

REDEFINING PROPERTY UNDER THE DUE PROCESS CLAUSE: *TOWN OF CASTLE ROCK v. GONZALES* AND THE DEMISE OF THE POSITIVE LAW APPROACH

Abstract: Since *Board of Regents of State Colleges v. Roth*, the U.S. Supreme Court has defined property for due process purposes as a legitimate claim of entitlement rooted in a source of law independent from the Constitution and has recognized a broad variety of property interests. In 2005, however, the Court in *Town of Castle Rock v. Gonzales* reined in its due process property jurisprudence in determining that a court-ordered restraining order did not create property because its language was discretionary. The Court also suggested that no police protection statute, however worded, could ever constitute property because its enforcement lacks ascertainable monetary value and only indirectly benefits the protected person. This Note argues that the Court should refine the definition of property as a benefit rooted in a source of law independent from the Constitution that is conferred on a specific class subject to specific conditions and terminable only under specific conditions.

INTRODUCTION

In 1972, in *Board of Regents of State Colleges v. Roth*, the U.S. Supreme Court defined property for procedural due process purposes as a legitimate claim of entitlement rooted in a source of law independent from the U.S. Constitution.¹ Using this basic framework since

¹ 408 U.S. 564, 577 (1972) (defining property under the Due Process Clause as a "legitimate claim of entitlement" created and "defined by existing rules or understandings that stem from an independent source such as state law"); see U.S. CONST. amend. XIV, § 1; *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2803 (2005) (quoting the definition from *Roth*). The U.S. Constitution mentions property in three contexts: (1) in the Fourteenth Amendment Due Process Clause, which provides that "[No State] shall deprive any person of life, liberty, or property, without due process of law"; (2) in the Fifth Amendment Due Process Clause, which provides that the federal government shall not "deprive any person of life, liberty, or property, without due process of law"; and (3) in the Takings Clause of the Fifth Amendment, which states that private property shall not be taken for public use without just compensation. U.S. CONST. amends. V; XIV. Because the Takings Clause is limited to *private* property, a textual analysis may imply that property under either the Fifth Amendment or Fourteenth Amendment Due Process Clauses encompasses more than common-law notions of property. See Thomas W. Merrill, *The Landscape of Constitutional*

Roth, the Court has recognized a variety of property interests stemming from the common law and state and federal statutes.²

Then, in 2005 in *Town of Castle Rock v. Gonzales*, the Supreme Court revisited the contours of property under the Due Process Clause in determining whether the enforcement of a restraining order seemingly mandated under state law constituted a property interest.³ Ms. Gonzales, whose husband kidnapped and murdered her three children in open defiance of a court-ordered restraining order, claimed that the restraining order's mandatory enforcement terms entitled her to police protection and that the Castle Rock Police Department's policy of tolerating non-enforcement violated her procedural due process rights.⁴ The Court held that enforcement of the restraining order, despite its plain language, was not truly mandatory and, therefore, did not constitute a property interest.⁵ The Court also strongly suggested that no statute could ever entitle a person to police protection for procedural due process purposes because such protec-

Property, 86 VA. L. REV. 885, 955-56 (2000); Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Due Process*, 57 ADMIN. L. REV. 107, 128 (2005). Whether the Supreme Court agrees with this analysis is unclear, but the Court has treated property under both Due Process Clauses much more broadly than under the Takings Clause. See Merrill, *supra*, at 956-57; Stephen J. Massey, Note, *Justice Rehnquist's Theory of Property*, 93 YALE L.J. 541, 542-45 (1984) (noting that, under the Court's jurisprudence, the Takings Clause covers only "common law property," whereas the Due Process Clause encompasses common-law property and statutory entitlements based on the fulfillment of criteria under which the government provides a benefit or the inapplicability of the conditions depriving that benefit).

² See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982) (recognizing a property interest in the adjudication of a claim before a state commission provided by a state statute); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (recognizing a property interest in continued gas and electric service based largely on common-law precedents); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (stating that the continued receipt of Social Security benefits as provided under federal law is a property interest protected by the Fifth Amendment Due Process Clause).

³ See 125 S. Ct. at 2800. Although property interests may be recognized under the Due Process Clause of either the Fifth or Fourteenth Amendment, this Note will refer to the Due Process Clause in the singular for simplicity.

⁴ See *id.* at 2802. The Court accepted these facts as true because the appeal was over a granted motion to dismiss. *Id.* at 2800. Identifying whether a benefit fits the definition of property is only the first step in constitutional due process analysis. See *Roth*, 408 U.S. at 569-70. Once a court identifies a protected property interest, it must then examine whether there has been a deprivation of that interest and whether the procedural safeguards that accompany deprivation of that interest are adequate under the standards of due process. See *id.* See generally RHONDA WASSERMAN, *PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* (2004); Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871 (2000).

⁵ *Castle Rock*, 125 S. Ct. at 2809.

tion lacks ascertainable monetary value and only indirectly benefits the protected person.⁶

The Court's analysis in *Castle Rock* significantly departs from the framework established in *Roth* and its progeny for identifying due process property interests in three key respects: (1) by narrowly reading a seemingly mandatory state statute, (2) by adding a superfluous monetary value requirement that calls into question some of the Court's own precedents, and (3) by extending the test that examines whether a purported entitlement is indirect or incidental well beyond its previous application.⁷

It is possible that the Court's decision in *Castle Rock* is simply an extension of its general refusal to recognize a constitutional right to government protection.⁸ In 1989, in *DeShaney v. Winnebago County Department of Social Services*, the Court held that there was no substantive

⁶ See *id.*

⁷ See *id.* at 2805–06, 2809; *infra* notes 170–235 and accompanying text. Several authors have criticized aspects of *Castle Rock*. See Christopher Roederer, *Another Case in Lochner's Legacy, The Court's Assault on New Property: The Right to the Mandatory Enforcement of a Restraining Order Is a "Sham," "Nullity," and "Cruel Deception,"* 54 DRAKE L. REV. 321, 330–31 (2006) (disagreeing with the Court's statutory and constitutional interpretation, analyzing the viability of a property interest under mandatory arrest statutes in other states, and concluding that the Court's decision is akin to *Lochner*-era jurisprudence because it undermines the state's efforts to protect its citizens); Kathleen K. Curtis, Comment, *The Supreme Court's Attack on Domestic Violence Legislation—Discretion, Entitlement, and Due Process in Town of Castle Rock v. Gonzales*, 32 WM. MITCHELL L. REV. 1181, 1214–15 (2006) (stating that *Castle Rock* is contrary to both prior due process jurisprudence and the legislative intent of states that passed mandatory arrest laws to prevent domestic violence); Robert Michael Kline, Case Comment, *Constitutional Law: Is There a Protected Interest in Protection (or Are Court Orders Merely Suggestions)?*: *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005), 58 FLA. L. REV. 459, 465–469 (2006) (analyzing *Castle Rock* briefly and concluding that the Court should have used prior precedent to recognize a protected property interest); *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 208, 208–09 (2005) [hereinafter *2004 Term—Leading Cases*] (highlighting *Castle Rock's* departure from prior precedent in defining property interests and arguing that the decision ignores the importance of an individual's reliance on an interest, which is central to property in due process).

⁸ See *Castle Rock*, 125 S. Ct. at 2810 (stating that the benefit to a third party of arresting someone for a crime does not trigger either procedural or substantive due process protections); Erwin Chemerinsky, *The End of an Era: October Term 2004*, 8 GREEN BAG 2d 345, 354 (2005) (contending that *Castle Rock* should be understood as rejecting a constitutional duty to provide government protection regardless of whether the claim is framed as substantive or procedural due process); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 592 (2005) (predicting that *Castle Rock* will be treated as emblematic of the broader idea that constitutional rights are negative, not affirmative). For an examination of the debate as to whether the Constitution protects negative or positive liberties, see generally David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

due process right to government protection from third-party harm.⁹ *DeShaney*, however, explicitly left open the question of whether a statute requiring protection for specific persons could give rise to an entitlement, and hence a property interest, for procedural due process purposes.¹⁰ In addition, the Court's jurisprudence has consistently distinguished between substantive due process rights to government benefits and procedural due process property interests in benefits rooted in a statutory entitlement.¹¹ Given that the legislature can make restraining orders, unlike substantive rights, either mandatory or discretionary, recognizing the orders as entitlements would not necessarily conflict with *DeShaney*'s holding that there is no substantive due process right to protection from third-party harm or the view that the Constitution merely provides negative liberties.¹²

Rather, the Court's reluctance to recognize a property interest in *Castle Rock* seems to stem from the difficulty of determining what constitutes property under *Roth*.¹³ The *Roth* Court's definition of property

⁹ 489 U.S. 189, 196-97 (1989). Lower courts have recognized limited exceptions to *DeShaney*'s prohibition of governmental liability for third-party harm where there is a special relationship between the state and the claimant, and where the state creates the danger. See *Gonzales v. City of Castle Rock*, 307 F.3d 1258, 1262 (10th Cir. 2002), *aff'd en banc*, 366 F.3d 1093 (10th Cir. 2004), *rev'd sub nom.* *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005). For a critical response to *DeShaney*, see generally Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of DeShaney*, 1990 DUKE L.J. 1078 (arguing for a normative, constitutional basis for rejecting *DeShaney*'s reasoning). *DeShaney* even had superficially similar facts to *Castle Rock*; a state social worker received complaints that the petitioner was being abused by his father, yet failed to remove the petitioner from his custody. 489 U.S. at 191.

