Town of Castle Rock v. Gonzales: Executive Indifference, Judicial Complicity

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I. Introduction

We came in out of the state of nature, so the story goes, in order better to protect ourselves. There is safety in numbers, we said, and justice too. Thus, we gave up our rights of self-enforcement, in most cases, and asked the state to do it for us.[1] But what if the state fails in that most basic of its functions? What recourse do we have?

The tragic case that brought those questions before the Supreme Court this term, *Town of Castle Rock v. Gonzales*,[2] arose out of divorce proceedings in which one Mrs. Jessica Gonzales sought and obtained a temporary restraining order (TRO) against her estranged husband. Made permanent shortly thereafter and served that day on Mr. Gonzales, the order commanded him not to ''molest or disturb the peace'' of Mrs. Gonzales or their three daughters, ages ten, nine, and seven, and to remain at least 100 yards from the family home at all times. In bold letters on the back it gave him ample ''WARNING'' that a knowing violation was a crime and that he may be arrested without notice if a law enforcement officer had probable cause to believe he had knowingly violated the order.

Most important for our purposes, the order also included a ''NOTICE TO LAW ENFORCEMENT OFFICIALS'' that read in part:

> YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL

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[1]Those are the opening lines in Roger Pilon, Criminal Remedies: Restitution, Punishment, or Both? 88 Ethics 348 (1978), responding to Randy E. Barnett, Restitution: A New Paradigm of Criminal Justice, 87 Ethics 279 (1977).

[2]125 S. Ct. 2796 (2005).

> 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 AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER.[3]

A few weeks later, at about 5:00 or 5:30 p.m. on a weekday afternoon, without notice or advance arrangements, Mr. Gonzales abducted the three daughters while they were playing outside the family home in Castle Rock, Colorado. When Mrs. Gonzales noticed the children were missing, she suspected her husband had taken them, given his history of suicidal threats and erratic behavior. At about 7:30 p.m. she called the Castle Rock Police Department, which dispatched two officers. As the Court describes:

> When [the officers] arrived . . . she showed them a copy of the TRO and requested that it be enforced and the three children be returned to her immediately. [The officers] stated that there was nothing they could do about the TRO and suggested that Mrs. Gonzales call the Police Department again if the three children did not return home by 10:00 p.m.
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> At approximately 8:30 p.m., Mrs. Gonzales talked to her husband on his cellular telephone. He told her ''he had the three children [at an] amusement park in Denver.'' She called the police again and asked them to ''have someone check for'' her husband or his vehicle at the amusement park and ''put out an [all points bulletin]'' for her husband, but the officer with whom she spoke ''refused to do so,'' again telling her to ''wait until 10:00 p.m. and see if'' her husband returned the girls.
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> At approximately 10:10 p.m., Mrs. Gonzales called the police and said her children were still missing, but she was now told to wait until midnight. She called at midnight and told the dispatcher her children were still missing. She went

[3]That notice and the quoted facts that follow are taken from the opinion of the Court, *id*. at 2801–02. The quoted facts are taken by the Court from the complaint respondent Mrs. Gonzales filed in federal district court. Because the case comes to the Court on appeal from a dismissal of the complaint, the Court assumes its allegations are true.

> to her husband's apartment and, finding nobody there, called the police at 12:10 a.m.; she was told to wait for an officer to arrive. When none came, she went to the police station at 12:50 a.m. and submitted an incident report. The officer who took the report ''made no reasonable effort to enforce the TRO or locate the three children. Instead, he went to dinner.''
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> At approximately 3:20 a.m., Mrs. Gonzales' husband arrived at the police station and opened fire with a semiautomatic handgun he had purchased earlier that evening. Police shot back, killing him. Inside the cab of his pickup truck, they found the bodies of all three daughters, whom he had already murdered.[4]

A layman reading and reflecting on those horrific facts would most likely have little difficulty concluding that the Castle Rock police officers had a clear legal duty on behalf of Mrs. Gonzales to enforce the restraining order; that they were grossly negligent, at least, in failing to do so; and that, accordingly, they and the town of Castle Rock, their employer, were liable to Mrs. Gonzales for the losses she suffered as a result of that failure. At bottom, after all, the protection at issue here is the very thing we created government in the first place to provide. Our founding document, the Declaration of Independence, states that plainly: ''That to secure these Rights [to Life, Liberty, and the Pursuit of Happiness], Governments are instituted among Men.''

Indeed, does anyone doubt that a private firm would be held liable if it had contracted to enforce that order and its agents had been as derelict as the Castle Rock police were? The layman understands a contract. And he has an intuitive understanding of the social contract as well. Are public officials, unlike their private counterparts, insulated from responsibility and hence, to that extent, ''above the law''? Principle aside, as a practical matter it goes without saying that it is far more effective to hold officials accountable in a targeted way than to try to do so through the broad brush of periodic elections. The political remedy favored by many conservatives of the judicial restraint school—Mrs. Gonzales' right to vote every so often—is cold comfort here. In the end, therefore, this case is not difficult.

