court referred to the *shall arrest/seek warrant* provisions as "obligations" on the police officers, but simply found that those obligations were not mandatory because they were invoked only upon probable cause. *Id*. In contrast, the Supreme Court stated that probable cause was not an issue, but nevertheless held that the *shall arrest/seek warrant* language itself was not strong enough to create a mandatory duty on police officers. *Castle Rock*, 545 U.S. at 760.

24. *Gonzales*, 366 F.3d at 1117.

25. *Castle Rock*, 545 U.S. at 760, 768.

Next, this Part will discuss the negative consequences that the *Castle Rock* precedent may create, including unnecessary and uninformed Supreme Court decisions, weakened state legislatures, and particular disadvantages to women. Part V will discuss the possibility of fashioning a state-law remedy to the constitutional problem that was framed in *Castle Rock*. Finally, Part VI will conclude that the best remedy in *Castle Rock* lies *in between* the opinions of the majority and dissent.

II. HISTORICAL AUTHORITY

The central issue in *Castle Rock*—whether or not a state restraining order statute created a property entitlement to enforcement—was an issue of first impression for the Court.[26] However, many sub-issues that were critical to the outcome of the *Castle Rock* decision did have precedent to provide guidance. Such issues included whether or not deference should be given to lower federal courts' interpretations of state law within their jurisdiction,[27] how to interpret restraining order statutes with mandatory enforcement language,[28] and what factors have historically been used to determine whether or not a property entitlement exists.[29] Additionally, the Court addressed the issue of whether or not an individual may be entitled to state protection under substantive, rather than procedural, due process in a prior case.[30]

26. *See id.* at 755 (discussing the fact that the Supreme Court "left a similar question unanswered" in *DeShaney*, due to the petitioner's failure to preserve the issue on appeal).

27. *See id.* at 757 (demonstrating the majority's view that deference to lower federal courts as to state law "can be overcome"); *id.* at 775 (giving examples of cases applying deference) (Stevens, J., dissenting).

28. *See id.* at 782–783 (discussing cases with similar statutes at issue from other jurisdictions) (Stevens, J., dissenting).

29. *See id.* at 766 (showing the majority's view that cases have implicitly required property entitlements to have some ascertainable monetary value); *id.* at 789–790 (listing several cases that have interpreted the requirements of property entitlements) (Stevens, J., dissenting).

30. *See id.* at 755 (stating that "[w]e held that the so-called 'substantive' component of the Due Process Clause does not 'require the State to protect the life, liberty, and property of its citizens'" (quoting *DeShaney*, 489 U.S. at 195)).

A. Caselaw

In *DeShaney v. Winnebago County Department of Social Services*,[31] the Supreme Court held that substantive due process could not be used to require the State of Wisconsin to protect a young child from an abusive father, even when that state's Social Services Department had reason to know that the abuse was occurring.[32] In its analysis, the Court noted that the substantive aspect of due process was "phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."[33] Yet *DeShaney* plainly left undecided whether or not procedural due process may be used in such situations.[34]

Seventeen years before *DeShaney* was decided, the Supreme Court in *Board of Regents of State Colleges v. Roth*[35] held that an untenured professor did not have a constitutional property entitlement to be rehired after his initial contract expired.[36] The import of the Court's decision was that a "unilateral expectation" of a benefit is not enough to create a property entitlement.[37] Rather, property entitlements protect "claims upon which people rely in their daily lives," and benefits to which people have "legitimate claim[s] of entitlement."[38]

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31. 489 U.S. 189 (1989).

32. *Id*. at 201. The Court noted that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id*. at 200.

33. *Id*. at 195. *DeShaney*, like *Castle Rock*, involved particularly egregious facts. A four-year-old child was beaten repeatedly over a two year period by his father, which resulted in severe permanent mental retardation in the child. Because the State's Department of Social Services was aware of the abuse and failed to intervene, the child's mother claimed that the State deprived the child of his liberty in violation of due process. *Id*. at 193.

34. *Id*. at 195. Interestingly, the petitioners in *DeShaney* attempted to make the argument that an applicable state statute gave the victim a property entitlement to protective services, which was deprived by the State without due process. This argument, however, was not timely pled or argued before the Court of Appeals, and thus was not considered by the Supreme Court. *Id*. at 195 n. 2. Had the complaint been correctly pled, the issue of procedural due process, which the Court faced in *Castle Rock*, would have been decided sixteen years earlier.

35. 408 U.S. 564 (1972).

36. *Id*. at 578.

37. *Id*. at 577.

38. *Id*.

On the same day *Roth* was decided, the Supreme Court also decided *Perry v. Sindermann*.[39] This case presented facts almost identical to those in *Roth*, but the Court found that a different professor did have a property entitlement to be rehired, because although he was technically untenured, other factors gave him a "legitimate claim of entitlement to de facto job tenure."[40] These decisions establish that if a state agency grants a benefit to one of its citizens, then that citizen can reasonably rely on the government not to renege arbitrarily on the benefit it has conferred.[41]

In *Goss v. Lopez*,[42] the Supreme Court extended procedural due process protections to the intangible right of a child to attend public school.[43] The Court held that the right to public education was granted under state law and, therefore, a student could not be suspended from school without being afforded fair procedural due process protections.[44] In its decision, the Court emphasized the flexibility of procedural due process, noting that very informal procedures may be adequate to protect against arbitrary deprivations of one's property interests.[45] The Court has also taken a broad and flexible approach in determining whether or not a state-granted benefit constitutes a property entitlement under the Fourteenth Amendment, as illustrated by *Logan v. Zimmerman Brush Co.*[46] In *Logan*, the Supreme Court held that an employee's right to utilize specific adjudicatory procedures in an unlawful termination hearing, provided for by state law, was a constitu-

39. 408 U.S. 593 (1972).

40. *Id*. at 602. In *Perry*, the college that employed the professor in the action—Odessa College—had an interesting and somewhat unusual tenure program. *Id*. at 600. The college's official Faculty Guide stated that although the college "has no tenure system. *The Administration of the College wishes the faculty member to feel that he has permanent tenure* as long as his teaching services are satisfactory[,] as long as he displays a cooperative attitude[,] . . . and as long as he is happy in his work." *Id*. (emphasis added).

41. The Supreme Court, *Scope of Procedural Due Process Protection—Property Interests in Police Enforcement*, 119 Harv. L. Rev. 208, 214 (2005) [hereinafter *Property Interests*].

42. 419 U.S. 565 (1975).

43. *Id*. at 573.

44. *Id*.

45. *Id*. at 577, 581–582. In dicta, the Court explained that a school may satisfy procedural due process requirements simply by having a disciplinarian "informally" discuss the misconduct that the student's suspension is based upon with the student, and allowing the student to explain his version of what happened. *Id*. at 582.

46. 455 U.S. 422 (1982).

tionally protected property entitlement.[47] The Court emphasized that although property entitlements are created within the prerogative of individual state legislatures, once an entitlement is created "[the State] may not constitutionally authorize the deprivation of such an interest . . . without appropriate procedural safeguards."[48]

Although *Castle Rock* was the first Supreme Court case to address the issue of whether a state restraining order statute mandated police enforcement, state courts had addressed the issue. In *Nearing v. Weaver*,[49] the Supreme Court of Oregon held that state law created a mandatory duty on police officers to arrest violators of restraining orders, once probable cause of a violation had been established.[50] In finding that the probable cause requirement of the statute did not make the statute discretionary, the Court noted that "an officer or employee is not engaged in a 'discretionary function or duty' whenever he or she must evaluate and act upon a factual judgment."[51] Similarly, in *Robinson v. United States*,[52] the Court of Appeals for the District of Columbia interpreted a Washington, D.C. domestic violence statute to be mandatory, stating that "D.C. Code Section 16-1031(a) makes it mandatory for a police officer to arrest any person . . . whom the officer has probable cause to believe has committed a violent intrafamily offense."[53] Although the Colorado courts have not specifically addressed whether police officers have any discretion under the restraining order statute at issue in *Castle Rock*, the

47. *Id.* at 432.

48. *Id.*

49. 670 P.2d 137 (Or. 1983).

50. *Id.* at 139. The mandatory language of the 2002 Oregon Revised Statutes Section 133.310(3) reads:

> A peace officer shall arrest and take into custody a person without a warrant when the peace officer has probable cause to believe that:
>
> (a) There exists an order issued pursuant to . . . [Or. Rev. Stat. Ann. §§§ 107.095 (1)(c) or (d), 107.716 or 107.718] restraining the person; [and]
>
> (b) A true copy of the order and proof of service on the person has been filed as required in . . . [Or. Rev. Stat. Ann. § 107.720]; and
>
> (c) [The peace officer has probable cause to believe that] [t]he person to be arrested has violated the terms of that order.

51. *Nearing,* 670 P.2d at 142.

52. 769 A.2d 747 (D.C. Cir. 2001).

53. *Id.* at 757. For the relevant language of the cited statute, see *infra* note 217.

Tenth Circuit Court of Appeals has referred to the statute as "mandatory arrest provisions."[54]

B. Legislative Authority

In 1994, the Colorado Legislature passed several statutes regulating the procedures of law enforcement officers in domestic violence situations.[55] Among these were Colorado Revised Statutes Sections 18-6-803.5 and 18-6-803.6.[56] Section 803.5(3)(b) reads:

> A peace officer *shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest* of a restrained person when the peace officer has information amounting to probable cause that:
>
> (I) The restrained person has violated or attempted to violate any provision of a protection order; and
>
> (II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.[57]

Section 803.6(1) reads in pertinent part:

> When a peace officer determines that there is probable cause to believe that a crime or offense involving domestic violence, as defined in [S]ection 18-6-800.3(1), has been committed, the officer *shall, without undue delay, arrest* the person suspected of its commission . . . .[58]

Although the exact wording of these two statutes differs, both clearly spell out their respective enforcement procedures by using

54. *Eckert v. Town of Silverthorne*, 25 Fed. Appx. 679, 686 (10th Cir. 2001) (unpublished).