¹⁰ 489 U.S. at 195 n.2; see *Castle Rock*, 125 S. Ct. at 2803 (noting that the *DeShaney* Court had left the procedural due process claim unanswered).

¹¹ See *Goss v. Lopez*, 419 U.S. 565, 572-75 (1975) (declining to acknowledge a constitutional right to public schooling, but recognizing property and liberty interests in public education based on state law). Compare *Dandridge v. Williams*, 397 U.S. 471, 472-73 (1970) (impliedly refusing to recognize a fundamental right to government welfare), with *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970) (recognizing a property interest in welfare benefits and analyzing whether their deprivation comports with due process).

¹² Compare *DeShaney*, 489 U.S. at 195 (stating that the Due Process Clause is phrased as a limitation on the state's power to act rather than as a guarantee of minimum standards of security), with *Castle Rock*, 125 S. Ct. at 2813 (Stevens, J., dissenting) (noting that even though there is no federal constitutional guarantee of police protection under *DeShaney*, there is no constitutional bar to the creation of such an entitlement under state law).

¹³ See *Castle Rock*, 125 S. Ct. at 2805-06, 2809; *Roth*, 408 U.S. at 577 (defining property as a "legitimate claim of entitlement" rooted in an independent source of law). The Court's contradictory statements on the essence of property for due process purposes highlight the problem of defining due process property. Compare *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 667 (1999) (writing that "[t]he hallmark of a constitutionally protected property interest is the right to exclude others"), with *Logan*, 455 U.S. at 430 (writing that "[t]he hallmark of property . . . is an individual

as an entitlement rooted in a source of law other than the Constitution begs the question of what constitutes an entitlement.¹⁴ The Court has identified property interests as the source of entitlements, but has made only halting efforts to delimit their scope.¹⁵ *Castle Rock's* approach to defining property only confuses the issue and questions the continued viability of some of the Court's own precedent.¹⁶

This Note critiques the Court's decision in *Castle Rock* and suggests a clarification of *Roth's* conception of property as an entitlement under the Due Process Clause.¹⁷ This clarification defines an entitlement, and hence property for procedural due process purposes, as a benefit rooted in a source of law other than the Constitution that requires specific conditions for conferral on a discrete class of persons and that cannot be removed except on specific conditions.¹⁸ This definition attempts to clarify *Roth's* framework of property and harmonize the Court's jurisprudence in this area without turning the

entitlement grounded in state law, which cannot be removed except 'for cause'") (quotation omitted).

¹⁴ See *Roth*, 408 U.S. at 577; Merrill, *supra* note 1, at 921 (noting that the Court in *Roth* never defined "entitlement" and that its meaning surprisingly was not an issue in subsequent cases).

¹⁵ See *Logan*, 455 U.S. at 430; *Roth*, 408 U.S. at 577; *infra* notes 58–108 and accompanying text.

¹⁶ See 125 U.S. at 2809; *infra* notes 170–235 and accompanying text.

¹⁷ See *Castle Rock*, 125 S. Ct. at 2809; *Roth*, 408 U.S. at 577; *infra* notes 170–283 and accompanying text. This Note does not address what constitutes property for substantive due process purposes, an issue which the Court has rarely explored. See Merrill, *supra* note 1, at 888; see also Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 591, 609 (1997) (noting the Court's lack of attention to property for substantive due process purposes and arguing that certain interests, such as reputation and bodily integrity, merit recognition as fundamental property interests). Two Supreme Court cases in recent years have touched upon the possibility of substantive due process property, but neither spelled out a comprehensive approach to defining what it would entail. See *Coll. Sav. Bank*, 527 U.S. at 673 (suggesting that there could be fundamental property interests in holding that the interest of a business firm protected by a statutory cause of action for false advertising is not "property" within the meaning of the Due Process Clause); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584–85 (1996) (holding that a two million dollar punitive damage award for failing to disclose that a car had been repainted was grossly excessive in relation to legitimate state interests and therefore in violation of substantive due process).

¹⁸ See *Logan*, 455 U.S. at 430 (stating that the Court has emphasized that "the hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause'"); *Roth*, 408 U.S. at 577 (stating that the benefits that give rise to a legitimate claim of entitlement are protected property interests); Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 443 (1977) (suggesting that the Court's doctrine could define property as "a present legal relationship, interruptible only for cause, plus a practical expectancy of its continuance").

Due Process Clause into a "font of tort law."¹⁹ It also hews closer than the Court's current approach to property's underlying purpose of protecting claims that people rely on in their daily lives and the Due Process Clause's goal to limit arbitrary decision making.²⁰

Part I of this Note reviews the Court's treatment of due process protections for liberty and property as a unitary concept prior to *Roth*, and then describes *Roth*'s approach to defining property for due process purposes as an entitlement stemming from "positive law."²¹ Part II focuses on the Court's post-*Roth* application of the entitlement definition of property and the problems it engenders, as well as the Court's interpretation of statutes in the prisoners' liberty interest area using *Roth*'s definition of liberty.²² Part III discusses the decision in *Castle Rock*, where the Court adopted a modified and more limited view of property under *Roth*'s definition.²³ Part IV critiques the Court's statutory analysis in *Castle Rock*, its adoption of an additional "ascertainable monetary value" test, and its misapplication of an incidental benefit test in identifying due process property interests.²⁴ In place of the Court's monetary value and misapplied direct benefit tests, Part V suggests a refined definition of property for due process purposes: a benefit for a discrete class of persons rooted in an independent source of law that requires specific conditions for its conferral and that cannot be terminated without satisfying specific conditions.²⁵

¹⁹ See *Paul v. Davis*, 424 U.S. 693, 701 (1976) (stating that the Due Process Clause should not be turned into a "font of tort law" to be superimposed upon state tort law systems).

²⁰ See *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (stating that "the Due Process Clause . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government'" (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884))); *Roth*, 408 U.S. at 577.

²¹ See *infra* notes 26-57 and accompanying text. The various sources of law other than the Constitution that can give rise to property interests are often collectively referred to as "positive law" or "nonconstitutional law" and the corresponding approach to identifying property interests as "positivist." See JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 104-06 (1985); Merrill, *supra* note 1, at 920.

²² See *infra* notes 58-108 and accompanying text.

²³ See *infra* notes 109-169 and accompanying text.

²⁴ See *infra* notes 170-235 and accompanying text.

²⁵ See *infra* notes 236-283 and accompanying text.

I. TRADITIONAL AND POSITIVIST MODES OF DEFINING PROPERTY

Since the rise of the administrative state, the Supreme Court has struggled to define property in the due process context.²⁶ The Court first focused on the difference between rights and privileges rather than any distinction between property and liberty.²⁷ Later, the Court focused on the nature of the property or liberty interest at stake.²⁸

A. Defining Property in Traditional Due Process Jurisprudence

Prior to the New Deal, the Court did not devote attention to defining the scope of property or distinguishing it from liberty for due process purposes.²⁹ By the New Deal era, however, administrative agencies increasingly made decisions previously made by courts, leading to challenges to their decision making.³⁰ In an attempt to define the scope of due process protection against government action, the

²⁶ See Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in XVIII NOMOS: DUE PROCESS 126 (J. Roland Pennock & John W. Chapman eds., 1977). See generally MASHAW, *supra* note 21; Merrill, *supra* note 1; Monaghan, *supra* note 18; Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984); Shapiro & Levy, *supra* note 1; Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982); Timothy P. Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861 (1982); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

²⁷ See *infra* notes 29–42 and accompanying text.

²⁸ See *infra* notes 43–57 and accompanying text.

²⁹ Compare *Coppage v. Kansas*, 236 U.S. 1, 14 (1915) (treating freedom of contract as an aspect of property), with *Lochner v. New York*, 198 U.S. 45, 53 (1905) (treating freedom of contract as an aspect of liberty). The Court's inattention to defining constitutional property prior to the New Deal was due in part to the importance of the Contract Clause in protecting economic rights in the nineteenth century and the grounding of freedom of contract in liberty, for substantive due process purposes, during the *Lochner* era. See Monaghan, *supra* note 18, at 434–35 (noting that the Court paid little attention to the definition of property for due process purposes because of the prominence of liberty in protecting economic interests after *Lochner*). See generally Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1 (1986) (tracing nineteenth-century Contract Clause litigation and the property-privilege distinction's effect on that litigation).

³⁰ See Rubin, *supra* note 26, at 1048–49 (examining the implications of the rise of the administrative state for procedural due process doctrine). For example, by the 1920s, congressional legislation fixed transportation industry rates that private contract had previously determined and common law enforced. See *Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 384 (1932) (noting that the Interstate Commerce Act of 1887 altered the common law by allowing an administrative agency to determine the reasonableness of transportation rates rather than the courts).