Unfortunately, that common sense eluded seven members of the Supreme Court this term. Led by Justice Antonin Scalia, with a

[4] *Id.* at 2801–02.

brief concurrence by Justice David Souter, joined by Justice Stephen Breyer, the Court followed a strained course of reasoning to deny Mrs. Gonzales her claim for relief under section 1983 of the Civil Rights Act of 1871,[5] which spells out the right of individuals to sue state officials they believe have violated their constitutional rights under color of state law. In a word, Scalia could find no constitutional right to be violated and hence no violation. Only Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg, came close to the first principles of the matter. They would have upheld the six members of the en banc Tenth Circuit Court of Appeals that had found for Mrs. Gonzales.[6]

Because Scalia's opinion for the majority is tightly argued, I will follow and analyze it point by point. To better ground and frame the analysis, however, it will be useful at the outset to recur to those first principles on which the common sense view rests, the better also to see how far today we have strayed from them. This will be no wild-eyed excursion into the hoary reaches of natural rights theory, let me note. I will not be inventing rights with abandon. Neither did the two justices or six judges below who found for Mrs. Gonzales. Rather, I want simply to outline the principles that pretty much everyone in the founding generation and most in the generation that wrote and ratified the Civil War Amendments agreed on. Representations to the contrary notwithstanding, it is a foundation at some remove from the one upon which many ''originalists'' like Scalia rest.[7]

II. First Principles

A. In the Beginning

''We start with first principles,'' Chief Justice William Rehnquist famously said in 1995 in *United States v. Lopez*.[8] ''The Constitution creates a Federal Government of enumerated powers.''[9] Invoking the Tenth Amendment, which makes the doctrine of enumerated powers explicit, he might more fully have said that the Constitution

[5]42 U.S.C. § 1983.

[6]366 F.3d 1093 (10th Cir. 2004).

[7]See, e.g., Antonin Scalia, A Matter of Interpretation 138–41 (1997).

[8]514 U.S. 549 (1995).

[9]*Id*. at 552.

creates a government of *delegated*, enumerated, and thus limited powers. For the Tenth and Ninth Amendments together, the final documentary evidence from the founding period, recapitulate the theory of government and governmental legitimacy that was first set forth in the Declaration and is implicit throughout the Constitution. Grounded in Lockean state-of-nature theory,[10] the idea is that we are all born with certain natural rights, as reflected largely in the English common law:[11] the right to property, broadly understood as ''Lives, Liberties, and Estates'' as Locke put it;[12] the right to change that world of natural rights through contract; and the instrumental, second-order right to secure or enforce those substantive, first-order natural and contractual rights through what Locke called the ''Executive Power'' that each of us enjoys in the state of nature.[13]

That three-part theory of rights is implicit in the Declaration and is employed by the Tenth Amendment, which tells us that power is legitimate only insofar as it has been delegated to the government by those who first have it, ''we the people,'' the powers not so delegated being reserved to the states or to the people. And the Ninth Amendment makes it clear that we have far more rights than the few that could have been enumerated in the original Constitution and the Bill of Rights. In a nutshell, the Constitution is a social contract through which the founding generation created a government whose powers are limited to those that have been delegated to it, which makes them legitimate, leaving individuals otherwise free to pursue happiness as they think best, exercising all the rights they've retained. And as the powers enumerated in the Constitution indicate, most are drawn from Locke's Executive Power: in one way or another, that is, most are aimed at securing our first-order substantive rights.[14]

[10]John Locke, The Second Treatise of Government, in Two Treatises of Government (Peter Laslett ed., 1960) (1690).

[11]Edward S. Corwin, The ''Higher Law'' Background of American Constitutional Law 26 (1955) (''[T]he notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law.'').

[12]Locke, *supra* note 10, at ¶ 123.

[13]*Id*. at ¶ 13.

[14]I have discussed those issues more fully in Roger Pilon, The Purpose and Limits of Government, in Limiting Leviathan 13–37 (Donald P. Racheter & Richard E. Wagner eds., 1999), reprinted as Cato's Letter No. 13 (Cato Institute 1999). See also Scott Douglas Gerber, To Secure These Rights: The Declaration of Independence and Constitutional Interpretation (1995).

To be sure, the great bulk of that executive or police power was left with the states, but state constitutions follow the same Lockean theory of legitimacy as the federal Constitution. In particular, government officials are our agents, charged by constitutional contract with exercising the power we've delegated to them. Cast negatively, the idea of ''inherent sovereignty,'' other than in the people, and ''discretionary power,'' other than for practical reasons, is utterly foreign to our system of government. Thus, of particular relevance here, officials may have some discretion as a practical matter, but when that discretion is clearly removed, they must act as charged.

B. Completing the Constitution

But even after the Bill of Rights was added in 1791, the original design was flawed by the Constitution's oblique recognition of slavery, made necessary to ensure union. Thus, as the Court held in 1833,[15] the Bill of Rights applied not against the states but only against the government created by the document it amended, the federal government. And slavery, far from withering away, as most Framers had hoped it would, was ended only by the Civil War and the ratification of the Civil War Amendments.

With the ratification of those Amendments, however, the relationship between the federal government and the states was fundamentally changed. Especially through Section 1 of the Fourteenth Amendment—defining citizenship, protecting the privileges or immunities of United States citizens against state violations, and ensuring due process and equal protection by the states—individuals at last had federal remedies against state violations of their rights. As has rightly been said, the Civil War Amendments ''completed'' the Constitution, finally incorporating into the document the grand founding principles of the Declaration of Independence.[16]

But the Court has never come to grips with that fundamental change. The problem began in 1873, barely five years after the Fourteenth Amendment was ratified, when a deeply divided five to four Court effectively eviscerated the Privileges or Immunities Clause

[15]Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[16]See especially Robert J. Reinstein, Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment, 47 Temp. L. Rev. 361 (1993).

from the Amendment in the infamous *Slaughterhouse Cases*.[17] Thereafter the Court would attempt to do under the Due Process Clause what was meant to be done under the more substantive Privileges or Immunities Clause. The effort has been uneven at best, largely because the Court seems never to have grasped that the rights ''incorporated'' against the states *ab initio* by the Fourteenth Amendment included not simply most of those in the Bill of Rights but the whole body of rights that stands behind the Constitution, drawn not simply from the Bill of Rights but from the common law and natural rights traditions—rights we never gave up. Those rights, ''more tedious than difficult'' to enumerate, were *constitutionalized* by the Fourteenth Amendment.[18]

Thus, such subsequent federal and state legislation as the Civil Rights Act of 1871, *provided it is faithful to the Fourteenth Amendment as originally understood*, does not ''create'' any new rights. Rather, it simply recognizes and clarifies the rights and procedures the Amendment had already constitutionalized. It is positive law, yes, but law that reflects not simply the will of the legislature that enacts it but that of the generation that wrote and ratified the Amendment, which itself reflected the ''higher law'' from which it was drawn, as the debates in the thirty-ninth Congress that passed the Amendment and the debates surrounding ratification make clear.[19]

[17]83 U.S. (16 Wall.) 36 (1873). See Kimberly C. Shankman and Roger Pilon, Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government, 326 Cato Policy Analysis (Nov. 23, 1998), reprinted in 3 Tex. Rev. L. & Pol. 1 (1998).