55. Melody K. Fuller & Janet L. Stansberry, *Legislature Strengthens Domestic Violence Protective Orders*, 23 Colo. Law. 2327, 2327 (1994).

56. *Id.* at 2327 n. 28 and accompanying text.

57. Colo. Rev. Stat. § 18-6-803.5(3)(b) (emphasis added).

58. *Id.* at § 18-6-803.6(1) (emphasis added).

the term "shall." While Section 803.5 was the statute at issue in *Castle Rock*,[59] Section 803.6 is also important for case analysis as a comparative tool because it provides similar language, regarding similar substance, and it was created by the same legislature at the same time as the statute at issue.

III. THE SUPREME COURT'S ANALYSIS IN CASTLE ROCK

The Supreme Court decided *Castle Rock* by a vote of 7–2, with two Justices concurring on alternative grounds.[60] Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, Justice Thomas, Justice Souter, and Justice Breyer.[61] Justice Souter wrote the lone concurrence in the decision, in which he was joined by Justice Breyer.[62] Justice Stevens wrote a dissenting opinion, in which Justice Ginsburg joined.[63]

Writing for the majority, Justice Scalia first framed the determinative question facing the Court—whether or not a person with a state-granted restraining order would have a Fourteenth Amendment property interest in having the order enforced.[64] Notably, the Court assumed that the police had probable cause that a violation of the restraining order had occurred, and thus probable cause was not a point of argument in its analysis.[65] The central issue was whether or not Colorado law gave Gonzales a right to enforcement of the restraining order.[66] In addressing this issue, the majority spent the bulk of its analysis construing the language of the restraining order and the matching language of the relevant Colorado Statute—Section 18-6-803.5—to determine whether or not police officers had a mandatory enforcement duty.[67] Initially, the majority stated that the Court would not de-

59. *See Castle Rock*, 545 U.S. at 758–759 (recognizing that the relevant portions of the restraining order's enforcement provisions were derived directly from Section 18-6-803.5 of the Colorado Revised Statutes).

60. *Id*. at 750.

61. *Id.*

62. *Id*.

63. *Id.*

64. *Id*. at 750–751.

65. *Id*. at 751 n. 1.

66. *Id*. at 757.

67. *Id*. at 758–766.

fer to the Tenth Circuit's analysis of the meaning and effect of the State restraining order and applicable State law.[68] While the majority conceded that the Supreme Court has historically given deference to federal courts' interpretations of state law within their respective jurisdictions,[69] the majority declined to apply such deference, arguing that "if we were simply to accept the Court of Appeals' conclusion, we would necessarily have to decide conclusively a federal constitutional question . . . ."[70] In the decision, the Court never explained what standards were historically used to decline deference; the Court simply stated that "deference [is] inappropriate here."[71]

The Court then noted several ostensibly mandatory parts of the restraining order and the applicable Colorado statute,[72] coming to the conclusion that Colorado had *not* made enforcement of restraining orders mandatory.[73] In reaching such a decision, the Court relied heavily on the policy of allowing police the discretion to make decisions in the realm of law enforcement, noting that "'such [seemingly mandatory] statutes cannot be interpreted literally.'"[74] The Court emphasized that the judiciary has long found a "deep-rooted [policy] of law-enforcement discretion" in police enforcement statutes.[75] Under this policy, Justice Scalia declared that "a true mandate of police action would require some stronger indication from the Colorado Legislature than 'shall use every reasonable means to enforce a restraining order' (or even 'shall arrest . . . or . . . seek a warrant')."[76] However, the Court did not provide any examples of language that might comprise such a "stronger indication." Furthermore, the majority stated that "[i]t is hard to imagine that a Colorado peace officer would not have some discretion to determine that—despite probable cause to believe a restraining order has been violated—the circumstances of

68. *Id*. at 756–757.
69. *Id*. at 757.
70. *Id*. at 757–758.
71. *Id*. at 757.
72. *See supra* n. 7 and accompanying text (presenting relevant quoted portions of the restraining order); *supra* n. 57 and accompanying text (presenting relevant portions of Colorado Revised Statute Section 18-6-803.5).
73. *Castle Rock*, 545 U.S. at 758–760.
74. *Id*. at 760 (quoting ABA Stands. for Crim. Just. 1–4.5 (2d ed. 1980 & Supp. 1986)).
75. *Id*. at 761.
76. *Id*.

the violation or the competing duties . . . counsel decisively against enforcement in a particular instance."[77]

Important to the Court's analysis was the fact that the restraining order left open the possibility that police officers could seek a warrant for arrest if making an arrest was "impractical" given the circumstances.[78] The Court reasoned that this clause made the precise nature of the enforcement uncertain, and that a property entitlement could not be created out of such a "vague" interest.[79] The fact that the respondent did not specify the exact means of enforcement to which she felt she was entitled was used by the majority to bolster this argument.[80]

Alternatively, the majority found that even if Colorado law made enforcement of the restraining order mandatory, the petitioner may not have had a right to insist on enforcement of that order.[81] In making this point, the Court reasoned that criminal law generally aimed at protecting the public, not private individuals, and it was not apparent that the Colorado Legislature had intended otherwise.[82] In dicta, the majority went even further with its analysis. The Court articulated that even if the petitioner had a right to enforcement of the restraining order, such a benefit lacked "ascertainable monetary value," which the Court believed was an implicit requirement for Fourteenth Amendment protection.[83] The majority thus assumed that a benefit was required to be somewhat tangible in order to constitute a property entitle-

77. *Id*.

78. *Id*. at 763.

79. *Id*.

80. *Id*. Several mentions of "enforcement" were made in the respondent's brief, but at no time did the respondent detail the exact procedures she felt she was entitled to under the Colorado Statute at issue. *E.g.* Respt.'s Br. on Merits at 25, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (stating that "[o]n its face, the subject provision [of the restraining order statute] creates in favor of Ms. Gonzales a property interest in her restraining order and a corresponding duty on the part of the Castle Rock [police] to enforce the restraining order"). Interestingly, the dissent analogized police enforcement in this case to health care, arguing that if a state granted indigent individuals the right to free health care at state clinics, this right would almost certainly be a property entitlement despite the fact that the procedures used to provide the person with health care would change from case to case. *Castle Rock*, 545 U.S. at 785 (Stevens, J., dissenting).

81. *Castle Rock*, 545 U.S. at 764–765 (majority).

82. *Id*. at 765. According to the majority, any rights or entitlements that may be derived from restraining order statutes do not include *personal* rights to enforcement. *Id*. at 766.

83. *Id*. at 766.

ment (at least to the extent that it has actual monetary value), but cited no cases to support this analysis.

Writing for the concurrence, Justice Souter did not focus his analysis on whether the restraining order created a mandatory duty on police officers.[84] Instead, he focused on the constitutional deficiencies the petitioner claimed.[85] According to Justice Souter, because the restraining order may mandate the police to seek a warrant for an arrest, the order entitled the petitioner to nothing but procedure, which historically has not been an adequate basis for a finding of a property entitlement.[86] Notably, Justice Souter stopped short of saying that entitlement to police procedures could never be a protected entitlement; rather, he simply stated that in past cases "we have not identified property with procedure as such."[87]

Writing for the dissent, Justice Stevens criticized the majority for not deferring to the Tenth Circuit's construction of Colorado law, that the enforcement of the restraining order was mandatory.[88] Providing the standard of review that the majority failed to offer, Justice Stevens recognized that the Supreme Court has historically declined to give deference to lower federal courts' interpretations of state law "only in rare cases in which the court of appeal's resolution . . . was 'clearly wrong' . . . ."[89] Because the majority had not (and the dissent argued it could not have) made an argument that the Tenth Circuit's construction was clearly wrong, the dissent reasoned that deference was appropriate.[90]

The dissent then analyzed the majority's view that the Colorado restraining order was discretionary, taking issue with this conclusion.[91] First, Justice Stevens argued that the majority failed to recognize the intent of the Colorado Legislature in passing laws regulating enforcement in the context of domestic vio-

84. *Id*. at 769–772.

85. *Id*. at 771 (Souter, J., concurring). For a further discussion of why Justice Souter felt that Ms. Gonzales' claim failed under procedural due process, see *infra* Part IV(B) (detailing and critically analyzing the arguments set forth in Justice Souter's concurrence).

86. *Id*.

87. *Id*. at 771–772.

88. *Id*. at 775 (Stevens, J., dissenting).

89. *Id*.

90. *Id*. at 775–776.

91. *Id*. at 779.

lence.[92] The purpose of such laws, according to Justice Stevens, was to counter police refusal to make arrests and to take away their discretion in such situations.[93]

Next, the dissent criticized the majority for finding that the restraining order was discretionary on the grounds that it did not specify the precise means of enforcement in each individual situation.[94] Justice Stevens apparently considered such language to be irrelevant to determining whether the statute was mandatory. The crucial point, according to Justice Stevens, was that under Colorado law[95] police officers were required either to make an arrest or seek a warrant for an arrest; once they had probable cause that a violation had occurred "*they lacked the discretion to do nothing*."[96]

In his criticism, Justice Stevens argued that the nature of the restraining order (and restraining orders in general) was "clearly" aimed at protecting individuals who held such orders, not at protecting the public at large.[97] Therefore, Justice Stevens was of the opinion that the majority's criminal law argument was too broad to be applied or, at least, was misapplied to the case at hand.[98]

The analysis finally shifted to whether or not the restraining order statute, which the dissent considered to be mandatory, created a property interest for the respondent.[99] Believing that it had, Justice Stevens argued that the petitioner had a "'legitimate claim of entitlement'" to have the order enforced, which was the standard historically followed by the Court.[100] Because the respondent had a property entitlement in the enforcement of the restraining order, the dissent reasoned that the police officers could not refuse to enforce the order without observing some form of procedural due process.[101] The dissent's analysis, however,

92. *Id*. at 779–782.
93. *Id*.
94. *Id*. at 784.
95. *Id.* (referring to Colorado Revised Statute Section 18-6-803.5(3)(b)).
96. *Id*. at 784–785 (emphasis in original).
97. *Id*. at 788.
98. *Id*. at 788–789.
99. *Id*. at 789–791.
100. *Id*. at 789 (quoting *Roth*, 408 U.S. at 577).
101. *Id*. at 792.

failed to specify what exact procedures may have been adequate.[102]

IV. CRITICAL ANALYSIS

In *Castle Rock* the Supreme Court decided, as a matter of federal law, that Ms. Gonzales did not have a property entitlement to enforcement of her restraining order.[103] One issue central to this analysis was whether the Colorado restraining order statute was mandatory; if it was, the respondent would have had a right to police enforcement.[104] This issue was concededly a "state-law question" according to the majority.[105] Despite this concession, the Court went on to decide both questions without giving any real deference to the State legislative history or intent, or to the Tenth Circuit's interpretation of State law.[106] The result was that the Court gave an incorrect meaning to the state statute[107] and, in the process, overstepped its historical standard of review.[108] Furthermore, the Court gave a very narrow and precedentially weak interpretation of what constitutes a property entitlement under the Fourteenth Amendment.[109] In the end, women around the country will be left more vulnerable to domestic violence as a direct result of the Court's decision in *Castle Rock*.[110]

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102. *See id.* at 793 (emphasis in original) (stating that, at a minimum, the State decisionmaker must "*listen* to the claimant and then *apply the relevant criteria* . . . ").