Supreme Court applied a conceptual distinction between "rights," which were protected by due process, and "privileges," which were not.³¹ The common law was the source of this distinction.³² Because government benefits typically fell outside the common law scope of rights, they were merely privileges, unprotected by due process, that could be curtailed or abolished by the government.³³

The distinction between rights and privileges led to strange results; for instance, selling ice was recognized as a fundamental right not to be deprived without due process, but government employment was not.³⁴ The right-privilege doctrine also seemed ill-equipped to handle arbitrary government decision making that fell outside the scope of the common law, in particular the denial of government benefits to persons suspected of subversive Communist activity in the 1940s and 1950s.³⁵ Commentators lambasted the right-privilege distinction as circular in logic and unfair in practice.³⁶ By the late 1960s, the Court indicated that it would discard the distinction in favor of a

³¹ See generally William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (tracing the exceptions to the right-privilege distinction and arguing for a rejection of the theory). This distinction had been famously set out by Justice Holmes in a Massachusetts case involving a policeman who challenged being fired for political activities: "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

³² See Van Alstyne, *supra* note 31, at 1455.

³³ See Monaghan, *supra* note 18, at 407.

³⁴ Compare *New State Ice Co. v. Liebman*, 285 U.S. 262, 278 (1932) (holding selling of ice to be a right that is encompassed within the liberty interest of engaging in a lawful business and, therefore, cannot be deprived without due process), with *Bailey v. Richardson*, 182 F.2d 46, 57 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951) (per curiam) (determining that due process did not apply to dismissals from federal civil service).

³⁵ See *Barsky v. Bd. of Regents*, 347 U.S. 442, 451 (1954) (upholding suspension of doctor's license after he failed to produce certain papers for the House Committee on Un-American Activities, on the grounds that a license to practice medicine is a privilege). For the Court's application of the right-privilege distinction to the loyalty-security programs, see Rubin, *supra* note 26, at 1053-60.

³⁶ See, e.g., Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 267 (1956) (noting the faulty logic of the right-privilege distinction as applied to business licenses); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964) (arguing that denying due process protection for government benefits based on a "privilege" or "gratuity" concept is a rubber stamp for arbitrary government action); Van Alstyne, *supra* note 31, at 1458-64 (noting the erratic reach of the right-privilege doctrine and urging its demise); Stanley C. Beyer, Note, *Due Process Requires That the Holder of a Cigarette Permit Be Given Notice and a Hearing Prior to Forfeiture of the Permit*, 44 TEX. L. REV. 1360, 1361 (1966) (observing that an activity might be labeled a "right" in one state and a "privilege" in another).

new approach that would allow for greater flexibility in defining the scope of due process protections.³⁷

This new approach appeared in 1970 in *Goldberg v. Kelly*, where the Supreme Court held that welfare benefits deserved due process protection prior to termination.³⁸ Considered the opening salvo in what became known as the "Due Process Revolution," the decision tore down the last vestiges of the right-privilege distinction.³⁹ In its stead, the Court in *Goldberg* stated that due process protections extended to adjudications of important rights or benefits the deprivation of which imposed a "grievous loss."⁴⁰ This approach overlooked the threshold question of whether an interest fit within the Due Process Clause's definition of "liberty" or "property."⁴¹ Predictably, the Court's analysis resulted in a dramatic expansion of the scope of procedural due process.⁴²

B. *Property as Entitlements Rooted in Positive Law*: Board of Regents of State Colleges v. Roth

Just two years after *Goldberg*, however, in 1972 in *Board of Regents of State Colleges v. Roth*, the Court underwent a further, and more lasting, transition in its attempt to define liberty and property.⁴³ The plaintiff,

³⁷ See *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969) (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

³⁸ See 397 U.S. 254, 262 (1970).

³⁹ See *Goldberg*, 397 U.S. at 262 & n.8. See generally Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971) (identifying the "Due Process Revolution").

⁴⁰ 397 U.S. at 262-63 (quoting *Joint Fascist Refugee Comm'n v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)); see also *Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that a driving license "may become essential in the pursuit of a livelihood" and that its suspension "adjudicates important interests of the licensees").

⁴¹ See Monaghan, *supra* note 18, at 407-08 (examining the approach to liberty and property due process in *Goldberg* and other cases). The *Goldberg* Court only addressed this issue obliquely in a footnote: "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'" 397 U.S. at 262 n.8.

⁴² See Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1273 (1975) (noting that there was a greater expansion of procedural due process from 1970 until 1975 than in the entire period since ratification of the Constitution).

⁴³ See Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576-77 (1972). The phrase "Due Process Revolution" is generally applied only to the brief period from 1970 to 1972, comprised of five Supreme Court cases. *Pierce*, *supra* note 26, at 1973 (referring to *Roth*, 408 U.S. 564; *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Bell*, 402 U.S. 535; *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); and *Goldberg*, 397 U.S. 254). Although the prevailing view is that *Goldberg* opened the floodgates for procedural due process claims by unmooring property from its common-law roots and placing it in the inchoate realm of weighing the importance of an interest, the degree to which *Goldberg* actually marked a theoretical

an untenured professor at a state university, was not rehired after his first year of teaching.⁴⁴ Although state law provided for notice and a hearing before termination of tenured professors, university officials had unfettered discretion to fire untenured professors.⁴⁵ Taking advantage of the Court's lenient standard for due process, the plaintiff filed suit, arguing that his procedural due process rights to liberty and property had been violated.⁴⁶

In a decision that would set the standards for defining liberty and property under the Due Process Clause, the Court took the opportunity both to rein in the breadth of *Goldberg's* important rights/grievous loss definition and to legitimize the Court's efforts to expand due process beyond traditional notions prescribed by the right-privilege distinction.⁴⁷ The Court discarded *Goldberg's* one-step inquiry that looked to the importance of the claimant's interest in determining whether due process applied, in favor of an examination of the nature of the property or liberty interest at stake.⁴⁸ *Roth* stated that courts must first ask whether the interest fits the definition of liberty or property before determining whether the procedures governing the interest violate due process.⁴⁹

In defining property under the Due Process Clause, the Court did not rely on a definition rooted in traditional property concepts.⁵⁰ Rather, the Court explicitly recognized that property interests take many forms beyond actual ownership of real estate or goods and, in so

departure from prior procedural due process jurisprudence has been recently questioned. See Shapiro & Levy, *supra* note 1, at 119–20 (arguing that *Roth* was the far more revolutionary decision and that *Goldberg* followed a common-law balancing approach that did occasionally recognize government benefits as subject to due process adjudication).

⁴⁴ *Roth*, 408 U.S. at 566.

⁴⁵ *Id.* at 566–67.

⁴⁶ *See id.* at 568.

⁴⁷ *See id.* at 567, 570–71 (stating that the Court “must look not to the ‘weight’ but to the nature of the interest at stake” to identify property interests, but upholding *Goldberg* because property interests “may take many forms”); *Goldberg*, 397 U.S. at 262–63; *see also* Merrill, *supra* note 1, at 918–19 (contending that the *Roth* Court's strategy was to make *Goldberg's* due process revolution more “law-like”).

⁴⁸ *Roth*, 408 U.S. at 570–71. For further analysis of *Goldberg's* approach to procedural due process, see Shapiro & Levy, *supra* note 1, at 124–25 (noting that the Court's due process jurisprudence, up until and including *Goldberg*, “incorporated elastic concepts such as basic standards of ‘decency and fairness’”).

⁴⁹ 408 U.S. at 571 (stating that “[w]e must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property”).

⁵⁰ *See id.* at 571–72.

doing, upheld *Goldberg* and the "New Property" cases.⁵¹ On the other hand, the Court stated that property interests are not infinite.⁵² To constitute a property interest, a person must have a "legitimate claim of entitlement" to the benefit, as opposed to an abstract desire or unilateral expectation.⁵³ Although the Court did not define "entitlement," the reliance interest was central to the concept because property was designed to protect claims upon which people rely in their daily lives.⁵⁴ The Court expounded on the source of entitlements, however, in a passage that would be quoted often in years to come:

Property interests, of course, are 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—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.⁵⁵

Henceforth, the Court would define property interests under the Due Process Clause as entitlements rooted in positive law.⁵⁶ It was up to subsequent jurisprudence to fill in the details.⁵⁷

⁵¹ *Id.* at 571–72, 576. "New Property" refers to those *Roth*-type property interests in government benefits that extend beyond traditional property interests in real estate, money, and chattels. See Reich, *supra* note 36, at 733.

⁵² *Roth*, 408 U.S. at 572.

⁵³ *Id.* at 577. Even though *Roth* expressly discards the right-privilege distinction, several commentators have noted that the entitlement concept in *Roth* has a whiff of the old right-privilege dichotomy because entitlements can be seen as "rights" and abstract desires as merely "privileges." See Karen H. Flax, *Liberty, Property, and the Burger Court: The Entitlement Doctrine in Transition*, 60 TUL. L. REV. 889, 902–03 (1986); Merrill, *supra* note 1, at 921–22; Rubin, *supra* note 26, at 1067; Smolla, *supra* note 26, at 75–82.

⁵⁴ See *Roth*, 408 U.S. at 577.

⁵⁵ *Id.*

⁵⁶ See *id.* The Court's Takings Clause and substantive due process jurisprudence also use *Roth*'s approach of looking to independent sources of law for identification of property, although neither body of law uses the "entitlement" definition of property employed in procedural due process cases. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 667 (1999) (impliedly looking to state law to identify a property interest for substantive due process purposes); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (looking to an independent source of law as the basis for identification of property under the Takings Clause). See generally Merrill, *supra* note 1 (suggesting a refined definition of property for Takings Clause, procedural due process, and substantive due process purposes).