[18]The quoted phrase is from Justice Bushrod Washington's authoritative interpretation of Article IV's Privileges and Immunities Clause: Corfield v. Coryell, 6 F. Cas. 546, 541 (C.C.E.D. Pa. 1823). Washington's opinion was among the sources relied on by those who drafted the Fourteenth Amendment.

[19]In the House, Rep. John Bingham, the author of Section 1, said its provisions would protect ''the inborn rights of every person.'' Cong. Globe., 39th Cong., 1st Sess. 2542 (statement of Rep. Bingham). In the Senate, Luke Poland, a former state chief justice, said that Section 1 ''is the very spirit and inspiration of our system of government. The absolute foundation upon which it is established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution.'' *Id*. at 2961 (statement of Sen. Poland). After Speaker of the House Schuyler Colfax presided over the debates in that chamber, he told his constituents that Section 1 is ''going to be the gem of the Constitution. . . . it is the Declaration of Independence placed immutably and forever in the Constitution.'' Cincinnati Commercial, Aug. 9, 1866, at 2, col.3.

The failure of the Court to fully or clearly grasp those points continues to this day, of course. In fact, today, on a wide range of issues, the Fourteenth Amendment is the main ground on which modern judicial ''liberals'' and ''conservatives'' so often wage war. Armed with the ''law-as-politics'' agenda set by the New Deal Court in 1937 and 1938,[20] modern liberals recognize rights under the Amendment episodically, largely ignoring genuine rights like property and contract while inventing specious ''rights'' from whole cloth—like the ''right'' to procure or perform an abortion, a matter for criminal law line-drawing that properly falls under the general police power of the states. In reaction, modern conservatives too often recoil at the very idea of judges recognizing rights not found explicitly in the constitutional text.[21] Dubious ''originalists'' and ''textualists,'' they ignore or disparage the plain text (the Ninth Amendment, the Privileges or Immunities Clause), the true original understanding, and the structure that reflects that understanding.

C. Modern Confusions

Not surprisingly, the checkered history of Fourteenth Amendment interpretation has led to several confusions and erroneous doctrines. One was just mentioned: the Amendment is not a mere invitation to legislators, much less judges, to legislate at will; rather, it is ''complete,'' yet it binds those who interpret it. And it ''completes'' the Constitution in the sense that it incorporates the Declaration's principles and applies them at last against the states. Thus, legislators and judges do not have to ''create'' new rights; they simply have to recognize, clarify, and make explicit the rights that are already there,

[20]Following President Franklin Roosevelt's infamous Court-packing scheme early in 1937, the New Deal Court eviscerated the doctrine of enumerated powers in *Helvering v. Davis*, 301 U.S. 619 (1937), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Then in 1938 the Court bifurcated the Bill of Rights, effectively distinguishing ''fundamental'' and ''nonfundamental'' rights, and invented a bifurcated theory of judicial review in famous (or infamous) footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). I have discussed those issues more fully in Roger Pilon, Restoring Constitutional Government, 2001–2002 Cato Sup. Ct. Rev. vii (2002). For a penetrating analysis of the political machinations that surrounded the Court-packing scheme, see William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (1995).

[21]See, e.g., Scalia, Matter of Interpretation, *supra* note 7; Robert H. Bork, The Tempting of America: The Political Seduction of the Law (1990); Lino Graglia, It's Not Constitutionalism, It's Judicial Activism, 19 Harv. J.L. & Pub. Pol'y 293 (1996).

if only by implication. That takes sound lawmaking and judge-crafting, to be sure: it means that legislators and judges must appeal more to reason than to will or politics, but that is nothing less than what the oath of office requires. Lawmakers and judges are not free, therefore, to stray beyond their authority, as too many modern liberals, proponents of unbounded legal positivism, would have them do. But neither may they shirk from their responsibilities to faithfully clarify through legislation , or interpret and apply through adjudication, the Amendment's principles and broad language, as too many modern conservatives, proponents of a narrow legal positivism, would have them do.

A closely related point follows: Far from *requiring* federal or state legislation to effect the changes wrought by the Fourteenth Amendment, Section 1 of the Amendment was drafted to be *self-executing*—to enable individuals to bring actions against states without Congress having first to authorize it or to articulate their rights. In fact, Rep. John Bingham, one of the Amendment's chief sponsors in the thirty-ninth Congress and the author of Section 1, introduced two versions of Section 1 that were *not* self-executing, only to be remonstrated from the floor that those versions would leave the enjoyment of rights ''to the caprice of Congress.''[22] A third version of Section 1, the present version, cured that problem by making the Section self-executing.