103. *See id.* at 757 (majority) (stating that the issue of whether a right constitutes a property entitlement is a federal constitutional question).

104. The majority stated that a resolution of the federal law issue of whether a property entitlement existed must begin with a determination of whether Ms. Gonzales had a right to police enforcement of the restraining order under Colorado law. *Id.*

105. *Id.*

106. *See infra* pt. IV(A) (discussing the extensive legislative history and intent for the Colorado statute at issue, and the Court's short shrift of these considerations); pt. IV(C) (discussing the Court's failure to follow the established standard of deference historically given to lower federal courts' interpretations of state law within their jurisdiction).

107. *See infra* pt. IV(A) (analyzing why the Colorado statute at issue should have been found to create a mandatory enforcement duty upon police officers).

108. *See infra* pt. IV(C) (arguing that the Supreme Court's failure to defer to the Tenth Circuit was a standard-of-review mistake, according to past precedent).

109. *See infra* pt. IV(B) (discussing the weaknesses of the Court's analysis concerning whether or not Ms. Gonzales had a property entitlement to enforcement of the restraining order).

110. *See infra* pt. IV(D) (summarizing the general police failure to enforce violations in the context of domestic violence, absent statutory mandates, and why such a failure leaves women vulnerable to future domestic violence).

A. The Court Misconstrued the Effect of the Colorado Restraining Order, Despite Its Statutory Language, Legislative Intent, and Contrary Judicial Decisions

The wording of the restraining order's enforcement provision was almost identical to Section 18-6-803.5, Colorado Revised Statutes, enacted in 1994.[111] This language specifically tells law enforcement officials that they "shall arrest, . . . or seek a warrant for the arrest" of any individual that violates the order.[112] According to *Black's Law Dictionary*, the first definition of the word "shall" is "[h]as a duty to; more broadly, is required to."[113] Although *Black's* provides four other definitions for "shall," including "[m]ay," the dictionary specifically states that "[o]nly sense 1 is acceptable under strict standards of drafting."[114] This approach has been adopted by the Supreme Court, which has recognized that "[t]he word 'shall' is ordinarily 'the language of command' . . . [and thus] the normal inference is that [it is to be] used in its usual sense . . . ."[115] In most cases, this language itself would be enough for the Court to determine that the statute created a mandatory duty: "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[116] Thus, it would seem that the majority in *Castle Rock* should have required some "clearly expressed intent" from the Colorado Legislature showing that a restraining order was meant to be discretionary, in order to overcome the apparent mandatory language.

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111. Fuller, *supra* n. 55, at 2327.

112. *Castle Rock*, 545 U.S. at 752.

113. *Black's Law Dictionary* 643 (Bryan A. Garner ed., 2d pocket ed., West 2001).

114. *Id*.

115. *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947), *superseded on unrelated grounds* (finding that the words in a Rule of Civil Procedure stating that "the action shall be dismissed as to the deceased party" were sufficient to create a statute of limitations which could not be extended by judicial discretion); *see also Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (holding that the language of a statute requiring that a "probationer *shall* be brought before the court is [a] command and not advice" (emphasis added)); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (noting that the term "'shall' . . . normally creates an obligation impervious to judicial discretion"); *Bd. of Pardons v. Allen*, 482 U.S. 369, 380 (1987) (finding that the usage of the mandatory term "shall" in a parole statute "made release [of a prisoner] mandatory upon certain findings").

116. *Consumer Prod. Safety Commn. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

However, the intent of the Colorado Legislature seems to be exactly the opposite. During the legislative session that produced House Bill 94-1253, the Colorado House passed several statutory provisions, all aimed at addressing the problem of domestic violence.[117] Of the two statutes that prescribe the duties of police officers, both contain language that is apparently mandatory: "shall arrest, or . . . seek a warrant for the arrest,"[118] and "shall, without undue delay, arrest . . . ."[119] Additionally, during a separate legislative session in 1994, the Colorado House amended other domestic violence statutes so that their enforcement was dictated by the seemingly mandatory provisions of Section 18-6-803.5.[120] This was done in an effort to create "[s]tatewide uniformity . . . to help petitioners, court staff, victim advocates and law enforcement agencies in obtaining, processing and *enforcing* protective orders."[121]

During the legislative hearings considering House Bill 94-1253, it was clear that Colorado lawmakers were pushing for laws that mandated police action:

> [T]he entire criminal justice system must act in a consistent manner, which does not now occur. *The police must make probable cause arrests*. The prosecutors must prosecute every case. . . . So this means the entire system must send the same message and enforce the same moral values, . . . that [ ] abuse is wrong and violence is criminal. *And so we hope that House Bill 1253 starts us down this road*.[122]

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117. Colo. H. 1253, 59th Leg., 2d Reg. Sess. 1–5 (June 3, 1994). Included among these provisions were Section 18-6-800.3 (defining "domestic violence" and providing other related definitions), Section 18-6-801 (providing sentencing guidelines for domestic violence violations), Section 18-6-801.6 (outlining the technical requirements for preparing domestic violence complaints), Section 18-6-803.5 (discussing what constitutes a violation of a restraining order, and the duties of peace officers in enforcing restraining orders), and Section 18-6-803.6 (discussing the duties of peace officers and prosecuting agencies following complaints of domestic violence). *Id*.

118. Colo. Rev. Stat. § 18-6-803.5(3)(b) (2002).

119. *Id*. at § 18-6-803.6(1).

120. *See* Colo. H. 1090, 59th Leg., 2d Reg. Sess. 1 (June 3, 1994) (addressing enforcement of restraining orders to prevent narrow categories of domestic abuse, such as "emotional abuse of the elderly").

121. Fuller, *supra* n. 55, at 2327 (emphasis added).

122. *See Castle Rock*, 366 F.3d at 1107–1108 (emphasis omitted from original, which emphasized the paragraph in its entirety) (quoting Colo. H. Jud. Comm., *Hearings on House Bill 1253*, 59th Gen. Assembly, 2d Reg. Sess. (Feb. 15, 1994)).

Equally clear was the widespread belief that the Colorado Legislature had accomplished this goal, and that "[House Bill] 94-1253 mandate[d] the arrest of domestic violence perpetrators and restraining order violators."[123] In fact, after the bill was sent to the Governor to sign, Colorado House Representative Diana Degette stated, "We've basically completely revamped domestic-violence laws in Colorado. . . . The message to citizens is '[w]*e're taking a zero tolerance in this type of activity*.' People who beat up their spouses, girlfriends or boyfriends are going to be punished swiftly and severely."[124]

This strong indication from the Colorado Legislature should have been given more weight than the majority gave it in *Castle Rock*. In fact, the entire decision contains *only one footnote* discussing the legislative history of the restraining order statute.[125] This may not seem surprising, as Justice Scalia—an outspoken critic against the use of legislative history[126]—wrote the opinion for the majority. However, Justice Breyer, who joined the majority in this decision, has written specifically on the importance of using legislative history to interpret statutory language.[127] In one article, Justice Breyer discussed several instances where using legislative history would be entirely appropriate.[128] One such instance occurs when a word may have a specialized meaning.[129] As Justice Breyer articulated, "[e]ven the strongest critics of the use

123. Fuller, *supra* n. 55, at 2329; *see also* Michael Booth, *Colorado Socks Domestic Violence*, Denver Post A1 (June 24, 1994) (articulating that "[a]rrests will now be mandatory when responding police suspect domestic violence has occurred"); John Sanko, *Stopping Domestic Violence: Lawmakers Take Approach of Zero Tolerance as They Support Bill, Revamp Laws*, Rocky Mountain News (Denver, Colo.) F5A (May 15, 1994) (stating that in the wake of Colorado's new domestic violence statutes, "[p]olice must arrest and remove the accused whenever they answer a domestic-violence call").

124. Sanko, *supra* n. 123 (emphasis added).

125. *Castle Rock*, 545 U.S. at 759 n. 6.

126. *See* Antonin Scalia, Lecture, *Judicial Deference to Administrative Interpretations of Law* (Duke U. Sch. of L., Durham, N.C., Jan. 24, 1989), in 1989 Duke L.J. 511, 521 (1989) (arguing that the use of legislative history to interpret ambiguous agency statutes will only create further ambiguity, and will lead to a "broader range of 'reasonable' interpretation[s] that the agency may adopt").

127. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845 (1992). In this article, Justice Breyer stated that "[u]sing legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute." *Id*. at 848.

128. *Id*. at 848–861.