⁵⁷ See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) (identifying a due process property interest in adjudicating a claim before a state commission); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11 (1978) (recognizing a due process property interest in continued gas and electric service based largely on state common law); *Bishop v. Wood*, 426 U.S. 341, 344–47 (1976) (declining to recognize a due process property in-

II. DEFINING PROPERTY AND LIBERTY AFTER *ROTH*

In defining liberty and property for procedural due process purposes, *Board of Regents of State Colleges v. Roth* left three significant issues unresolved: (1) whether the procedures laid out in the relevant positive law can delimit liberty or property interests, (2) what interpretive method courts should use to determine whether sources of law other than the Constitution give rise to liberty or property interests, and (3) whether courts must recognize due process interests seemingly recognized in state law that are not in accord with other policy goals.⁵⁸

With respect to the first issue, the U.S. Supreme Court later definitively stated that procedures cannot define the scope of a substantive interest because they, too, are subject to constitutional scrutiny.⁵⁹ Concerning the second issue of interpretation, the Court developed a methodology in the prisoners' due process area that has been largely retained for identifying property interests, although later discarded for identifying liberty interests.⁶⁰ The recent decision in

terest because an employment ordinance did not specify conditions under which petitioner could be deprived of the job); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (recognizing a due process property interest in a public school education); *Arnett v. Kennedy*, 416 U.S. 134, 153–54 (1974) (plurality opinion) (stating that a statute conferring on an employee the right not to be discharged except "for cause" created a due process property interest, but no procedural protection beyond that provided in the statute); *Perry v. Sindermann*, 408 U.S. 593, 596 (1972) (holding that a professor's interest in reemployment may constitute a due process property interest, despite a lack of a contractual or tenured position, if the college had a de facto tenure program).

⁵⁸ See *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2809 (2005) (stating that even if Colorado law created an entitlement in enforcement of a restraining order, it is "by no means clear" that entitlement to enforcement would rise to the level of a constitutional property interest for due process purposes); *Meachum v. Fano*, 427 U.S. 215, 223–24 (1976) (applying *Roth's* positive law approach in examining the text of a prison regulation and its lack of mandatory language to determine whether it gives rise to liberty interest); *Arnett v. Kennedy*, 416 U.S. 134, 153–54 (1974) (plurality opinion) (addressing whether procedures can define the scope of a property interest); Merrill, *supra* note 1, at 923 (characterizing the issues posed by *Roth* as reduced to how procedural due process protections can best avoid expanding and contracting with the vagaries of state law).

⁵⁹ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

⁶⁰ See *Castle Rock*, 125 S. Ct. at 2803; *Sandin v. Conner*, 515 U.S. 472, 484–86 (1995) (discarding the approach of parsing state positive law to identify liberty interests in favor of an atypical or significant hardship standard); *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1102 & n.6 (10th Cir. 2002) (en banc), *rev'd sub nom.* *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (analyzing the identification of property interests in state law through the lens of liberty cases in the prison setting).

Town of Castle Rock v. Gonzales, however, demonstrates that the Court is still wrestling with the third issue.⁶¹

A. Positive Law Procedures Limiting Property Interests

The Court first addressed the issue of whether procedures could define the scope of a property interest two years after *Roth* in *Arnett v. Kennedy* in 1974.⁶² Writing for a three-judge plurality, Justice Rehnquist determined that a civil service employee who was fired without an evidentiary hearing had a property interest for due process purposes in employment because the governing civil service statute prohibited dismissal except "for cause."⁶³ Justice Rehnquist added, however, that the procedures established for removing the employee defined the limits of the employee's interest and thus the limits of his constitutional protection, though they did not include a hearing.⁶⁴ In Justice Rehnquist's estimation, the employee could not obtain the benefits of the statute without also being subject to its limitations; the employee "must take the bitter with the sweet."⁶⁵

Although this logic seemed to be an extension of *Roth*'s statement that property interests are created and defined by positive law, its potential breadth alarmed commentators.⁶⁶ Taken to its logical extreme, the "bitter with the sweet" reasoning meant that legislators and regulatory agencies could dictate any procedures for termination of property interests without being subject to constitutional review.⁶⁷ Recognizing this potential conundrum, the Court in 1985 in *Cleveland Board of Education v. Loudermill* definitively rejected this reasoning and held

⁶¹ See *Castle Rock*, 125 S. Ct. at 2809 (implying that an entitlement stemming from state law does not necessarily constitute property for Fourteenth Amendment purposes); *infra* notes 170–235 and accompanying text.

⁶² See *Arnett*, 416 U.S. at 153–54.

⁶³ *Id.* at 154.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See *id.*; *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (stating that property interests are not created by the Constitution); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 893 (1981); Monaghan, *supra* note 18, at 441–42; Rubin, *supra* note 26, at 1070–72; Tribe, *supra* note 26, at 277–78.

⁶⁷ See Rubin, *supra* note 26, at 1091. Professor Mashaw provides the example of a school teacher fired without a hearing whose interest in employment relies exclusively on the School Board's rules under the *Arnett* plurality's reasoning. See Mashaw, *supra* note 66, at 893.

that procedural rules are irrelevant for purposes of determining the scope of a property interest.⁶⁸

B. *Mandatory Statutes and Prisoners' Rights—
Identifying Interests in Positive Law*

The Supreme Court has been more concerned with defining the source of property interests for due process purposes than with statutory interpretation.⁶⁹ In the prisoners' liberty interest area, however, the Court has further revealed how it identifies a procedural due process interest in sources of law other than the Constitution.⁷⁰ Initially, the *Roth* Court seemed poised to define liberty for procedural due process purposes as it defined liberty in its substantive sense—as those long-recognized privileges essential to the orderly pursuit of happiness.⁷¹

In a case handed down the same day as *Roth*, however, the Court moved towards adopting an approach that would look to state positive law rather than lofty common-law goals to define liberty for procedural due process purposes.⁷² In *Morrissey v. Brewer* in 1972, the Court extended the positive law approach of identifying property interests protected by due process to the concept of liberty, by holding that a prisoner's conditional freedom based on a state-authorized parole program could not be revoked without a hearing.⁷³ This marked the first time that a liberty interest arose from an expectation grounded in statutory law, rather than constitutional or common law.⁷⁴ Two years later in 1974, in *Wolff v. McDonnell*, the Court expressly adopted

⁶⁸ 470 U.S. at 541 (writing that "it is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee" (quoting *Arnett*, 416 U.S. at 167)).

⁶⁹ See *Loudermill*, 470 U.S. at 541 (discarding the bitter-with-the-sweet approach to defining substance and procedure).

⁷⁰ See generally Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984); Donna H. Lee, *The Law of Typicality: Examining the Procedural Due Process Implications of Sandin v. Conner*, 72 FORDHAM L. REV. 785 (2004); Philip B. Sbaratta, Note, *Sandin v. Conner: The Supreme Court's Narrowing of Prisoners' Due Process and the Missed Opportunity to Discover True Liberty*, 81 CORNELL L. REV. 744 (1996).

⁷¹ See *Roth*, 408 U.S. at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

⁷² See *Morrissey v. Brewer*, 408 U.S. 471, 481–82 (1972).

⁷³ *Id.* at 482.

⁷⁴ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-9, at 686 (2d ed. 1988). The positivist approach to identifying liberty rights in nonconstitutional law has been generally limited to prisoners' rights cases because most other infringements of liberty occur in the arrest context and are allowable if there is a lawful conviction. See Herman, *supra* note 70, at 503.

the positivist approach for identifying liberty interests by concluding that credits for prisoners for good behavior guaranteed under a state statute could not be revoked without due process.⁷⁵ Although the Court noted that the Constitution does not guarantee so-called "good-time" credits, the liberty interest protected by the Fourteenth Amendment was expansive enough "to insure that the state-created right is not arbitrarily abrogated."⁷⁶

In an attempt to curb the potential breadth of liberty interests identified under state law, in 1976, in *Meachum v. Fano*, the Court took a more restrictive approach to identifying liberty interests in upholding a prisoner transfer to a substantially less favorable prison without a hearing.⁷⁷ The Court reasoned that the state regulations regarding prison transfers gave prison officials complete discretion whether to transfer prisoners; therefore, the prisoners had no state law entitlement and, in turn, no procedural due process liberty interest.⁷⁸ In distinguishing this case from *Wolff*, the Court focused on whether the statute was mandatory or discretionary, not on whether the prisoner's interest was seriously affected.⁷⁹

This method of identifying an interest in state law was clarified in 1989 in *Kentucky Department of Corrections v. Thompson*, where the Court found that state prison inmate visitation regulations did not give rise to a protected liberty interest in receiving certain visitors.⁸⁰ The Court reasoned that the regulations did not contain explicitly mandatory language stating that if a condition has been met, a particular outcome must follow, a requirement for any due process liberty interest.⁸¹

Nonetheless, the flood of prisoner litigation into federal courts continued unabated.⁸² According to the Court itself, its prior decisions spurred prisoners and their lawyers to search for mandatory language in prison regulations, rather than to frame their cases in

⁷⁵ 418 U.S. 539, 554–55 (1974).

⁷⁶ *Id.* at 557.

⁷⁷ See 427 U.S. at 223–24.