Finally, for present purposes, the early loss of the Privileges or Immunities Clause and the Court's subsequent reliance on the Due Process Clause to do so much of the Amendment's work has led to a spurious distinction, with serious consequences, between ''substantive'' and ''procedural'' due process. Due process clauses have a long and glorious history of protecting substantive rights stretching back at least to Magna Carta.[23] Thus, the narrow view of the clause

[22]''But this amendment proposes to leave it to the caprice of Congress; and your legislation on the subject would depend upon the political majority of Congress, and not upon two thirds of Congress and three fourths of the States.'' Cong. Globe, 39th Cong., 1st Sess. 1095 (statement of Rep. Hotchkiss) (quoted in Reinstein, *supra* note 16, at 393 n.179).

[23]See, e.g., Bernard H. Siegan, Property Rights: From Magna Carta to the Fourteenth Amendment (2002). In *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950), Justice Felix Frankfurter wrote in dissent, ''It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history.''

held today by many modern conservatives—that ''substantive due process'' is something of an oxymoron and that government may deprive a person of life, liberty, or property, provided only that the process due is accorded—is wrong historically as well as in theory.

The theory of the matter, in a nutshell, is this: *all* rights, including procedural rights, are ultimately substantive; in a state of nature, the procedural rights that arise when first-order substantive rights are threatened or violated—i.e., the second-order enforcement rights (the ''Executive Power''), and rights against wrongful enforcement—are derived from those first-order substantive rights. We call them ''procedural'' rights simply because they pertain to and arise in the context of enforcing or securing our first-order substantive rights of property and contract, a context essentially procedural. By virtue of their derivation from our first-order substantive rights, however, those procedural rights, once they arise or ''kick in,'' are every bit as ''substantive'' as the underlying rights they are meant to secure. After all, the state-of-nature procedural right ''to prosecute,'' whether to punish or to seek restitution, is a liberty—which arises only when a wrong is alleged.[24] Similarly, the procedural right against unreasonable searches and seizures is also a liberty, derived straightforwardly from the right to be free. Were we not to have lost the Privileges or Immunities Clause, this spurious dichotomy might never have arisen. But the loss has ''forced'' the Court, so to speak, to make the Due Process Clause do double duty—to serve as a source of both substantive and procedural rights, a duty that might better have been, and doubtless was meant to be, split between the two clauses.

III. Applying the Principles

With that brief background, especially concerning the Fourteenth Amendment, we can now turn to the case at hand and then to Scalia's opinion for the Court. As noted above, but for the history of the Amendment's interpretation and the confusions that have ensued, *Castle Rock*, like *Slaughterhouse* long before, should have been an easy case. As explained and justified by the social contract theory on which the nation rests, when Mrs. Gonzales entered civil society she yielded up, in most situations, her state-of-nature Executive

[24]I have discussed those issues more fully in Pilon, Criminal Remedies, *supra* note 1.

Power to enforce her rights—contracting mainly with the state, but also with the federal government, to have those governments exercise that right for her and on her behalf. And with the ratification of the Fourteenth Amendment she authorized a federal check on the states. All of that is evidenced by the Declaration, the federal and state constitutions, the statute at issue, and the restraining order issued under it.

The precise terms of that contract are no small matter, of course, especially for the case at hand, about which more in a moment. But concerning the principle at issue, there is nothing extraordinary in the arrangement itself. In a state of nature Mrs. Gonzales might have contracted for the same protection with a private protective agency.[25] Having contracted instead with the state, her right to have government protect her—derived from her former right to protect herself—amounts simply to one of the ''privileges'' of citizenship meant to be protected under Section 1's Privileges or Immunities Clause.[26] Having abridged one of her privileges by failing to protect her, the town, a subsidiary of the state, is liable, at least in principle.

Alternatively, under the Due Process Clause Mrs. Gonzales had a property interest in the above-noted contractual right to be protected by the state. Since all rights are reducible to property,[27] once

[25]See, e.g., Robert Nozick, Anarchy, State, and Utopia, Part I (1974).

[26]Speaking in the Senate, Jacob Howard said the most important feature of Section 1 of the Fourteenth Amendment was the Privileges or Immunities Clause. He addressed the scope of the clause by drawing on Justice Washington's explication of Article IV's Privileges and Immunities Clause (see note 18, *supra*), listing ''protection by the Government'' first among our privileges. Cong. Globe., 39th Cong., 1st Sess. 2765 (statement of Sen. Howard). That the Constitution leaves such protection with the states, in most cases, is immaterial since the object of the privilege is the same whether the power of protection was delegated by Mrs. Gonzales to the federal government, as in some cases, or reserved to the states, as with the general police power. The change wrought by the Fourteenth Amendment, which the *Slaughterhouse* majority was unwilling to acknowledge, was to make the privilege one of *national* citizenship, which no state might thereafter abridge. Thus were states restricted; and thus was federalism fundamentally changed by the ratification of the Fourteenth Amendment.

[27]Locke, *supra* note 10, at ¶ 123 (''Lives, Liberties, and Estates, which I call by the general Name, *Property*''); James Madison, Property, National Gazette, March 29, 1792, at 175, reprinted in 6 The Writings of James Madison 101 (Gaillard Hunt ed., 1906) (''In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.'').

she entered civil society the property she formerly held in her state-of-nature right to protect herself became simply the property she now holds through contract, the right to be protected. In failing to protect her, the town deprived her of her property—there having been no process forthcoming that might have shown that she had somehow forfeited that property. Here too, then, the town is liable for that deprivation, at least in principle.

That general theory needs to be tempered, however, by practical considerations of the kind that would likely arise in any contractual setting, private or public, involving enforcement. For just as no one in the state of nature would be able to provide absolute security for himself, so too no prudent party offering such services, private or public, would contract to provide absolute security. Thus it is that in civil society, law enforcement officials enjoy a measure of discretion as to whether and how they exercise the authority that has been delegated to them. As we negotiated the social contract, we did not charge officials with providing *absolute* security. But neither did we give them absolute discretion.