129. *Id*. at 851–853.

of legislative history concede that a court should take full account of any special meaning that a statutory word may have."[130] Given the fact that the word "shall" generally has a mandatory meaning, it would seem that interpreting the word to be *discretionary* would be giving it a "special meaning," and would justify the use of legislative history. Thus, the Court should have come to such a reading of the statute only after being directed to do so by the legislative history. However, after essentially failing to give the legislative history any credence at all, the majority stated that it needed a "stronger indication" from the State Legislature in order to find that enforcement was truly mandatory.[131] This statement contradicts Justice Breyer's view of statutory interpretation, which would seem to argue for the proposition that a "strong indication" from the State Legislature would be necessary for the Court to find that the statute was discretionary, leaving an interpretation that the statute is mandatory as the default.

Caselaw from Colorado and other jurisdictions further supports the argument that Colorado's domestic violence enforcement laws were mandatory. For example, in *Eckert v. Town of Silverthorne*,[132] the Tenth Circuit referred to Sections 18-6-803.5 and 18-6-803.6 as "mandatory arrest provisions."[133] Additionally, other jurisdictions have held similar statutes to be mandatory. In *Nearing*, the Oregon Supreme Court held that police were *required* to enforce restraining orders, due to a state law containing the provision, "A peace officer shall arrest and take into custody. . . ."[134] Although the language in this statute differed

130. *Id*. at 851.

131. *Castle Rock*, 545 U.S. at 761.

132. 25 Fed. Appx. 679 (10th Cir. 2001) (unpublished).

133. *Id*. at 686–687. In this case, the appellant could not establish that the Colorado police officers violated her due process rights or engaged in a pattern of discrimination by failing to make an arrest upon a complaint of abuse, because there was no probable cause to believe that domestic violence had occurred. "Both of these *mandatory arrest provisions* require as a prerequisite that an officer establish probable cause. . . . [Appellant's] allegations, by themselves, were insufficient to mandate an arrest." *Id*. at 686 (emphasis added).

134. *Nearing*, 670 P.2d at 139 n. 1. Notably, petitioners made no claim that they had a constitutionally guaranteed property entitlement, and thus the Oregon Supreme Court never reached the issue presented in *Castle Rock*. Yet, because the Court was willing to find that a state statute imposed a mandatory enforcement duty on police officers, it is very possible that they may also have found holders of such orders to have property interests in having them enforced. In this event, the Oregon Supreme Court may have presumably made a similar ruling to that of the Tenth Circuit in *Gonzales v. City of Castle Rock*, see *supra* note 23, and if it was appealed, the Supreme Court might have faced a

slightly from the Colorado statute, which may be enforced either by arresting or seeking a warrant for arrest, both statutes seem to mandate some form of enforcement, upon a finding of probable cause, by using the word "shall." Legislative intent also played a large role in *Nearing*'s analysis.[135] Unlike the majority in *Castle Rock*, the Oregon Supreme Court recognized that the legislative purpose of such statutes was "clearly [ ] to protect the named persons for whose protection the order is issued," and consequently, "the legislature chose mandatory arrest as the best means to reduce recurring domestic violence."[136]

State courts have also found that certain statutes create a mandatory enforcement duty on police officers in the general realm of domestic violence. In *Robinson v. United States*, the District of Columbia Court of Appeals specifically recognized that a District of Columbia statute mandated arrest upon the finding of probable cause in domestic violence situations.[137] The relevant statutory language providing a basis for this finding was, "A law enforcement officer *shall* arrest a person if the law enforcement officer has probable cause. . . ."[138] In Nevada, the Attorney General issued an opinion addressing the constitutionality of a State statute requiring a domestic violence arrestee to be detained for twelve hours after the arrest was made.[139] In the opinion, the Attorney General specifically addressed the obligatory nature of a separate domestic violence arrest statute.[140] This statute, which contained the provision "a peace officer *shall*, *unless mitigating circumstances exist*, arrest a person when he has probable cause to believe that the person . . . committed a battery upon his spouse, former spouse . . . ,"[141] was found to make arrest mandatory when the officer reasonably believed domestic violence had occurred and there were no factors "sufficient to mitigate the of-

case almost identical to *Castle Rock* more than 20 years ago!

135. *Id*. at 143.

136. *Id*.

137. *Robinson*, 769 A.2d at 757 (decided on other grounds).

138. D.C. Code § 16-1031 (2002) (emphasis added).

139. Nev. Atty. Gen. Op. 86-1, 1986 WL 224484 (Jan. 15, 1986). The statute central to the analysis in the opinion (but ancillary to the analysis of this Article) was Nevada Revised Statutes Section 178.484(3) (2002). *Id*.

140. *Id*. at 9–10. The mandatory arrest statute referenced can be found in Nevada Revised Statutes Section 171.137 (2006).

141. Nev. Rev. Stat. § 171.137(1) (emphasis added).

fense and prevent arrest."[142] In order for an officer to ensure that his refusal to arrest was valid, the statute required that he document his reasons for refusing to arrest in a written report.[143] Thus, the Nevada statute, containing the discretionary "mitigating circumstances" provision that the Colorado statute lacked, was found to be more obligatory than the Colorado statute in *Castle Rock*.[144]

Certainly, no one would argue that the Court was incorrect to point out that police discretion is an important and necessary social policy. This social policy clearly played a large role in the Court's decision that the Colorado statute did not create a mandatory enforcement duty on police officers.[145] However, in light of the statutory language, legislative history, and past decisions in the area of domestic violence, it is very difficult to see how the Supreme Court was able to hold the restraining order to be discretionary *in this case*. The Court seemed to lose sight of the fact that the policy of police discretion is not unqualified, and can be overcome by statutory mandates or upon the finding that a special relationship existed between the police officer and the victim.[146] Unfortunately, the Court's strong desire to preserve police discretion may lead to judicial tolerance of police inaction, even in the most egregious situations.

142. Nev. Atty. Gen. Op. 86-1, 1986 WL 224484 at *3.

143. *Id*.

144. The Court did not imply in the *Castle Rock* decision a requirement that a police officer compile a written report documenting his reasons not to arrest.

145. *See Castle Rock*, 545 U.S. at 760 (explaining that competing duties of the officer or his agency necessitate that they have discretion to enforce the restraining order, despite the existence of probable cause). The majority further stated that there is a "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands." *Id.* at 761.

146. *See Mackey v. Montrym*, 443 U.S. 1, 4–5 (1979) (discussing a Massachusetts statute that disallowed police officers any discretion in administering a breath test to a suspected drunk driver, after the suspect had initially refused the test but later changed his mind); *Burdette v. Marks*, 244 Va. 309, 312–313 (1992) (finding that a police officer had a mandatory duty to render assistance to a man being assaulted by another man, because a special relationship existed when the officer arrived on the scene, observed the assault, and was requested to help by the victim); *Davis v. Rennie*, 264 F.3d 86, 113–114 (1st Cir. 2001) (discussing a state mandate requiring police officers to act when they observe another officer using excessive force).

B. The Narrow Construction of "Property" by the Majority and Concurrence Results in an Unconstitutional Failure to Award Ms. Gonzales Fair Procedural Protections under the Due Process Clause

The Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law."[147] Once a protected property entitlement has been granted, a state cannot deprive the beneficiary of that entitlement without first providing some form of procedural due process.[148] The majority in *Castle Rock* seemed to narrowly construe the idea of "property entitlements" in a way that was inconsistent with past precedent. For example, the majority found that the right to have a restraining order enforced could not constitute a property entitlement, in part because it lacked monetary value.[149] Using only a single law review article as precedent, the Court claimed that such a condition was an implicit requirement "even [in] our '*Roth*-type property-as-entitlement' cases."[150] However, an analysis of *Roth*, as well as other Supreme Court cases, and even language from the Founders of the Constitution seems to indicate that such a narrow interpretation of "property" is misplaced.[151]

In contrast to the imposition of any "monetary value requirements," the Supreme Court has historically held the view that there are no strict definitions of what constitutes a property

147. U.S. Const. amend. XIV, § 1. Ms. Gonzales also relied upon 42 U.S.C. § 1983, which gives individuals a private right of action to enforce the provisions of the Fourteenth Amendment. *Castle Rock*, 545 U.S. at 755. The Supreme Court has previously found that § 1983 may be used against state officials. *E.g. Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (ruling that individuals have a cause of action, under § 1983, against state officials that abuse their authority and deny individuals their rights).

148. *Logan*, 455 U.S. at 432.

149. *Castle Rock*, 545 U.S. at 766.

150. *Id*. This reasoning is critical, because on some level the Court appeared to make it impossible for the Colorado Legislature to create a property entitlement by rewriting the statute. Although it remains debatable whether or not the Court would be willing to find *any* restraining order statute mandatory after its analysis in *Castle Rock*, even if such a statute *could* be created, the benefit conferred would never have any ascertainable monetary value and thus would never constitute a property entitlement under the Court's reasoning. *See infra* pt. IV(C) (discussing whether or not any restraining order statute could create a mandatory enforcement duty after *Castle Rock*).

151. *See infra* nn. 157–159 and accompanying text (discussing James Madison's views on property rights).

entitlement, and it has applied great flexibility in making such determinations.[152] The only general guidelines the Supreme Court has consistently followed, which are outlined in *Roth*, require the beneficiary to have a "legitimate claim of entitlement" to the asserted interest, which must have been created by a non-constitutional source, such as state law.[153] Furthermore, reliance plays a key role in determining if a property interest exists. Since *Roth*, the Court has been careful to protect legitimate individual interests that "people rely [on] in their daily lives."[154] *Roth* clearly emphasized that state-granted benefits upon which people legitimately rely should be protected as their "property."[155] According to *Roth*, such reliance is the "purpose of the ancient institution of property [protections]," and therefore "must not be arbitrarily undermined."[156] It is hard to imagine anything that a mother would place more reliance on than to have a restraining order enforced for the protection of herself and her three young children.