⁷⁸ *Id.* at 226–29.

⁷⁹ See *id.* at 226; Rubin, *supra* note 26, at 1076.

⁸⁰ See 490 U.S. 454, 463 (1989).

⁸¹ *Id.* The Court in *Castle Rock* also recognized that the statutory language must be mandatory to create property interests. 125 S. Ct. at 2803 (stating that "[o]ur cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion") (citing *Ky. Dep't of Corr.*, 490 U.S. at 462–63 (1989)).

⁸² BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS, 1980–2000, at 1 (2002), available at <http://www.ojp.usdoj.gov/bjs/abstract/ppfud00.htm> [hereinafter BUREAU OF JUSTICE STATISTICS SPECIAL REPORT].

terms of fundamental notions of liberty.⁸³ In 1995, the Court responded in *Sandin v. Conner* by discarding the positive law approach of identifying liberty interests in favor of a "grievous loss" approach that would examine whether the alleged deprivation of liberty represents an "atypical and significant hardship" in relation to ordinary prison life.⁸⁴ The Court held that an inmate who, after a hearing, had been put in disciplinary segregation, during which he was not allowed to call witnesses, did not have a cognizable liberty interest.⁸⁵ Instead of concluding that the state regulations failed to satisfy the mandatory language requirement, the Supreme Court criticized prior cases for mechanically applying a rigid mandatory-discretionary dichotomy and for neglecting the "nature" of the interest created by state law.⁸⁶ The Court noted that, although drawing negative inferences from the mandatory language of prison legislation may be useful for most statutes defining rights for the general public, it makes little sense in examining prison administration regulations.⁸⁷ Because such inference-drawing involved federal courts in day-to-day prison management, the Court felt compelled to abandon the parsing of statutory language in favor of its grievous loss/atypical hardship test.⁸⁸

Sandin appears to have reduced the amount of prisoner litigation in federal courts.⁸⁹ The "atypical and significant hardship" approach of identifying liberty interests for prisoners, however, trades a reduction in prisoner claims for a lack of uniformity, as lower courts have struggled to adopt a coherent strategy to define this new standard.⁹⁰ In addition, applying *Sandin's* reasoning beyond the realm of prison regulation to property interests for due process purposes is suspect,

⁸³ See *Sandin*, 515 U.S. at 481.

⁸⁴ See *id.* at 484.

⁸⁵ *Id.*

⁸⁶ See *id.* at 479–80.

⁸⁷ *Id.* at 481–82.

⁸⁸ *Sandin*, 515 U.S. at 482.

⁸⁹ See BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, *supra* note 82, at 1.

⁹⁰ Compare *Torres v. Fauver*, 292 F.3d 141, 151–52 (3d Cir. 2002) (holding that the punishment of a prisoner found guilty on escape charges solely based on his statement that he would escape if not granted housing placement violates the atypical hardship standard), with *Burnsworth v. Gunderson*, 179 F.3d 771, 774–75 (9th Cir. 1999) (holding that the punishment of a prisoner found guilty on escape charges solely based on his statement that he would escape if not granted housing placement does not violate the atypical hardship standard). See generally Lee, *supra* note 70 (tracing the uneven application of *Sandin's* standard); Michael Z. Goldman, Note, *Sandin v. Conner and Intraprison Confinement: Ten Years of Confusion and Harm in Prisoner Litigation*, 45 B.C. L. REV. 423 (2004) (arguing that the atypical hardship standard has led to harsh results and has led lower courts to ignore confinement that is not representative of the prison experience).

both because of the unique concerns in prison regulation and because rampant litigation is not necessarily a problem with respect to property after *Roth*.⁹¹ Nevertheless, in *Castle Rock*, the Court cited *Sandin* for part of its analysis and seems to be moving away from *Roth*'s positive law approach to identifying property interests.⁹²

*C. Recognizing Due Process Interests from State Law Not in Accord
with Other Policy Goals*

Although the Court has decided two of the open issues from *Roth*, it has left unclear whether it is obliged to follow the dictates of state law when it seems to recognize too much or too little property.⁹³ Read strictly, *Roth* did not seem to leave room for an independent constitutional review when it stated that "[p]roperty interests, of course, are not created by the Constitution."⁹⁴ In 1978, however, in *Memphis Light, Gas & Water Division v. Craft*, the Court suggested otherwise by holding that a utility company procedure of cutting off services for nonpayment in the midst of a payment dispute did not comport with due process.⁹⁵ The Court found that a requirement rooted in state common law and federal constitutional law barring a public utility from termination of service except for good cause created a property interest in continued utility service.⁹⁶ The Court stated that, although sources of law other than the Constitution create the substantive law, "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement.'"⁹⁷

⁹¹ Merrill, *supra* note 1, at 966 (stating that "there is no sign of increasing numbers of cases raising new property claims"). See generally Herman, *supra* note 70 (noting that liberty is distinct from property and should not be defined by looking to positive law because the state does not create liberty).

⁹² See *Castle Rock*, 125 S. Ct. at 2808.

⁹³ See Merrill, *supra* note 1, at 933 (stating that the Court has wrestled with how to avoid capturing too much or too little property for due process purposes). Professor Mashaw described this dilemma as a "positivist trap"—once the Court seeks to define constitutional interests in positive law, it must address whether those rules suffice in and of themselves or must comport with other constitutional values. See Mashaw, *supra* note 66, at 888.

⁹⁴ See *Roth*, 408 U.S. at 577.

⁹⁵ See 436 U.S. 1, 10 (1978).

⁹⁶ *Id.*

⁹⁷ *Id.* at 9 (quoting *Roth*, 408 U.S. at 577, and *Perry v. Sindermann*, 408 U.S. 593, 602 (1972)). Professor Merrill has argued that this two-tiered constitutional review represents a departure from prior procedural due process jurisprudence. See Merrill, *supra* note 1, at 927.

Thus, at first glance *Memphis Light* appeared to establish a two-tiered review for recognizing property interests under the Due Process Clause; on one level, there is a state law examination, and on the other, a federal constitutional one.⁹⁸ The Court's constitutional review, however, resulted in the unexceptional determination that state common law precedent did not permit public utilities to terminate service if the customer was withholding payment because of a bona fide payment dispute, even though the utility company's procedures required payment regardless.⁹⁹ Thus, the constitutional review in *Memphis Light* was almost entirely grounded in an examination of a source of law independent from the Constitution—in this case, Tennessee common law precedents that clearly contradicted utility company regulations.¹⁰⁰ More importantly, the Court did not erect a bar for constitutional recognition of a property interest, but rather ensured that constitutional norms would apply to a public utility procedure that would not otherwise recognize a property interest in continued utility service.¹⁰¹ In this way, the Court's constitutional analysis stood for the proposition that the source of law at issue—in this case, discretionary utility company regulations—did not determine the limits of a property interest for due process purposes if they were in conflict with other state law or the Constitution.¹⁰²

In 1982, in *Logan v. Zimmerman Brush Co.*, the Court reaffirmed *Memphis Light*'s limited constitutional review for recognizing property interests by holding that an employee's right to adjudication procedures was a type of property protected by due process.¹⁰³ The Court held that the hallmark of constitutional property is an entitlement grounded in state law that cannot be removed except "for cause."¹⁰⁴ Beyond the general requirement that for a state law benefit to create a property interest it must have specific conditions governing its termination, *Memphis Light* and *Logan* do not indicate that the Court

⁹⁸ See Merrill, *supra* note 1, at 926–27; Rubin, *supra* note 26, at 1079 n.193, 1091.

⁹⁹ See *Memphis Light*, 436 U.S. at 10–11.

¹⁰⁰ See *id.* The Court's only citations to decisions outside of Tennessee were to Supreme Court decisions buttressing the Court's conclusion. See *id.*

¹⁰¹ See *id.* at 11.

¹⁰² See *id.* Additionally, because *Memphis Light* was decided before the Court had definitively settled the previously discussed "bitter with the sweet" controversy from *Arnett*, the case could also point towards a retreat from the proposition that procedures can dictate whether a property entitlement exists. See *Loudermill*, 470 U.S. at 541 (writing that "it is settled that the 'bitter with the sweet' approach misconstrues the constitutional guarantee").

¹⁰³ 455 U.S. 422, 430 (1982).

¹⁰⁴ *Id.*

should turn to additional independent criteria in defining property under the Due Process Clause.¹⁰⁵ No clear criteria to which the Court could turn existed because, prior to *Roth*, due process protections were defined by either the discredited right-privilege distinction or *Goldberg's* important interest approach.¹⁰⁶ Perhaps for this reason, the language of *Memphis Light* was not used in subsequent cases until *Castle Rock*, and was interpreted narrowly by some scholars.¹⁰⁷ As explained below, however, the *Castle Rock* dicta appears to utilize this language in crafting additional criteria for state entitlements to rise to the level of constitutional property interests and, in the process, undercuts *Roth's* clearly stated positivist approach.¹⁰⁸

III. CASTLE ROCK V. GONZALES: REDEFINING DUE PROCESS PROPERTY

The Supreme Court's 2005 decision in *Town of Castle Rock v. Gonzales* stands as a significant milestone in procedural due process jurisprudence.¹⁰⁹ The facts of the case are "undeniably tragic."¹¹⁰ According to Jessica Gonzales's complaint, she obtained a restraining order on May 21, 1999 against her husband in connection with divorce proceedings.¹¹¹ The order commanded Mr. Gonzales not to disturb or molest his three children and to remain at least 100 yards from the family home at all times, except during certain pre-arranged visitations.¹¹² The restraining order also contained a preprinted notice to law enforcement officials: "You *shall* use every reasonable means to

¹⁰⁵ See *id.*; *Memphis Light*, 436 U.S. at 10–11.