All of that was left only implicit in the Constitution and its amendments, of course, to be clarified and made explicit later, consistent with the underlying principles, through either judicial discovery or statute. That there is a measure of indeterminacy here should not surprise: law has numerous such areas. But neither should it lead to judicial deference bordering on abdication. Notwithstanding the indeterminacy that is inherent in the enforcement context, therefore, it is the underlying principles that we need to keep foremost in mind as we analyze the Court's handling of this case.

IV. Justice Scalia's Opinion for the Court

That deductive approach to the case, grounded in first principles and in the theory of the Constitution, sits uneasily among those accustomed to a world of mere positive law. Thus, Scalia, generally a textualist, rarely invokes that underlying theory, which does what inescapably incomplete text alone cannot do—give a complete account. All three opinions issuing from the Court ignore the Privileges or Immunities Clause, of course, focusing instead on the Due Process Clause. And all three wrestle with the spurious and distracting distinction between ''substantive'' and ''procedural'' due process—in part because a 1989 decision, *DeShaney v. Winnebago*

County,[28] had ruled out ''substantive due process'' relief for Mrs. Gonzales, but also because they're working within a positivist framework whereby states ''create'' rights to life, liberty, and property, then ''create'' various procedures to guard against deprivation of those positive rights. Thus are ''substantive'' and ''procedural'' rights separated, both the creations of positive law—of mere will. Accordingly, none of the opinions conceives of process rights as being substantive because entailed by substantive rights, as discussed above, although Stevens does make an effort to cut through the artificial distinction in a note responding to Souter's concurrence.[29]

A. Framing the Issue

Scalia frames the case 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.''[30] As noted above, Mrs. Gonzales sued under section 1983, ''claiming that the town violated the Due Process Clause because its police department had 'an official policy or custom of failing to respond properly to complaints of restraining order violations' and 'tolerate[d] the non-enforcement of restraining orders by its police officers.'''[31]

Beginning with the text of both the Fourteenth Amendment's Due Process Clause and section 1983, which creates a federal cause of action for the deprivation of rights ''secured by the Constitution and laws,'' Scalia first distinguishes *DeShaney*: ''We held [there] that the so-called 'substantive' component in the Due Process Clause does not 'requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors.'''[32] With the grammatical overkill of ''so-called'' plus sneer quotes, we cannot miss Scalia's well-known contempt for the idea of ''substantive due process.'' That leaves ''procedural due process.'' But the ''procedural component'' of the clause doesn't protect every ''benefit,'' Scalia says,

[28]489 U.S. 189 (1989).

[29]Town of Castle Rock v. Gonzales, 125 S. Ct. 2796, 2824 n.20 (2005) (Stevens, J., dissenting).

[30]*Id*. at 2800.

[31]*Id*. at 2802.

[32]*Id*. at 2803.

thereby inviting us to look upon Mrs. Gonzales as claiming a mere ''benefit,'' not a right. A property interest entails ''more than an abstract need or desire,'' he continues. It requires ''a legitimate claim of entitlement.'' And that is ''created'' not by the Constitution, he says, but by some ''independent source such as state law.''[33]

B. U.S. Constitution or State Statute?

All right, grant for the moment that this claim must be created by state law, not by the Constitution. But ''a benefit is not a protected entitlement if government officials may grant or deny it in their discretion,''[34] Scalia says, thus planting the theme he will try to develop for pretty much the rest of the opinion. He notes that the court below found no such discretion; thus, it held that Colorado law *did* create an entitlement ''because the 'court-issued restraining order . . . specifically dictated that its terms must be enforced' and a 'state statute command[ed]' enforcement . . . .''[35] Scalia will work that issue of discretion shortly, but first he addresses Mrs. Gonzales' contention that the Court must give deference to the Tenth Circuit's analysis of Colorado law. And in the course of doing so he wrestles with the question of whether Colorado law has given Mrs. Gonzales a property interest ''for purposes of the Fourteenth Amendment.''

As noted above, this case fits more naturally under the Privileges or Immunities Clause. But ''for purposes of'' procedural due process, Scalia asserts that, despite its ''state-law underpinnings,'' that question is ultimately one of federal constitutional law and hence one for the High Court to determine by asking whether the underlying substantive interest created by state law ''rises to the level of'' a legitimate claim of entitlement—again, ''for purposes of'' procedural due process.[36]

Just what ''rises to the level of'' means here, or in any rights context for that matter, is hard to know. However common, the idiom mixes values and rights, degree and kind, uncritically; thus, it sits uncomfortably in discussions about rights. Presumably, we're invited to believe that if an ''interest'' is, perhaps, ''important

[33]*Id*.

[34]*Id*.

[35]*Id*.

[36]*Id*. at 2803–04.

enough,'' it ''rises to the level of'' a right. If so, that bespeaks profound confusion about the theory of rights. Moreover, here it suggests that an interest may be a *right* under state law (if the Tenth Circuit is right), yet not have ''risen'' to that level ''for purposes of'' procedural due process (if Scalia is right). And that would seem to contradict Scalia's earlier claim that entitlements enjoying due process protection are created not by the Constitution but by state law.[37] Or is it rather that Mrs. Gonzales has a *right* under state law, but a mere ''benefit'' under federal law, even though federal law here depends on state law? Is it surprising that the layman has difficulty following these hermeneutics?

But there's more. The deference the Court owes a circuit court interpreting state law in its jurisdiction ''can be overcome,'' Scalia says. The problem here, it seems, is that the court below relied primarily on the ''language from the restraining order, the statutory text, and a state-legislative-hearing transcript''—that from Scalia the textualist—rather than ''a deep well of state-specific expertise.'' And because those texts ''say nothing distinctive to Colorado, but use mandatory language that . . . appears in many state and federal statutes,'' deference to the circuit court's reading is unwarranted, presumably.[38] Stevens too puzzles over what he calls that ''odd'' reasoning, which he says ''makes a mockery of our traditional practice.''[39] Be that as it may, Scalia adds that if the circuit court's analysis were to be accepted, ''we would necessarily have to decide conclusively [the] federal constitutional question''[40]—i.e., the due process question. And that he is unprepared to do.