Nowhere in this historical analysis is there a requirement that property entitlements have some definite monetary value. The idea that property entitlements protect a broad range of tangible and intangible interests dates back to the eighteenth century. In fact, in 1792, James Madison wrote a newspaper article

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152. *See e.g. Roth*, 408 U.S. at 576 (stating that property entitlements may take many different forms); *Logan*, 455 U.S. at 430 (articulating that "the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact'" (quoting *Natl. Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949))); *Arnett v. Kennedy*, 416 U.S. 134, 155 (1984), *overruled on other grounds*, *Cleveland Bd. Educ. v. Loudermill*, 470 U.S. 532 (1985) (finding that the "types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests"); *Perry*, 408 U.S. at 601 (asserting that property entitlements should not be limited by strict, technical rules, but rather, property entitlements are intended to protect a broad range of individual state-granted benefits). This approach has been followed by lower federal courts as well. *See e.g. Wolf v. City of Fitchburg*, 870 F.2d 1327, 1333 (7th Cir. 1989); *Skeets v. Johnson*, 805 F.2d 767, 772–773 (8th Cir. 1986); *Haimowitz v. U. of Nev.*, 579 F.2d 526, 528 (9th Cir. 1978) (all stating that "'property' denotes a broad range of interests that are secured by 'existing rules or understandings'").

153. *Roth*, 408 U.S. at 577.

154. *Id*; *see also Property Interests*, *supra* n. 41, at 213 (stating that "[s]ince *Roth*, the Court has taken a positivist approach to defining property for procedural due process purposes, an approach that allows people to rely on state laws they have interpreted correctly").

155. *Roth*, 408 U.S. at 577.

156. *Id*.

entitled *Property*, in which he stated, "[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights."[157] Although Madison alluded to the fact that property protects things of value, it is unlikely that he meant "monetary value," which is how the term was construed by the *Castle Rock* majority.[158] This is evidenced by Madison's belief that property interests should protect things that have no definite value, such as a person's "opinions and the free communication of them."[159]

If taken at face value, Justice Souter's concurrence would also dramatically reduce the range of state-granted benefits protected by the Fourteenth Amendment. According to Justice Souter, procedural due process should only be invoked to protect against arbitrary deprivations of "substantive interest[s]," not "state-mandated process in and of itself."[160] This argument is somewhat convoluted, perhaps because Justice Souter continually referred to two categories of benefits—*substantive benefits* and *benefits in process or procedure*—as different levels of benefits, both of which are analyzed under *procedural* due process.[161] The import of his concurrence is that substantive benefits are inherently more valuable (at least for purposes of procedural due process protection) than benefits in process or procedure itself.[162] According to Justice Souter, Ms. Gonzales' claim that she had a property entitlement to enforcement of her restraining order would necessarily have to fail under the Fourteenth Amendment because "'process is not an end in itself.'"[163]

Despite the ambiguous and repetitive categorizations of "benefits" utilized by Justice Souter in his concurrence, he never attempted to define what constitutes a substantive benefit or a benefit to process or procedure. Instead, he left these concepts

157. James Madison, *Property*, Natl. Gaz. 1, 1 (Mar. 29, 1792) (available at http://www.vem.duke.edu/POI/madison.pdf) (accessed Feb. 2, 2006).

158. *Castle Rock*, 545 U.S. at 766.

159. Madison, *supra* n. 157, at 1.

160. *Castle Rock*, 545 U.S. at 771 (Souter, J., concurring).

161. *Id*. Justice Souter was careful to note that he was strictly referring to procedural due process rather than substantive due process in his comment that "[t]he Due Process Clause extends *procedural protection* [for] substantive state-law property rights." *Id*. (emphasis added).

162. As stated by Justice Souter, "[A] State [does not] create a property right merely by ordaining beneficial procedure unconnected to some articulable substantive guarantee." *Id*.

163. *Id*. (citing *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983)).

open to interpretation, making clear only his belief that the right to have a restraining order enforced is not a "substantive" benefit.[164] Inevitably, this begs the question: Where does one draw the line between what comprises "substance" and what comprises "process"? In *Logan*, the Court found that a state employee had a property entitlement to specific statutory adjudicatory procedures in an unlawful termination hearing, and thus held that these procedures could not be circumvented by the employment commission's failure to conduct a hearing within the statute of limitations.[165] It would seem, according to Justice Souter's characterizations of due process benefits, that a right to demand the use of particular state-granted adjudicatory procedures is a right to nothing more than process or procedure in and of itself. Yet, rather than excluding specific categories of potential property interests from constitutional protection, the Court in *Logan* simply pointed out that "the types of interests protected as 'property' are varied and, as often as not, intangible . . . ."[166]

In essence, *Logan* seemed to present a situation where a benefit—no more substantive than the benefit asserted in *Castle Rock*—was found to be a protected property entitlement by the Supreme Court. In fact, the argument could be made that Ms. Gonzales' claim actually had more substantive importance than the petitioner's claim in *Logan*. In both cases, the rights asserted were entitlements to specific government action, with the ultimate purpose of safeguarding particular interests of the claimants.[167] Yet it would be difficult to argue that protection from arbitrary employment dismissal is a more substantive right than protection from a dangerous person, regardless of what process is used to guarantee that benefit. At the very least, *Logan* exposes a weakness in Justice Souter's concurrence, due to his failure to define what is meant by substantive benefits and benefits in proc-

164. *Id*.

165. *Logan*, 455 U.S. at 432.

166. *Id*. at 430.

167. *See Castle Rock*, 545 U.S. at 786–789 (Stevens, J., dissenting) (arguing that the legislative purpose of restraining orders is to provide protection against physical and emotional harm); *Logan*, 455 U.S. at 431 (noting that the right to use FEPA's adjudicatory proceedings protected the claimant's interest in employment by essentially providing a "for cause" standard for discharge).

ess or procedure.[168] This failure leaves courts with only caselaw to provide direction, which, as demonstrated above, may be of very little help.

For these reasons, the finding of the majority and concurrence that Ms. Gonzales did not have a property entitlement to have her restraining order enforced seems questionable on legal grounds. However, had the majority found such a property entitlement in this case, the next question would be: How would courts apply procedural due process to the facts at issue?

In general, procedural due process is comprised of two basic elements—notice and an opportunity to be heard.[169] At first glance, it seems awkward to apply these principles to the instant scenario. Certainly, common sense tells us that it is not plausible for a police officer to afford an alleged victim a judicial hearing before refusing to enforce a protective order. However, as emphasized in *Mathews v. Eldridge*,[170] "'Due process is flexible and calls for such procedural protections as the particular situation demands.'"[171] This custom of flexibility was demonstrated in *Goss*, where the Supreme Court molded procedural due process protections to protect students from arbitrary suspension from public school.[172] The Court found that holding an informal discussion between a disciplinarian and a student before suspending the student from public school was enough to satisfy procedural due process, as long as the disciplinarian simply allowed the student to state his version of the facts.[173] The *Goss* Court noted that "[t]here need be no delay between the time 'notice' is given and

168. *Castle Rock*, 545 U.S. at 769–772 (Souter, J., concurring).

169. *See e.g. Cleveland Bd. Educ.*, 470 U.S. at 542 (noting that "[a]n essential principle of [procedural] due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for [a] hearing . . .'" (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 399 U.S. 306, 313 (1950))).

170. 424 U.S. 319 (1976).

171. *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *see also Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) (stating that "[t]he very nature of due process negates any concept of inflexible procedures"); *O'Connor v. Donaldson*, 422 U.S. 563, 585–586 (1975) (Burger, C.J., concurring) ("It is too well established to require extended discussion that due process is not an inflexible concept. Rather, its requirements are determined in particular instances by identifying and accommodating the interests of the individual and society."); *Goss*, 419 U.S. at 581 (articulating the importance for school children to be protected from "arbitrary exclusion from school").

172. *Goss*, 419 U.S. at 582.

173. *Id.*

the time of the hearing."[174] This procedure was notably labeled by the Court as "an informal give-and-take."[175] Using *Goss* as precedent, perhaps the police officer in *Castle Rock* would have been able to satisfy procedural due process simply by calling a supervisor, relaying Ms. Gonzales' concerns, and allowing the supervisor to make the final decision as to whether or not to enforce the protective order. Even a simple preventative measure such as this would at least provide "rudimentary precautions" against arbitrary nonenforcement, which is essentially all that is required for procedural due process.[176]

C. *Castle Rock* Encourages an Unnecessary and Unwise Overextension of the Supreme Court's Power of Review

Two unfortunate precedents that may encourage an overextension of the Supreme Court's reach are established by the majority's decision in *Castle Rock*. One stems from the Court's outright refusal to defer to the Tenth Circuit's analysis of whether Colorado law had created a mandatory duty on police officers. As the dissent points out, the Supreme Court has long given deference to lower federal courts' interpretations of state law, and refusal to give such deference generally occurs only on rare occasions when the federal court's interpretation was clearly wrong.[177]

This history of deference exists for a reason. Presumably, federal courts operating within a given jurisdiction have more expertise in that jurisdiction's state law than the Supreme Court would possess. For example, in *McMillian v. Monroe County*,[178] the ma-

174. *Id.*

175. *Id.* at 584.

176. *See id.* at 581 (noting that students facing temporary suspension from school must be given some form of procedural due process protections so that they may be protected from "unfair or mistaken findings of misconduct and arbitrary exclusion from school").

177. *Castle Rock*, 545 U.S. at 775 (Stevens, J., dissenting). Such deference can be seen in many decisions. *See e.g. Bishop v. Wood*, 426 U.S. 341, 346–347 (1976) (stating that "this Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion"); *Huddelston v. Dwyer*, 322 U.S. 232, 237 (1944) (articulating that "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts"); *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943) (stating, "Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error").