¹⁰⁶ See *supra* notes 26–42 and accompanying text.

¹⁰⁷ See MASHAW, *supra* note 21, at 108 (failing to mention this two-tiered approach to identification of property interests in discussing *Memphis Light*). But see Rubin, *supra* note 26, at 1079 n.193 (stating that *Memphis Light* represents the Court's current approach to identifying property interests). The one exception to *Memphis Light's* lack of citation, prior to *Castle Rock*, was *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 788 (1980). Professor Merrill argues that *Memphis Light* was not cited because it involved a well-settled question of law and did not directly implicate the "bitter-with-the-sweet" debate which attracted most scholars' attention in this area. See Merrill, *supra* note 1, at 926–29.

¹⁰⁸ See *infra* notes 198–235 and accompanying text.

¹⁰⁹ See Roederer, *supra* note 7, at 360–63 (contending that *Castle Rock* is on par with *Lochner* in its efforts to undermine state attempts to alter the common-law distribution of wealth and entitlements); 2004 Term—Leading Cases, *supra* note 7, at 208. See generally *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005).

¹¹⁰ 125 S. Ct. at 2803 (quoting *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 191 (1989)).

¹¹¹ *Id.* at 2800. Because the district court dismissed Ms. Gonzales's complaint for failure to state a claim for which relief could be granted, the Supreme Court assumed the facts as presented in her complaint were true. *Id.*

¹¹² *Id.* at 2800–01.

enforce the 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."¹¹³ This language mirrored that in the Colorado statute that created restraining orders.¹¹⁴

On June 22, 1999, a day for which he had made no visitation arrangements, Mr. Gonzales abducted his three daughters while they were playing outside the family home.¹¹⁵ When Ms. Gonzales noticed that the children were missing, she suspected that her husband had taken them, and so she called the police department around 7:30 p.m.¹¹⁶ Over the next several hours, Ms. Gonzales repeatedly contacted the police station both in person and over the phone to request enforcement of the restraining order.¹¹⁷ At one point, Ms. Gonzales talked to her husband on his cellular telephone; when he said that he was at an amusement park in Denver with the three children, she asked the police to check on him or put out an all-points bulletin for him.¹¹⁸ At every request, the police rebuffed Ms. Gonzales and asked her to call again later.¹¹⁹ Around 3:20 a.m., Mr. Gonzales arrived at the police station and opened fire with a handgun he had purchased that night.¹²⁰ Police shot back and killed him.¹²¹ Inside his truck, they found the bodies of all three of his daughters, whom he had murdered earlier that day.¹²²

Ms. Gonzales brought an action under 42 U.S.C. § 1983 against three police officers and the town of Castle Rock, alleging they had violated her due process rights under the Fourteenth Amendment.¹²³ All of the defendants filed a motion to dismiss for failure to state a

¹¹³ *Id.* at 2801 (emphasis added).

¹¹⁴ *Id.* at 2805. The relevant statute in effect at the time of the conduct reads as follows:

(a) Whenever a restraining order is issued, the protected person shall be provided with a copy of such order. 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

COLO. REV. STAT. § 18-6-803.5(3) (1999).

¹¹⁵ *Castle Rock*, 125 S. Ct. at 2801.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 2801-02.

¹¹⁹ *Id.*

¹²⁰ *Castle Rock*, 125 S. Ct. at 2802.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

claim for which relief could be granted.¹²⁴ The district court granted their motions, concluding that Ms. Gonzales had neither a substantive nor a procedural due process right to enforcement of the restraining order.¹²⁵ On appeal, a three-judge panel for the U.S. Court of Appeals for the Tenth Circuit affirmed the rejection of the substantive due process claim.¹²⁶ The Tenth Circuit cited *DeShaney v. Winnebago County Department of Social Services*, a 1989 U.S. Supreme Court case holding that the state had no constitutional duty to protect an individual from third-party harm under substantive due process.¹²⁷ *DeShaney*, however, had explicitly left open the question whether a statute requiring protection could give rise to an entitlement to protection, and hence a property interest, for procedural due process purposes.¹²⁸ The three-judge panel held that the Colorado restraining order's mandatory enforcement terms and limitation to specific protected persons created a procedural due process property interest under the Fourteenth Amendment.¹²⁹

Upon further review, a divided Tenth Circuit en banc panel affirmed.¹³⁰ The majority opinion stated that the legislative history and unequivocally mandatory terms of the statute creating the restraining order, coupled with the mandatory enforcement terms on the court-issued restraining order itself, created a property interest in its enforcement.¹³¹ The court made clear that the mandatory language of a law enforcement statutory provision standing alone could

¹²⁴ *Id.*

¹²⁵ *Castle Rock*, 125 S. Ct. at 2802. The U.S. Court of Appeals for the Tenth Circuit granted the three officers qualified immunity which Ms. Gonzales did not challenge. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1118 (10th Cir. 2004) (en banc), *rev'd sub nom. Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005).

¹²⁶ *Gonzales v. City of Castle Rock*, 307 F.3d 1258, 1264 (10th Cir. 2002), *aff'd en banc*, 366 F.3d 1093 (10th Cir. 2004), *rev'd sub nom. Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005). There are two exceptions recognized by some lower courts to the bar imposed by *DeShaney* on substantive due process claims against the state for failing to protect against third-party violence. *Id.* at 1262. The first is where there is a special relationship between the state and the victim, such as in a foster home. *Id.* The second is where police action or inaction either creates or significantly increases the danger to the individual. *Id.* at 1262–63. The panel held that neither of these exceptions applied in Ms. Gonzales's case. *Id.* at 1263.

¹²⁷ See *DeShaney*, 489 U.S. at 195; *Castle Rock*, 307 F.3d at 1262.

¹²⁸ 489 U.S. at 195 n.2.

¹²⁹ *Castle Rock*, 307 F.3d at 1263, 1266.

¹³⁰ *Castle Rock*, 366 F.3d at 1106–08.

¹³¹ *Id.*

not give rise to a constitutionally protected property interest.¹³² The court concluded that, because the town of Castle Rock had provided inadequate safeguards for enforcing restraining orders, Ms. Gonzales was entitled to relief.¹³³ There were four dissenting opinions.¹³⁴ Judges Kelly, O'Brien, and Hartz argued that enforcement of the restraining order did not rise to the level of a property interest because, on the whole, enforcement was not truly mandatory.¹³⁵ Judge McConnell contended that Ms. Gonzales's claim was a substantive due process claim masquerading as a procedural due process claim that should, therefore, be rejected under *DeShaney*.¹³⁶

The Supreme Court granted certiorari and reversed.¹³⁷ The Court rejected Ms. Gonzales's claim that enforcement of the restraining order created a property interest under the Due Process Clause.¹³⁸ The Court held that the restraining order was not an entitlement created under state law because it was not truly mandatory, given the long history of police discretion for enforcement of apparently mandatory statutes.¹³⁹ Although the restraining order used the term "shall," the Court wrote, this was hortatory language used in many general protection statutes; a "true mandate of police action would require some stronger indication from the Colorado Legislature."¹⁴⁰

The Court also dismissed the reasoning that the legislative history of the restraining order statutes, which suggested that the drafters' intent was to make enforcement truly mandatory, required a contrary holding because a mandatory arrest could only be made if the offender were present.¹⁴¹ Furthermore, the Court stated that, even if the restraining order made enforcement mandatory for the police, it did not necessarily mean that Ms. Gonzales herself had an entitlement

¹³² *Id.* at 1108–09; see *Jennings v. City of Stillwater*, 383 F.3d 1199, 1206–07 (10th Cir. 2004) (holding that a rape victim's allegation that a police officer's failure to comply with a state statute requiring officers not to discourage prosecution of a sexual assault claim did not constitute a property interest because the mandatory statute was not coupled with a mandatory court order).

¹³³ *Castle Rock*, 366 F.3d at 1117.

¹³⁴ See *id.* at 1118 (Kelly, J., dissenting); *id.* at 1126 (McConnell, J., dissenting); *id.* at 1130 (O'Brien, J., dissenting); *id.* at 1144 (Hartz, J., dissenting).

¹³⁵ *Id.* at 1118 (Kelly, J., dissenting); *id.* at 1130–31 (O'Brien, J., dissenting); *id.* at 1144 (Hartz, J., dissenting).

¹³⁶ *Castle Rock*, 366 F.3d at 1126 (McConnell, J., dissenting).

¹³⁷ *Castle Rock*, 125 S. Ct. at 2802, 2811.

¹³⁸ *Id.* at 2809.

¹³⁹ *Id.* at 2805–06.

¹⁴⁰ *Id.* at 2806.