C. Right or Mere Benefit?

Thus does Scalia begin his own altogether conclusory analysis of whether Colorado law created a right or simply a benefit. Pointing to the notice to law enforcement personnel that was printed on the

[37]*Id*. at 2803. (''Such [due process] entitlements are 'of course . . . not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.''') (citing Paul v. Davis, 424 U.S. 693, 709 (1976) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

[38]*Id*. at 2804.

[39]*Id*. at 2815 n.2 (Stevens, J., dissenting).

[40]*Id*. at 2804.

back of the restraining order, which effectively restates the statutory provision, he quotes from that statutory text, which reads, in relevant part:

> (a) A peace officer shall use every reasonable means to enforce a restraining order.
> (b) 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 officer has information amounting to probable cause [to believe that the order has been violated].
> (c) A peace officer shall enforce a valid restraining order whether or not there is a record of a restraining order in the registry.[41]

Scalia then cites briefly from the legislative history of the statute. As if the ''shall'' above were not enough (for a textualist), that history, cited far more extensively in the Stevens dissent, makes it unmistakably clear that in this area involving domestic violence, Colorado, like a number of other states in recent years, meant precisely to remove virtually all law enforcement discretion, especially given the well-documented evidence that absent such mandatory requirements, police underenforcement tended to be the rule, often with tragic results, which is just what happened here.

Yet Scalia dismisses the text, uncharacteristically, and the legislative history too, which he is ordinarily more inclined to do. He baldly asserts, ''[w]e do not believe that these provisions of Colorado law truly make enforcement of restraining orders *mandatory*,'' claiming that ''[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.''[42] Doubtless to the surprise of many Scalia watchers, text here is trumped by ''tradition,'' as reflected in, of all things, the ''ABA Standards for Criminal Justice'' that he cites.[43] Those standards give three reasons for not interpreting mandatory statutes literally: (1) ''legislative history,'' which goes the other way here; (2) ''insufficient resources''; and (3) ''sheer physical impossibility,'' neither of which was an issue here.

[41]*Id*. at 2805.

[42]*Id*. at 2805–06.

[43]*Id*. at 2806 (citing 1 ABA Standards for Criminal Justice 1–4.5, commentary, 1-124–1-125 (2d ed. 1980) (footnotes omitted)).

Continuing in this vein, Scalia next cites the Court's treatment of the ''shall order'' language at issue in a recent case involving a Chicago crowd dispersal ordinance: ''[I]t is, the Court proclaimed, simply 'common sense that *all* police officers must use some discretion in deciding when and where to enforce city ordinances.'''[44] Scalia could have illustrated at length, of course, this ''tradition'' of police discretion coexisting side-by-side with apparently mandatory text, but none of that would have distracted one bit from the fact that in *this* area, concerning domestic violence, the Colorado legislature meant precisely to *eliminate* police discretion, as the evidence adduced by the dissent makes overwhelmingly clear. Thus, when Scalia says that ''a true mandate of police action would require some stronger language from the Colorado Legislature than 'shall use every reasonable means to enforce a restraining order' (or even 'shall arrest . . . or seek a warrant'),''[45] we have to ask, what more could the legislature have done? Stevens, too, remarks that ''it is hard to imagine what the Court has in mind . . .'' by way of stronger language.[46] Perhaps the four words could have been added that many believe should have been added at the end of the Constitution: ''And we mean it.''

Scalia himself gives no indication of what more the Colorado legislature could have done. Instead, he now starts, in effect, to split hairs. He avers that ''[i]t is hard to imagine that a Colorado peace officer would not have *some* discretion,'' given the ''circumstances of the violation or the competing duties of the officer . . . .''[47] But even if such ''circumstances'' had obtained in this case, and none did, that argument, of course, poses a straw man: the legislature could hardly have expected to eliminate discretion *absolutely*. The impossible standard Scalia implicitly erects would render legislatures impotent, officers immune, and citizens disarmed and vulnerable.

Next, Scalia notes that discretion is needed especially when the whereabouts of the suspected violator are unknown, which again was not the case here once Mrs. Gonzales had located her husband. Scalia continues to work variations of the absent-offender situation,

[44]*Id*. (citing Chicago v. Morales, 527 U.S. 41, 62 n.32 (1999)) (emphasis added).

[45]*Id*.

[46]*Id*. at 2818 (Stevens, J., dissenting).

[47]*Id*. at 2806 (emphasis added).

concluding by noting that the statute at issue requires, when arrest is impractical, that the officer seek a warrant rather than an arrest. But of course the Castle Rock police did not do that either.

At this point Scalia complains that Mrs. Gonzales did not specify ''the precise means of enforcement that the Colorado restraining-order statute assertedly mandated,'' adding that ''[s]uch indeterminacy is not the hallmark of a duty that is mandatory.''[48] But neither, of course, did the statute permit the Castle Rock police to do nothing, which is what they did. Stevens gives the complaint short shrift, analogizing the statutory duty of the police and the correlative right of the citizen to any other entitlement that might be satisfied in various ways.[49] Scalia's argument here is simply too precious to be credible.