178. 520 U.S. 781 (1997).

jority gave complete deference to the Eleventh Circuit's determination regarding whether a sheriff was a "policymaker," articulating, "Since the jurisdiction of the Court of Appeals includes Alabama, we defer considerably to that court's expertise in interpreting Alabama law."[179] In surprising contrast to his strict position against giving deference in *Castle Rock*, Justice Scalia was a member of the majority in this 5–4 decision.[180] The explanation for why federal judges have heightened expertise is simple—federal courts within a given jurisdiction encounter issues of that jurisdiction's State law much more frequently than the United States Supreme Court.[181]

Also, because circuit courts operate within a limited number of states, frequently at least some judges on appellate panels are residents of those states, or are licensed to practice in the state whose law is in question.[182] Presumably those judges are more knowledgeable about that State's law than Supreme Court justices. *Phillips v. Washington Legal Foundation*[183] illustrated this principle when the Supreme Court deferred to the Fifth Circuit's determination of Texas law, specifically recognizing that "[t]he Court of Appeals in this case, two of the three judges of which are Texans, held that Texas also follows this rule."[184] In the Tenth Circuit's holding for *Castle Rock*, two of the eleven judges on the panel were licensed to practice law in Colorado.[185] Both of these

179. *Id*. at 786.

180. *Id*. at 782.

181. Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. Cal. L. Rev. 975, 976 (2004). Although this article primarily deals with the deference that federal appellate courts give federal district courts, the author states that federal courts in general often must resolve issues of local state law. *Id*. Furthermore, the author pronounces, "In a typical setting in which state law questions were to be resolved solely within the federal court system, the Supreme Court tended to defer to state law determinations of federal appellate courts." *Id*.

182. For example, the Tenth Circuit is comprised of six states and twenty-one judges. U.S. Ct. App. 10th Cir., *Judges of the U.S. Court of Appeals for the 10th Circuit*, http://www.ck10.uscourts.gov/chambers/index.php (accessed Sept. 8, 2006) [hereinafter *Judges*]. At least five of these judges have at one time practiced law in Colorado. *Id*.

183. 524 U.S. 156 (1998) (superseded on grounds unrelated to deference).

184. *Id*. at 165–166.

185. *See Gonzales*, 366 F.3d at 1093–1094 (listing the panel of judges and the holding with which each judge sided). The only two judges on this panel that are licensed to practice in Colorado are Judge Ebel and Judge Lucero. *See Judges*, *supra* n. 182 (providing a list of all twenty-one judges on the Tenth Circuit, and a brief biographical history of each judge).

judges sided with the majority, finding that the Colorado statute at issue indeed created a mandatory enforcement duty on police officers.[186]

Given such a history of deference, it is hard to see why the Supreme Court did not afford deference to the Tenth Circuit's analysis of Colorado law. In rejecting deference, the Court noted that "if we were simply to accept the Court of Appeals' conclusion, we would necessarily have to decide conclusively a federal constitutional question (i.e., whether such an entitlement constituted property)."[187] However, the concurring justices pointed out that even if the enforcement order was mandatory, Ms. Gonzales may not have had a "[property] entitlement to *enforcement* of the mandate."[188] Thus, it would seem that the *Castle Rock* Court had very little reason to decline to give deference to the Tenth Circuit in this case, but still decided to do so despite a slew of contrary precedent.[189] This is dangerous because it may encourage the Supreme Court to follow suit in future decisions, and conduct a de novo review of state law at its own will, when lower federal courts have more expertise in the matter. Presumably, this could lead to future decisions that are poorly informed, or at least less informed than they would be if deference was given.

If lack of proper deference to the Tenth Circuit was the Supreme Court's standard-of-review mistake in *Castle Rock*, then lack of proper deference to Colorado's legislative intent was the Court's interpretive mistake. Despite clear evidence to the contrary,[190] the Supreme Court held that the Colorado restraining

186. *Gonzales*, 366 F.3d at 1093–1094.

187. *Castle Rock*, 545 U.S. at 757 (majority).

188. *Id*. at 765 (Souter & Breyer, JJ., concurring). Although the statement that a mandatory enforcement statute would not necessarily give rise to a property entitlement was presented in dicta, it is unclear how great an effect this will actually have on lower federal courts. The late Chief Justice Rehnquist cautioned against over-using dicta, asserting that "'[g]eneral observations' by this Court customarily carry great weight with lower federal courts . . . ." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 598 (1993) (Rehnquist, C.J., dissenting). Chief Justice Rehnquist went on to argue that when providing answers to more questions than necessary, especially in cases involving unusual subject matters, the Court should "proceed with great caution . . . because our reach can so easily exceed our grasp." *Id*. at 599.

189. *See supra* nn. 175–180 and accompanying text (discussing several Supreme Court decisions that have given deference to the decisions of lower federal courts).

190. *See supra* pt. IV(A) (discussing why the Colorado restraining order should have been found to be mandatory).

order was discretionary.[191] Furthermore, whether or not the police had probable cause to make an arrest in this case played no role in the Court's analysis of whether or not they had discretion to enforce the restraining order.[192] In fact, the Court assumed at the outset that the police *did* have probable cause to believe that the husband had violated the restraining order.[193] Thus, after *Castle Rock*, it would seem that police officers have wide discretion to enforce restraining orders despite (1) statutory language that seems to mandate enforcement; and (2) reasonable grounds to believe that a particular person has violated the order.[194] So what could the Colorado Legislature have done differently in order to ensure that a mandatory restraining order was created? Could the statute at issue possibly have been written more clearly? Perhaps, it has been posited, "[T]he four words could have been added that many believe should have been added at the end of the Constitution: 'And we mean it.'"[195]

While this argument may be somewhat facetious, it remains debatable whether the Court in *Castle Rock* completely closed the door on a State's ability to create mandatory-enforcement restraining orders. The language in the Court's opinion sent mixed signals in this regard.[196] Early in its analysis, the majority seemed to leave open the possibility that Colorado *could* have created a mandatory enforcement order if only it had used stronger

191. *Castle Rock*, 545 U.S. at 757–758 (majority).

192. *Id.* at 764–765.

193. *Id.* at 751 n. 1. The Court framed the issue as follows: "whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order *when they have probable cause to believe it has been violated*." *Id.* at 750–751 (emphasis added).

194. *See Md. v. Pringle*, 540 U.S. 366, 371 (2003) (stating that "'[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' . . . and that the belief of guilt must be particularized with respect to the person to be searched or seized" (citation omitted)).

195. Roger Pilon, Town of Castle Rock v. Gonzales*: Executive Indifference, Judicial Complicity*, 2005 Cato S. Ct. Rev. 101, 117 (2005).

196. Interestingly, Justice Scalia argued that a petition for certiorari should be granted in *Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996) (denying certiorari), largely because the Court had sent "mixed signals" in the area of abortion cases. *Id.* at 1178 (Scalia, J., dissenting). After addressing several prior rulings, Justice Scalia expressed a clear concern that the Court had sent contrary messages as to the standard for conducting a facial challenge to an abortion statute. *Id.* at 1178–1179. His disdain for sending mixed signals is apparent in a concluding remark: "Today's denial [of certiorari] serves only one rational purpose: [i]t makes our abortion ad hoc nullification machine as stealthful as possible." *Id.* at 1181.

language in Section 18-6-803.5.[197] However, as the opinion unfolded, it seemed less and less likely that it could ever be possible for a state to create such an order.[198] For the majority, the idea that a state legislature intended to eliminate all police discretion as to whether to enforce protective orders seems unimaginable.[199]

This reasoning could be very dangerous. Essentially, the Court is sending a message to state legislatures that they do not have the power to mandate police enforcement in domestic violence situations. In the wake of *Castle Rock*, one critic said, "[Justice] Scalia's opinion is a huge setback for domestic violence victims. The message is: 'Mandatory arrest statutes don't mean what they say.'"[200] Perhaps even more disturbing is the fact that the Court cites no constitutional grounds for its refusal to honor the Colorado Legislature's intent. Instead, the Court relies solely on the public policy of police discretion. This seems to be a major divergence from the Court's historical position regarding acts of state legislatures, as illustrated below in *Ferguson v. Skrupa*:[201]

> [T]he proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.[202]

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197. *Castle Rock*, 545 U.S. at 761. The Court seemed to allude to a belief that it is possible for states to create mandatory enforcement statutes, but the Colorado statute had not risen to this level: "[A] true mandate of police action would require some stronger indication from the Colorado Legislature. . . ." *Id.*

198. *Id*. The Court stated that differing circumstances or competing duties would make it very impractical for a law to remove all discretion from an officer as to whether to enforce an order, especially when the order mandates either a duty to arrest or seek a warrant. *Id*.

199. Pilon, *supra* n. 195, at 117. Mr. Pilon notes that even though the officers in *Castle Rock* had no "competing duties," the Court's opinion "poses a straw man: the legislature could hardly have expected to eliminate discretion *absolutely*." *Id*.

200. Margaret Graham Tebo, *Protective Orders' Power in State's Hands: Castle Rock Ruling Leaves Advocates Looking toward Home*, 4 ABA J. eRpt. 26 (July 1, 2005) (available at WL 4 No. 26 ABAJEREP1).

201. 372 U.S. 726 (1963).

202. *Id*. at 729 (quoting *Tyson & Brother v. Banton*, 273 U.S. 418, 445–446 (1927) (Sanford, J., dissenting)).

Although the Court did not strike down any act of legislation in *Castle Rock*, its refusal to find the enforcement order to be mandatory ostensibly fails to recognize the will of the Colorado Legislature. This seems to be a clear overextension of the Court's power, with no adequate constitutional basis validating it. The decision weakens state legislatures tremendously by essentially barring their ability to make certain types of laws in the context of domestic violence. As noted by one commentator, "The impossible standard [Justice] Scalia implicitly erects would render legislatures impotent, officers immune, and citizens disarmed and vulnerable."[203]

D. Women Will Be Left More Vulnerable to Domestic Violence As a Result of *Castle Rock*

Perhaps the most troubling aspect of the majority's failure to hold that the police officers had a mandatory arrest duty in *Castle Rock* is the effect it will undoubtedly have on women. Unfortunately, domestic violence is an enormous problem facing the country. In an article published by *The Colorado Lawyer* during the same year that Colorado passed its domestic violence statutes, one author wrote, "Domestic violence is the single largest cause of injury to women in the United States, more common than auto accidents, muggings and rapes combined."[204] Also in 1994, Congress introduced the Violence against Women Act (VAWA) in part to "ensure that protection orders are given full faith and credit by all sister states," and to "criminalize violations of protection orders."[205] The "daughter of VAWA," an act promoting similar goals

203. Pilon, *supra* n. 195, at 117.

204. Fuller, *supra* n. 55, at 2327. Fuller goes on to state that Colorado has made significant improvements in the area of domestic violence, by enacting statutes that mandate arrests. *Id*. at 2329–2330. Unfortunately, the Court in *Castle Rock* had a different interpretation of the meaning of the Colorado statutes.

205. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J.L. & Feminism 3, 12 (1999). Ms. Epstein notes that VAWA, originally enacted as Public Law Number 103-322, 108 Statute 1902 (1994) has been codified in numerous sections under several titles of the United States Code. *Id*. at n. 48. Notably, the Supreme Court struck down one provision of VAWA—42 U.S.C. § 13981—in *United States v. Morrison*, 529 U.S. 598 (2000). This provision purported to confer a federal cause of action against anyone who "commits a crime of violence motivated by gender." 42 U.S.C. § 13981(c) (2000). In *Morrison*, the Supreme Court denied a rape victim the ability to use this provision to sue her assailants, because the Court found that neither the Commerce Clause nor the Fourteenth Amendment gave

and policies of the original act, was introduced to Congress in 1998.[206] VAWA provides concrete incentives for states to enact mandatory arrest statutes in the context of domestic violence, reserving "[g]rant funds totaling $120 million" for that purpose.[207] For example, one provision provides a clause reserving grant money to states that "certify that their laws or official policies . . . encourage or mandate arrest of domestic violence offenders who violate the terms of a valid and outstanding protection order."[208] Another provision allots grant money to states that "certify that their laws or official policies . . . encourage or mandate arrests of domestic violence offenders based on probable cause that an offense has been committed."[209]

One significant reason that states have chosen to enact mandatory enforcement statutes in the context of domestic violence is that police enforcement, when left up to the discretion of individual officers, is often inadequate.[210] Statistics on this issue are alarming. Three separate studies found that police only make arrests between three percent and ten percent of the time when responding to domestic violence calls.[211] In a Philadelphia study, police officers made arrests only thirteen percent of the time when observable injuries were present on the victim.[212] Perhaps most shockingly, a study in Milwaukee found that police made arrests only fourteen percent of the time, despite the fact that eighty-two percent of the victims requested to have the batterer arrested.[213] According to a sergeant with the New York City Police Department, "[t]raditional police practice in domestic violence

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Congress the authority to enact this law. 529 U.S. at 627.

206. Epstein, *supra* n. 205, at 12 n. 49 and accompanying text.

207. Marion Wanless, *Mandatory Arrest: A Step toward Eradicating Domestic Violence, but Is It Enough?* 1996 U. Ill. L. Rev. 533, 543 (1996).

208. 42 U.S.C. § 3796hh(c)(1)(B) (2006).

209. *Id*. at § 3796hh(c)(1)(A).

210. *See* Bernadette Dunn Sewell, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 Suffolk U. L. Rev. 983, 1006 (1989) (articulating that "if officers do respond [to domestic violence calls], they frequently assign these calls low priority and response time is greater than with other calls"). Ms. Sewell states that "[i]n situations clearly presenting police officers with sufficient cause to arrest an abuser, responding officers instead frequently attempt to calm the parties and act as mediators." *Id*. at 1007.

211. Sarah M. Buel, *Mandatory Arrest for Domestic Violence*, 11 Harv. Women's L.J. 213, 217 (1988).

212. *Id*.

213. *Id*.

cases has been to invoke arrest as a last resort."[214] This failure on the part of law enforcement agencies has been recognized by the judiciary in the past.[215] For example, in discussing why Oregon decided to create a mandatory enforcement statute in the context of restraining orders, the Court in *Nearing* articulated that "[t]he widespread refusal or failure of police officers to remove persons involved in episodes of domestic violence was presented to the legislature as the main reason for tightening the law so as to require enforcement of restraining orders by mandatory arrest and custody."[216]

Despite these disturbing statistics, studies show that when states choose to enact mandatory enforcement statutes, arrest rates go up. For instance, in the District of Columbia, arrest rates skyrocketed to forty-one percent after the Council enacted a mandatory enforcement statute for perpetrators of domestic violence.[217] Prior to enacting the statute, arrests were made only five percent of the time, and only fifteen percent of the time when "serious injuries were visible [on the victim] when the police arrived on the scene."[218] Additionally, research has shown that "vigorous prosecution and significant sanctioning" prevents abusers from re-abusing victims, which may be the most important factor of all.[219]

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214. Kevin Walsh, *The Mandatory Arrest Law: Police Reaction*, 16 Pace L. Rev. 97, 98 (1995).

215. *Id.* at 99–100 (citing *Thurman v. Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) and *Sorichetti v. City of New York*, 65 N.Y.2d 461 (N.Y. 1985)).

216. 670 P.2d at 142.

217. Epstein, *supra* n. 205, at 14. The District of Columbia mandatory enforcement statute that Ms. Epstein refers to is District of Columbia Code Section 16-1031 (2001). The pertinent language of this statute reads as follows:

> (a) A law enforcement officer shall arrest a person if the law enforcement officer has probable cause to believe that the person:
>
> (1) Committed an intrafamily offense that resulted in physical injury, including physical pain or illness, regardless of whether or not the intrafamily offense was committed in the presence of the law enforcement officer; or
>
> (2) Committed an intrafamily offense that caused or was intended to cause reasonable fear of imminent serious physical injury or death.

218. *Id.*

219. Thueson, *supra* n. 2, at 276–277; *see also* U.S. Dept. Just., *The Report of the Law Enforcement Assistance Administration Task Force on Women* 47 (1998) (available at http://www.ojp.usdoj.gov/reports/98Guides/wcjs98/wcjspdf.pdf) (accessed Jan. 15, 2006) [hereinafter *LEAA Report*] (discussing a study that found that domestic violence reoccurrences dropped by nearly fifty percent once the suspect had been arrested).

Certainly, hopes were high that women in Colorado would enjoy benefits similar to those demonstrated in the District of Columbia after the Legislature passed House Bill 94-1253. Referring to the Bill, Connie Platt, a spokeswoman for the Colorado Domestic Violence Coalition, said, "*This is the kind of response to domestic violence that is going to make a difference*. People can advocate for victims all they want, but until there is a coordinated system response to perpetrators, nothing is going to change."[220] Unfortunately, with the decision in *Castle Rock*, this "response" from the Colorado Legislature will not provide the protection that many felt it would. Faced with a statute that appeared to be mandatory, both in wording and in legislative intent,[221] the Supreme Court found that Colorado police officers retained discretion to enforce protective orders.[222]

Sadly, the problem that faced Ms. Gonzales continues to persist. As Margaret B. Drew, former chair and special advisor to the ABA Commission on Domestic Violence, articulated: "This is not an isolated case. We hear frequently from [domestic violence] victims that failure to enforce is a problem."[223] These battered women will be left unnecessarily vulnerable to under-enforced domestic violence violations in the future, a reality that could have been avoided had the Court come to a different conclusion. This under-enforcement has the potential to lead to an increase in domestic violence, as studies have demonstrated that there is a direct link between making arrests in domestic violence situations and the prevalence of subsequent domestic violence attacks.[224] Taking all of these factors into account, the *Castle Rock* holding is not only questionable on grounds of legal interpretation and analysis, but the end result is also profoundly unfair to women as a group, who comprise the overwhelming majority of all domestic violence victims.[225]

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220. Booth, *supra* n. 123 (emphasis added).

221. *See supra* pt. IV(A) (discussing the wording and legislative history of Colorado Revised Statutes Section 18-6-803.5).

222. *Castle Rock*, 545 U.S. at 760.

223. Tebo, *supra* n. 200.

224. *LEAA Report*, *supra* n. 219, at 47. The report cites to "The Minneapolis Domestic Violence Experiment," which purports to find that the "prevalence of subsequent domestic violence was reduced by nearly [fifty] percent when the suspect was arrested." *Id.*

225. *See id.* at 49 (stating that women are six times more likely to be physically abused by an intimate partner than men). Other studies indicate that women represent an even

V. POTENTIAL REMEDIES

Up to this point, this Article has focused on why the majority's decision in *Castle Rock* was questionable according to case precedent and statutory interpretation, and what effect this decision might have on women. However, it is also important to consider what effect the decision would have had if the Court had made the opposite ruling, with Justice Stevens writing for the majority. Had this been the outcome, the Colorado restraining order statute would have created a mandatory enforcement duty on police officers,[226] and this mandatory enforcement duty would have, in turn, given Ms. Gonzales a property entitlement to have the restraining order enforced.[227] As Justice Stevens correctly points out, "Recognizing [the] respondent's property interest in the enforcement of her restraining order is fully consistent with [Supreme Court] precedent."[228] While this solution seems to be more sound from a legal standpoint than the opinion written by the majority, is it feasible?

The first part of Justice Stevens' analysis—that the restraining order statute should have been interpreted to be mandatory—seems not only to be clearly correct, as discussed above,[229] but is also entirely feasible, as illustrated by cases from other jurisdictions.[230] In *Nearing*, the Oregon Supreme Court used a similar statute to hold state police accountable for negligently failing to enforce a mandatory restraining order.[231] Notably, the dissent in *Nearing* opposed the imposition of tort liability for police inaction, arguing that such a holding would cost local governments too much money.[232] Yet, the Court specifically addressed this objec-

larger portion of domestic violence victims. *See e.g. Bruno v. Codd*, 393 N.E.2d 976, 977 n. 2 (N.Y. 1979) (stating that "in [twenty-nine] out of every [thirty] such [interspousal abuse] cases the husband stands accused of abusing his wife").

226. *See Castle Rock*, 545 U.S. at 787–788 (Stevens, J., dissenting) (stating that "the [restraining order] statute (as well as the order itself) mandated police enforcement").

227. *Id*. at 789–791.