¹⁴¹ *Id.* at 2807.

for due process purposes to its enforcement.¹⁴² Citing *Sandin v. Conner*, the Court noted that making actions mandatory could serve a variety of ends other than the conferral of a benefit on a specific class of people.¹⁴³ Moreover, because Ms. Gonzales's claim rested on a statutory, and not a common-law or contractual entitlement to enforcement, the Court expected to see a conferral of a benefit on a specific class of persons in the statute itself.¹⁴⁴ Thus, the Court concluded that Ms. Gonzales did not have an entitlement to "something as vague and novel as enforcement of restraining orders."¹⁴⁵

The Court could have ended there, but went on to state that even if the restraining order granted Ms. Gonzales an entitlement under Colorado law, it was "by no means clear" that this could constitute a property interest under the Due Process Clause.¹⁴⁶ The Court's reasoning rested on two points: (1) the restraining order did not have an "ascertainable monetary value," that the Court's "*Roth*-type property-as-entitlement" cases implicitly required; and (2) the alleged property interest arises only "incidentally" out of a government function that government actors have always performed.¹⁴⁷

To support the first of these points the Court cited a law review article that proposed the monetary value test as a means of separating property from liberty interests.¹⁴⁸ For the second point, the Court cited *O'Bannon v. Town Court Nursing Center*, where the Court held that indirect benefits conferred on Medicaid patients did not trigger due process protections.¹⁴⁹ The Court concluded its opinion in *Castle Rock* by stating that protection against third-party violence generally does not trigger either substantive or procedural due process protections—language that seemed designed to foreclose any person's entitlement to enforcement of protective measures against third parties under any state law.¹⁵⁰ The Court left the recovery mechanism for police non-

¹⁴² *Castle Rock*, 125 S. Ct. at 2808.

¹⁴³ *Id.* The *Sandin* Court had found no constitutionally protected liberty interest in prison regulations phrased in mandatory terms because, among other reasons, they are not set forth solely to benefit the prisoner. 515 U.S. 472, 482 (1995).

¹⁴⁴ *Castle Rock*, 125 S. Ct. at 2808.

¹⁴⁵ *Id.* at 2809.

¹⁴⁶ *See id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (citing Merrill, *supra* note 1, at 964).

¹⁴⁹ *Castle Rock*, 125 S. Ct. at 2810 (citing *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 775 (1980)).

¹⁵⁰ *Castle Rock*, 125 S. Ct. at 2810 (writing that "[i]n light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for

enforcement up to the states, stating that "the people of Colorado are free to craft such a system under state law."¹⁵¹

Justice Souter filed a brief concurring opinion which Justice Breyer joined.¹⁵² He wrote separately to stress that Ms. Gonzales's argument should be rejected because she was claiming a property interest in process itself.¹⁵³ Her claim could be reduced to an argument that police officers should follow procedure, but in every case where the Court has recognized a property interest, the underlying property was distinguishable from the procedural obligations sought.¹⁵⁴

Justice Stevens dissented, in an opinion joined by Justice Ginsburg.¹⁵⁵ The dissent began with a repudiation of the majority's language suggesting that the Court would rule out all entitlements under any state law.¹⁵⁶ Justice Stevens posited that, although *DeShaney* meant that Ms. Gonzales was not entitled to police protection as a matter of substantive due process, the Constitution did not bar the recognition of an entitlement grounded in state law.¹⁵⁷ Ms. Gonzales could have entered into a contract with a private security firm, and her interest in such a contract would undoubtedly constitute "property" under the Due Process Clause.¹⁵⁸ Therefore, if Colorado law created the functional equivalent of such a private contract, this state-created right should qualify as property under *Roth*.¹⁵⁹

After admonishing the majority for answering a question of Colorado law on its own rather than certifying it to the Colorado Supreme Court, the dissent turned to the mandatory nature of the state restraining order statute and its legislative history.¹⁶⁰ Justice Stevens contended that the Court ignored the "unique case" of mandatory arrest statutes in the domestic violence context passed during the 1980s and 1990s, which had the clear goal of cabining police discretion.¹⁶¹ Thus,

a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations") (citation omitted).

¹⁵¹ *Id.*

¹⁵² *Id.* at 2811 (Souter, J., concurring).

¹⁵³ *Id.* at 2812.

¹⁵⁴ *Id.*

¹⁵⁵ *Castle Rock*, 125 S. Ct. at 2813 (Stevens, J., dissenting).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Castle Rock*, 125 S. Ct. at 2815-18 (Stevens, J., dissenting).

¹⁶¹ *Id.* at 2816-17. Against this backdrop, the dissent argued that the apparent novelty of this form of property interest is not as troubling as the majority made it out to be. *Id.* at 2823.

although the term "shall" might be best read as meaning "may" in other Colorado police enforcement statutes, the particular history of this restraining order statute implied that it should be read literally to limit police discretion.¹⁶² Justice Stevens finally rebutted the majority's focus on the lack of precise means of enforcement with the point that the police were required either to arrest or to seek a warrant for arrest; "*they lacked the discretion to do nothing.*"¹⁶³

Justice Stevens further responded to the majority's dicta that stated that the restraining order had no ascertainable monetary value and only incidentally benefited Ms. Gonzales.¹⁶⁴ The dissent noted that the Court had never previously required that a property interest possess monetary value.¹⁶⁵ In fact, property interests recognized by the Court as requiring due process protections had taken a variety of forms, "as often as not, intangible" ones, such as public education.¹⁶⁶ Nevertheless, if Ms. Gonzales had contracted with a private security firm, her interest in enforcement of the contract would have an underlying value.¹⁶⁷ As for whether the decision in *O'Bannon* regarding indirect benefits was fatal to Ms. Gonzales's complaint, Justice Stevens stated that the *O'Bannon* opinion, which he authored, did not actually address a situation where the underlying law created an entitlement and was thus inapplicable.¹⁶⁸ The dissent concluded its discussion with a rebuke to Justice Souter's reasoning that Ms. Gonzales merely sought enforcement of process, not substance, by remarking that she asserted an interest in enforcement of a restraining order, a "tangible, substantive act."¹⁶⁹

IV. ANALYSIS OF CASTLE ROCK'S DEFINITION OF PROPERTY

Judge Kelly of the U.S. Court of Appeals for the Tenth Circuit began his dissent in *Gonzales v. City of Castle Rock* by stating that "[t]he facts of this case give new meaning to the old adage that hard cases make bad law."¹⁷⁰ This admonishment could equally apply to the deci-

¹⁶² *Id.* at 2818.

¹⁶³ *Id.* at 2819–20 (citation omitted).

¹⁶⁴ *Id.* at 2823 nn.18–19.

¹⁶⁵ *Castle Rock*, 125 S. Ct. at 2823 n.19 (Stevens, J., dissenting).

¹⁶⁶ *Id.* at 2822 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)).

¹⁶⁷ *Castle Rock*, 125 S. Ct. at 2823 n.19 (Stevens, J., dissenting).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 2824 n.20.

¹⁷⁰ *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1118 (10th Cir. 2004) (en banc) (Kelly, J., dissenting), *rev'd sub nom.* *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005).

sion of the U.S. Supreme Court in 2005 in *Town of Castle Rock v. Gonzales*.¹⁷¹ The Court's analysis of state law in holding that a restraining order does not grant its holder a property interest in its enforcement, although perhaps not surprising given the Court's holding in *DeShaney v. Winnebago County Department of Social Services* that there is no substantive right to government protection from third-party harm, departs significantly from the framework for identifying property interests for due process purposes set out by the Court in *Board of Regents of State Colleges v. Roth*.¹⁷² The Court's decision in *Castle Rock* reveals a cramped view of property interests under the Due Process Clause that is not in accord with the Court's prior case law or the constitutional aims implicated by due process.¹⁷³

A. Castle Rock's Statutory Analysis

The Court began its analysis of Ms. Gonzales's claim in *Castle Rock* with an examination of whether enforcement of the Colorado restraining order was mandatory.¹⁷⁴ Drawing on the Court's liberty interest precedents for the proposition that a benefit cannot rise to the level of an entitlement if officials can grant or deny it in their discretion, the Court parsed the restraining order's language and context.¹⁷⁵ The Court determined that Colorado's seemingly mandatory restraining order statute was in fact circumscribed by a long tradition of police discretion in enforcement of the laws.¹⁷⁶ In support, the Court compared the restraining order statute to other seemingly mandatory statutes regulating police behavior, such as directives or-

¹⁷¹ See generally 125 S. Ct. 2796 (2005).

¹⁷² See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196-97 (1989) (holding that there is no substantive right to government protection against third-party violence). Compare *Castle Rock*, 125 S. Ct. at 2809 (stating that even if Colorado law created an entitlement to enforcement of the restraining order, it could not constitute a property interest for due process purposes because it lacks monetary value and only incidentally benefits the claimant), with *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (stating that property interests are created and their dimensions are defined by the understandings stemming from independent sources such as state law).

¹⁷³ See *infra* notes 174-235 and accompanying text.

¹⁷⁴ 125 S. Ct. at 2804-09. In reaching its conclusion, the Court examined the language on the preprinted notice to law enforcement personnel appearing on the back of the restraining order itself: "A peace officer shall use every reasonable means to enforce a restraining order 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." *Id.* at 2805 (emphasis omitted).

¹⁷⁵ See *id.* at 2803, 2805-06.