Yet he presses the point. In answer to the dissent's contention that the entitlement in question is ultimately quite precise—''either make an arrest or (if that is impractical) seek an arrest warrant''—Scalia claims that ''the seeking of an arrest warrant would be an entitlement to nothing but procedure,'' which could hardly be ''the basis for a property interest'' since it remains in the discretion of a judge to grant it and of the police to execute it.[50] Note first that ''the making of an arrest'' is every bit as ''procedural'' as ''the seeking of an arrest warrant.'' Both are processes executed in service of underlying substantive rights. Second, notice that Scalia seems unable to conceive of a procedural right as being a substantive right, derived from an underlying substantive right, as discussed earlier. For him, perhaps (it is unclear here), a right is either substantive, and hence an entitlement, or procedural, and hence not an entitlement. Finally, while it is true that there is an element of discretion involved in a judge's granting a warrant and in the police executing it—just as there is in the police making an arrest when it is practical to do so—the statutory context here reduces that discretion nearly to a nullity. Once again, then, we're back to the statutory text and legislative history, which Scalia is trying desperately to ''what if'' away. It is passing strange, at least, to find Scalia, for whom judicial restraint is all but a commandment, looking for light that would enable a

[48]*Id*. at 2807.

[49]*Id*. at 2820 (Stevens, J., dissenting).

[50]*Id*. at 2808.

judge ruling on a warrant request to ignore the plain text before him and substitute his own judgment.

In a final effort to show that Colorado has not created an entitlement, Scalia mounts an argument that soon brings us back to first principles. He asks us to suppose that enforcement of the restraining order were in fact mandatory rather than discretionary: it would still not follow, he claims, that the *beneficiary* of the order had an entitlement to its enforcement. Making officials' duties mandatory can serve various ends, he says. In fact, it's the ''normal course'' of the criminal law to serve public ''rather than'' private ends, because criminal acts strike at ''the very being of society.'' Mrs. Gonzales' alleged interest stems ''only'' from the statutory scheme, he continues. Although the statute speaks of ''protected persons,'' it does so respecting only ministerial matters, not enforcement. Most important, Scalia concludes, the statute speaks of the protected person's power to *initiate* civil proceedings; but on the criminal side, it speaks only of her power to *request* the prosecuting attorney to initiate proceedings. And it is silent about any power to request, much less demand, that an arrest be made.[51]

In that argument, Scalia works, for all it is worth, the modern split between civil and criminal law. To oversimplify considerably, and set aside overlaps, civil law deals with wrongs between private individuals, redressed by private suits; criminal law deals with wrongs against the public, redressed by prosecutions by the state. Centuries ago there was no such split: a wrong against an individual, whether accidental or intentional, was redressed through private suits. But among other reasons, as the king's peace grew in importance as a ''public interest,'' he took on responsibility for redressing those ''spill-over'' wrongs against the public, and two distinct proceedings evolved—civil for private matters, criminal for public matters.

Nevertheless, state-of-nature theory is able to account for both, since there are two sets of interests at stake when an ordinary crime occurs—those of the victim and those of the public. When the state emerges from the state of nature, the victim of crime retains his right to be made whole by suing the criminal for restitution, while the state assumes the right to prosecute the criminal to redress the

[51]*Id*. at 2808–09.

separate wrong to the community the crime occasions—a right that belonged to mankind in general in the state of nature but was yielded up to the state once men left the state of nature and created the state.[52]

Clearly, then, the right of the state to prosecute and punish is parasitic upon and grows out of the right of the victim to seek restitution and, if the wrong is intentional, punish. The state's right, that is, was not created from whole cloth; rather, the state got that right by delegation from the people who first had it, then yielded it up to the state to exercise on their behalf. Thus, when Scalia says the ''normal course'' of the criminal law is to serve public *rather than* private ends, he overstates the matter substantially. The criminal law serves both ends. For victims of crime have an interest in restitution from the criminal; but they also have an interest in seeing the criminal punished as well as incapacitated by incarceration or restraint, as the case may be, even if those are public interests too.

Indeed, the interest of the victim, as distinct from that of the public, looms especially large here; for the statute making it a crime to violate a restraining order is meant almost entirely to protect a particular individual, not the public in general. Since the private end served by this criminal law dwarfs the public end, Scalia could not be more wrong on this point. Likewise, Mrs. Gonzales' ''alleged interest'' does not stem ''only'' from the statutory scheme. It stems from her natural right against ''molestation'' and her natural right to secure that right, which she yielded up to the state to exercise on her behalf, as reflected in and given effect by Colorado's statutory scheme. That the statute speaks of ''protected persons'' only in the context of ministerial matters is utterly irrelevant: the very fact that it speaks of ''protected persons'' implies that there are persons with rights to be protected. Finally, that a protected person may *initiate* civil proceedings but only *request* the initiation of criminal proceedings speaks simply to the division of labor we instituted through constitutions when we left the state of nature.[53] Before leaving the

[52]For a fuller discussion, see Pilon, Criminal Remedies, *supra* note 1; Barnett, Restitution, *supra* note 1.

[53]Stevens drives that point home when he notes: ''Indeed, for a holder of a restraining order who has read the order's emphatic language, it would likely come as quite a shock to learn that she has no right to demand enforcement in the event of a violation. To suggest that a protected person has no such right would posit a lacuna between a protected person's rights and an officer's duties—a result that would be hard to reconcile with the Colorado Legislature's dual goals of putting an end to police

state of nature Mrs. Gonzales could initiate criminal proceedings herself; she now buys that service, paying for it through taxation, from the state, which is duty-bound to provide it as of right, (social) contractual right—at least here, where her representatives have made that duty so crystal clear.

D. For Due Process Purposes?

Having disposed, he believes, of the argument that Mrs. Gonzales was entitled under state law to have the restraining order enforced, Scalia returns finally and briefly to the question of whether, *assuming otherwise*, her right to enforcement could constitute a property interest for purposes of the Due Process Clause. One would think that question settled in the affirmative by earlier remarks in the opinion.[54] After all, why else would Scalia have directed most of his energies toward showing that Colorado had *not* created an entitlement?