228. *Id*. at 789. For a discussion of why Justice Stevens is correct to point out that Ms. Gonzales' right to enforcement of her restraining order is consistent with precedent, see *supra* Part IV(B) (discussing how property entitlements have historically been interpreted).

229. *Supra* pt. IV(A).

230. *See Nearing*, 670 P.2d at 142.

231. *Id*. at 139, 145.

232. *See id*. at 151 (Peterson, J., dissenting) (stating that "[p]ublic monies are scarce,

tion, noting that (1) the same argument could be made against numerous other torts in the State's Tort Claims Act, yet this act was still passed; and (2) under the mandatory-enforcement statute, "there is in fact no liability if the statute is followed."[233] Other state courts have been willing to imply a cause of action against state officials for failing to enforce similar laws that were considered to be mandatory. For example, in *Campbell v. City of Plainfield*,[234] a New Jersey court held that a restraining order statute created a mandatory enforcement duty, which in turn created a special relationship between the responding police officer and the victim.[235] When the police officer failed to make an arrest under the statute, the court held that governmental immunity could not be used to exempt that state official from tort liability.[236] In *Matthews v. Pickett County*,[237] the Tennessee Supreme Court confirmed that a mandatory restraining order statute could be used as a basis for holding a local government liable for police inaction because restraining orders imposed a special duty on police officers.[238] These cases indicate not only that state courts have been willing to interpret restraining order statutes so as to impose mandatory duties on their law enforcement officials, but also that state courts are willing to impose liability on local governments for failing to enforce such statutes.

The feasibility of using a federal law—42 U.S.C. § 1983—to imply a state cause of action against local governments, however, may not be as clear. If Justice Stevens' opinion was followed by the majority in *Castle Rock*, this exact situation would have resulted. Ms. Gonzales would have a property entitlement to en-

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and public responsibilities are multiplying. I do not favor compounding already hefty public problems by creating this new strict liability tort.").

233. *Id*. at 144 (majority).

234. 682 A.2d 272 (N.J. Super. L. Div. 1996)

235. *Id*. at 276.

236. *Id*. Attorney John C. Duffy has publicly criticized the *Matthews* decision, arguing that the harm suffered by the restraining order beneficiary in that case was unforeseeable. Kirk Loggins, *Emotional Distress Costs Deputies*, The Tennessean 1B (Aug. 22, 2000). Despite this criticism, however, Duffy recognizes the large potential economic and political effects this decision is likely to have on local governments: "[The] Haynes' ruling 'affects every municipality and every county in the state and, more importantly, every employee in law enforcement.'" *Id*.

237. 996 S.W.2d 162 (Tenn. 1999).

238. *Id*. at 165.

forcement of her restraining order,[239] and 42 U.S.C. § 1983 would provide a cause of action against the Town of Castle Rock for the peace officers' failure to enforce the restraining order.[240] This situation is certainly open to criticism, not necessarily from the standpoint of legal precedent, but rather from an economic and social science perspective. As Judge Chris Altenbernd, a judge on Florida's Second District Court of Appeal pointed out, "[I]t is a bad idea for the federal government to create tort-like remedies. *One size does not fit all states*."[241] Essentially, if Justice Stevens' opinion was adopted, federal law would provide domestic violence victims with a fixed enforcement mechanism against state governments, where state law failed to create such a cause of action.[242] This remedy has the potential to open a "Pandora's Box" for lawsuits against state governments that enacted mandatory enforcement legislation only for the purposes of reducing domestic violence, not to create additional state liability.[243] Presumably, this Pandora's Box would be very large, and would have the potential to expose states to enormous liability, simply due to the sheer number of domestic violence victims each year.[244] In response to this increased toll on state treasuries, legislatures might be inclined to reduce their potential exposure by rewriting domestic violence statutes so as to allot police officers more discretion in their enforcement duties. In this case, providing women with a federal "tort-like" remedy against state officials might eventually "harm the very policies that [Justice Stevens] wish[ed] to foster" in his dissent.[245]

239. *Castle Rock*, 545 U.S. at 791–792.

240. *See id*. at 774 (stating that if Ms. Gonzales' allegations were true, "42 U.S.C. § 1983, provides her with a remedy against the petitioner, even if Colorado law does not").

241. E-mail from Chris W. Altenbernd, Judge, Fla. 2d. Dist. App., to Ryan Hasanbasic, Student, Stetson U. College L. (Mar. 30, 2006, 12:08 p.m. EDT) (emphasis added).

242. *See supra* n. 240 (demonstrating Justice Stevens' belief that 42 U.S.C. § 1983 could be used to hold the Town of Castle Rock liable in the absence of such a remedy under Colorado law).

243. William Fuente, Judge, Fla. Cir. Ct., Hillsborough County, Panel Remarks, Town of Castle Rock v. Gonzales*: Upholding the Policy of Police Discretion, but at What Cost?* (Tampa, Fla., Mar. 29, 2006).

244. *See* ABA Commn. on Dom. Violence, *supra* n. 1 and accompanying text (stating that it is estimated that four million American women are seriously affected by domestic violence each year).

245. E-mail, *supra* n. 241.

On the other hand, if Justice Stevens' first finding—that the Colorado restraining order statute was mandatory—was adopted, but his second finding—that 42 U.S.C. § 1983 gave Ms. Gonzales a cause of action to enforce her property entitlement under state law—was not adopted, the Supreme Court would have created a precedent tolerating state statutes that give individuals empty rights. This precedent would be in direct contrast with a foundational policy established by the great Chief Justice John Marshall over two hundred years ago in *Marbury v. Madison*:[246] "[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."[247] Since *Marbury*, courts have continued to show disdain towards legislative provisions that specify duties, but fail to provide remedies for victims due to nonperformance of those duties.[248] Thus, it would seem that domestic violence victims are entitled to some sort of remedy under a mandatory reading of the Colorado restraining order statute, but a federal remedy to the state problem may not be feasible.

Perhaps, then, the most realistic solution, as evidenced by previous caselaw, would be to fashion a remedy under state law rather than federal law.[249] However, an effective state remedy would also have to be economically feasible in order to encourage states to include mandatory enforcement provisions in their arrest statutes.[250] One possible remedy would be to hold state police officers liable for failure to enforce mandatory arrest statutes under a deliberate indifference standard. Deliberate indifference

246. 5 U.S. 137 (1803).

247. *Id*. at 166.

248. *E.g. Franklin v. Gwinnett Co. Pub. Schs*., 503 U.S. 60, 66 (1992) (emphasizing that it is an "'indisputable rule, that where there is a legal right, there is also a legal remedy'" (quoting William Blackstone, *Commentaries* vol. 3, *23)); *Peck v. Jenness*, 48 U.S. 612, 623 (1849) (stating that "[a] legal right without a remedy would be an anomaly in the law"); *Amoco Prod. Co. v. Columbia Gas Transmission Corp*., 455 So. 2d 1260, 1264 (La. App. 1984) (recalling the words of Justice Holmes, "A right without a remedy is like a ghost that stalks the law").

249. *See supra* nn. 231–238 (citing various state court cases that have held police officers liable for failing to enforce restraining orders).

250. This concern was emphasized by the dissent in *Nearing*: "We have no way of knowing how much today's decision will exacerbate the fiscal problems of Oregon's cities. Given the prevalence of domestic strife, the effect upon a local government budget could be considerable." 670 P.2d at 151–152.

denotes "the same kind of conduct [as] 'recklessness with conscious disregard,'"[251] and may be used to punish government actors that demonstrate conduct of "a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking."[252] Such a high standard may be appropriate to hold states and municipalities liable for nonenforcement of mandatory restraining order statutes, because it would punish only the particularly egregious scenarios.[253] Under such a platform, liability costs to local governments would remain relatively low, but local police agencies would still have incentive to adopt strict enforcement policies with regard to restraining orders due to the potential repercussions.[254]

VI. CONCLUSION

In *Town of Castle Rock v. Gonzales*, the Supreme Court's holding, which ultimately resulted in a mother having no redress for the tragic deaths of her three young daughters, is questionable on several grounds. The Court's failure to articulate any standard as to why no deference was given to the Tenth Circuit's view of state law goes against a long history of case precedent. The Court's refusal to find that the Colorado restraining order statute was mandatory is in direct conflict with the clear intent of the Colorado Legislature. Finally, the Court's narrow construction of what constitutes a property entitlement has very little, if any, legal ground for support. However, it cannot be said, from a constitutional standpoint, that the final result reached by the majority was *entirely* incorrect and the dissenting opinion was *entirely*

251. *See L.W. v. Grubbs*, 92 F.3d 894, 898 (9th Cir. 1996) (quoting *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995)).

252. *Uhlrig*, 64 F.3d at 574.

253. The intent element of deliberate indifference has been equated with the notion of "willful blindness." *See e.g. Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 582 (1st Cir. 1994) (asserting that a supervisor may be liable for his subordinate's unconstitutional conduct "if he would have known of it but for his deliberate indifference or willful blindness, and if he had the power and authority to alleviate it"). Although the *Maldonado-Denis* case is factually dissimilar from *Castle Rock*, the notion of "willful blindness" seems to describe perfectly the conduct demonstrated by the Colorado police officers.

254. As stated by Judge Altenbernd, the most feasible solution may be "a matter of convincing state legislatures and state courts that a level of liability for the worst case scenarios will result in lots more economic and social benefit than the immediate and direct costs of the occasional liability judgments it creates." E-mail, *supra* n. 241.

correct. Under a plain reading of the Colorado statute coupled with the seemingly clear legislative history, the dissent is correct to argue that the Colorado restraining order statute was mandatory. However, the majority's conclusion that a federal law remedy is inappropriate is similarly correct, due to economic considerations for state governments. This Article posits that, despite the legal inadequacies of the arguments made by the majority, the best remedy to the problem presented in *Castle Rock* is to encourage states to regulate domestic violence by imposing liability on police officers only in worst-case scenarios. This solution would maximize the social benefit of deterring nonenforcement in domestic violence situations, as well as the economic incentive for states to adopt mandatory arrest provisions.