Nevertheless, at this juncture he argues, for due process purposes, that a right to have a restraining order enforced, unlike traditional conceptions of property, ''does not 'have some ascertainable monetary value,' as even [the Court's] '*Roth*-type property-as-entitlement' cases have implicitly required.''[55] Stevens responds that Mrs. Gonzales could certainly have hired a private security firm, which would have monetized the value of the protection.[56] Scalia replies that the analogy is not precise because a private party would not have the power to arrest if the crime had not occurred in his presence.[57] Stevens answers that the abduction was ongoing (thus removing that restraint), so a private arrest would have been legal.[58] To such lengths does Scalia go to try to disprove what should be clear to all—that there is very little that cannot be monetized.

Scalia then raises a second argument to show that, for due process purposes, Mrs. Gonzales' entitlement does not constitute a property interest: ''the alleged property interest here arises *incidentally*,'' he

indifference and empowering potential victims of domestic abuse.'' Castle Rock, 125 S. Ct. at 2821 n.16 (Stevens, J., dissenting).

[54]See note 37, *supra*.

[55]Castle Rock, 125 S. Ct. at 2809 (discussing Board of Regents v. Roth, 408 U.S. 577 (1972)).

[56]*Id*. at 2823 n.19 (Stevens, J., dissenting).

[57]*Id*. at 2809 n.12.

[58]*Id*. at 2823 n.19 (Stevens, J., dissenting).

says, ''not out of some new species of government benefit or service'' but as a function of what governments have always done—arrest suspected criminals. Were *direct* benefits withheld, due process protections would be triggered, he continues. But here the benefits are *indirect*. Quoting the 1980 case of *O'Bannon v. Town Court Nursing Center*,[59] Scalia says, '''[t]he simple distinction between government action that directly affects a citizen's legal rights . . . and action that is directed against a third party and affects the citizen only indirectly or incidentally, provides a sufficient answer to' [Mrs. Gonzales'] reliance on cases that found government-provided services to be entitlements.''[60]

No, it is not a sufficient answer. Scalia asks us here to think of the government's action as being ''directed against a third party,'' i.e., Mr. Gonzales, with Mrs. Gonzales, the beneficiary, affected only ''indirectly'' or ''incidentally.'' Doubtless, Mrs. Gonzales would be surprised to learn that the failure of the police to enforce the restraining order affected her only indirectly or incidentally. Scalia would be right if we were talking about the ''incidental'' benefits we all lose when the police fail to enforce, say, traffic laws, but that is hardly the situation here. Stevens notes, moreover, that Scalia's reliance on *O'Bannon* is mistaken since the Court there concluded that the regulations at issue had *not* created an entitlement, whereas here Scalia is assuming the opposite ''for due process purposes.''[61] More directly, however, it simply strains credulity to think of Mrs. Gonzales as a mere incidental beneficiary of this statute. Here again, it is the precise character of the statutory scheme the state created that Scalia is unwilling to acknowledge.

V. Conclusion

Unable to recognize the property right Mrs. Gonzales had under the Due Process Clause, as made clear by Colorado's statute and particularized by the restraining order she obtained, much less the privilege she enjoyed under the Privileges or Immunities Clause, Scalia concludes, quite naturally, that it is unnecessary for the Court to determine whether ''the town's custom or policy prevented the

[59]447 U.S. 773 (1980).

[60]Castle Rock, 125 S. Ct. at 2809–10.

[61]*Id*. at 2823 n.18 (Stevens, J., dissenting).

police from giving her due process when they deprived her of that alleged interest.''[62] Thus, the Court reversed the decision of the court below.

Summarizing the state of the law that results, and invoking the analogy above, Scalia observes that *Castle Rock* and, before that, *DeShaney* stand for the proposition that ''the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations.''[63]

True, that is an accurate statement of the law as the Court has now decided it. And as the Court *should* have decided such cases, being faithful to the Constitution, Scalia's statement may also be ''generally'' true; but the facts of a given case can and often should lead a court to override that presumption. In this case, however, where the legislature has clearly overridden the presumption by recognizing a right arising under a particular set of circumstances, any indeterminacy there might otherwise have been has been removed. To be sure, the state might have gone even further: it might have provided victims with ''personally enforceable remedies,'' as Scalia next suggests,[64] thus making Mrs. Gonzales' right even more explicit. But its failure to take that further step does not mean that Mrs. Gonzales, unlike an ordinary crime victim unprotected by something like the Colorado statutory scheme, does not have a remedy under the Fourteenth Amendment.

Waxing more broadly, Scalia says this decision reflects the Court's ''continuing reluctance to treat the Fourteenth Amendment as 'a font of tort law.'''[65] But this case sounds in contract, not in tort. Mrs. Gonzales isn't a ''stranger'' to the police. She's in a special relationship with them, created by the legislature and particularized by the judge who signed the restraining order.

The tragedy of the Court's Fourteenth Amendment jurisprudence over the years, starting with the *Slaughterhouse Cases*, is its failure to recognize that the Amendment, for the second time in the nation's history, created ''a more perfect union.'' Not that it ended federalism,

[62]*Id.* at 2810.

[63]*Id.*

[64]*Id.*

[65]*Id.*

by any means, but it did erect far-reaching limits on what states could do—saying here, for example, that especially if states clarify rights under the Amendment and put in place a set of particularized protections for their citizens, they cannot then walk away from enforcing those protections with impunity. The indifference of the Castle Rock police to their responsibilities under that regime led directly to the death of three little girls. The repeated failures of the Court over so many years to articulate and secure the guarantees against that kind of indifference that were crafted in the aftermath of the Civil War makes it complicit in that tragedy.