¹⁷⁶ *Id.* at 2805-06.

dering chiefs of police to pursue and arrest any person fleeing from justice.¹⁷⁷ Underlying the Court's analysis was the concern that any statute that limits police discretion could potentially be transformed into a constitutionally protected property interest if the police failed to enforce it.¹⁷⁸ The majority also noted that the precise enforcement mechanism of the restraining order was vague; it was unclear how the restraining order could be enforced if the offender was not present.¹⁷⁹

The logic of the majority's statutory analysis does not stand under scrutiny.¹⁸⁰ Although the Court relied heavily on the ambiguity of the word "shall" to determine that enforcement of the Colorado restraining order was not truly mandatory, few words have a clearer non-discretionary meaning in statutory interpretation.¹⁸¹ In fact, the Colorado legislature amended the state's restraining order statute to require enforcement precisely because police officers had been failing to enforce more discretionary restraining orders.¹⁸² In so doing, Colorado joined a wave of states that had amended their restraining order statutes to combat domestic violence.¹⁸³

Even beyond the text and legislative history, there are other aspects of restraining orders that distinguish them from other general protection laws using hortatory terms to uphold a law enforcement objective.¹⁸⁴ A restraining order's terms are court-ordered, unlike most other statutes limiting police discretion, and are also, by their nature, for the benefit of a specific class of persons—the "protected persons" identified in the restraining order.¹⁸⁵

¹⁷⁷ *Id.* at 2806.

¹⁷⁸ *See id.*

¹⁷⁹ *Castle Rock*, 125 S. Ct. at 2807–08.

¹⁸⁰ *See id.* at 2813–25 (Stevens, J., dissenting) (noting inconsistencies in the majority's statutory analysis).

¹⁸¹ *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (discussing the customary use of "shall" to command a particular action); *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 302 (1989) (categorizing both "shall" and "must" as command expressions); *see also DiMarco v. Dep't of Revenue, Motor Vehicle Div.*, 857 P.2d 1349, 1352 (Colo. Ct. App. 1993) ("The factor which most heavily weighs in favor of a mandatory construction is the use of the word 'shall' in the provision at issue. Unless the context indicates otherwise, the word 'shall' generally indicates that the General Assembly intended the provision to be mandatory.") (citation omitted).

¹⁸² *See Castle Rock*, 125 S. Ct. at 2816–18 (Stevens, J., dissenting).

¹⁸³ *Id.* at 2817–18 (noting that when Colorado passed its statute in 1994, it joined nineteen other states that mandated arrests for domestic restraining order violations); *see Roe-derer, supra* note 7, at 322 n.5 (placing the current number of states and territories that have passed mandatory arrest provisions for restraining order violations at thirty-five).

¹⁸⁴ *See Castle Rock*, 125 S. Ct. at 2816–20 (Stevens, J., dissenting).

¹⁸⁵ *Id.* at 2816.

Additionally, contrary to the majority's suggestion, the means of enforcement are clear and unambiguous.¹⁸⁶ The police are required either to arrest or to seek a warrant for arrest if they have probable cause to believe the restraining order has been violated—two specific actions, routinely performed by police, that were neither attempted nor performed in Ms. Gonzales's case.¹⁸⁷ Although the concurrence and majority characterize these actions as merely procedures, unconnected to any articulable substantive guarantee, the enforcement of a restraining order is in fact a tangible act.¹⁸⁸ It involves substantive action by the police and is entirely separate from the procedures that govern its treatment—namely, the police procedures for dealing with restraining order violations.¹⁸⁹

The legislative history and text of the restraining order statute make clear that the law guaranteed to a specific class of beneficiaries the provision of a particular service in certain defined circumstances, and Ms. Gonzales reasonably relied on that guarantee.¹⁹⁰ Given the narrowness of this interest, it is unlikely that its constitutional recognition would federalize a large swath of state process, as the concurrence suggested, or turn the Fourteenth Amendment into a "font of tort law," as the majority feared.¹⁹¹ For example, as the Tenth Circuit's

¹⁸⁶ See *id.* at 2807–08 (majority opinion).

¹⁸⁷ See *id.* at 2820 (Stevens, J., dissenting).

¹⁸⁸ See *id.* at 2811 (Souter, J., concurring); *id.* at 2824 n.20 (Stevens, J., dissenting). Additionally, the Court's precedents have recognized property interests that could be recast as merely interests in procedure under the concurrence's analysis—for instance, a cause of action. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) (stating that "the right to use the [statute's] adjudicatory procedures" is a protected property interest) (emphasis added). *Logan* is notably absent from the litany of post-*Roth* procedural due process decisions that the concurrence lists as distinguishing between property and procedural obligations. See *Castle Rock*, 125 S. Ct. at 2812 (Souter, J., concurring). As Professor Roederer notes, under the Court's analysis, almost all government obligations to provide a service—in other words, all of the interests recognized in the "New Property" cases—could arguably be collapsed into an interest in procedure, because all entitlements to services are supplemented by process. Roederer, *supra* note 7, at 354.

¹⁸⁹ See *Castle Rock*, 125 S. Ct. at 2811 (Souter, J., concurring); *id.* at 2824 n.20 (Stevens, J., dissenting).

¹⁹⁰ See *id.* at 2823 (Stevens, J., dissenting).

¹⁹¹ See *id.* at 2810 (majority opinion); *id.* at 2812–13 (Souter, J., concurring). From a normative perspective, although the legislature's choice to require enforcement of restraining orders could raise concerns that the police may not pursue enforcement of other crimes, there is also evidence to suggest that encouraging police discretion discourages police action, a potentially dangerous consequence in the domestic abuse context. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 822–23 (2006) (arguing that the law's emphasis on discretionary police action leads to greater police inaction and urging more constitutional review of arbitrary police action).

en banc opinion in *Castle Rock* suggests, a statute that required the fire department to respond to a fire would be unaffected by such a narrow ruling and would not give rise to a property interest; it is not a guarantee of service aimed towards a certain class of beneficiaries, but a promise of service to the general public.¹⁹²

The Supreme Court's analysis of state law in *Castle Rock* also reveals a deep skepticism of non-traditional forms of property in contradiction to *Roth's* stated terms and the Court's own precedent.¹⁹³ Undergirding much of the Court's opinion is an aversion to recognizing a "novel" or "unconventional" form of property.¹⁹⁴ The type of property interest in *Castle Rock* was relatively novel, however, because of the relative novelty of the statutes creating mandatory restraining orders.¹⁹⁵ Nevertheless, the majority implied that statutes conferring benefits on a specific class of persons based on certain enforceable criteria are required to have "further indication" that they are intended to create a property interest.¹⁹⁶ Instead of explaining what further statutory requirements are necessary, however, the Court constructed additional barriers for the constitutional recognition of a property interest even where the statutory terms creating the interest are mandatory.¹⁹⁷

¹⁹² See *Castle Rock*, 366 F.3d at 1109 (distinguishing these two scenarios and narrowing its holding to enforcement of restraining orders); see also *Logan*, 455 U.S. at 430 (stating that the hallmark of a property interest is an *individual* entitlement rooted in a source of law) (emphasis added); Michael Mattis, Note, *Protection Orders: A Procedural Pacifier or a Vigorously Enforced Protection Tool? A Discussion of the Tenth Circuit's Decision in Gonzalez v. Castle Rock*, 82 DENV. U. L. REV. 519, 534-35 (2005) (arguing that the Tenth Circuit's decision would not mean that a general protection statute would give rise to a property interest). The Tenth Circuit explicitly acknowledged the narrowness of its *Castle Rock* holding in a subsequent case, refusing to recognize a property interest in a general protection statute. See *Jennings*, 883 F.3d at 1206-07 (holding that a state statute requiring officers not to discourage prosecution of a sexual assault claim did not constitute a property interest despite the Tenth Circuit's decision in *Castle Rock* because the mandatory statute was not coupled with a mandatory court order).

¹⁹³ See *Logan*, 455 U.S. at 430 (stating that the types of property interests recognized by the Court are varied and often intangible); *Roth*, 408 U.S. at 576 (noting that property interests come in many forms).

¹⁹⁴ See *Castle Rock*, 125 S. Ct. at 2809 (stating that an entitlement to "something as vague and novel as enforcement of restraining orders cannot 'simply g[o] without saying'" (citation omitted); *id.* at 2811 (Souter, J., concurring) (characterizing Ms. Gonzalez's argument as "unconventional").

¹⁹⁵ See *id.* at 2823 (Stevens, J., dissenting).

¹⁹⁶ See *id.* at 2808 (majority opinion).

¹⁹⁷ See *id.*

B. Constitutional Property Values in Castle Rock

Perhaps sensing the inadequacy of its statutory analysis, the Court seized upon additional grounds for the failure of Ms. Gonzales's interest in enforcement of her restraining order to rise to the level of a cognizable property entitlement: the entitlement lacked "ascertainable monetary value" and only incidentally benefited its recipient.¹⁹⁸ The first requirement not only fails by its own terms as it would apply in *Castle Rock*, but makes little sense in relation to the aims of protecting property under the Due Process Clause.¹⁹⁹ The second requirement is stretched well beyond its previous application by the Court.²⁰⁰ These additional requirements call into question a number of Court decisions and fundamentally misconstrue the purpose of property under the Due Process Clause, which is to protect a legal relationship based on reasonable reliance on protection from arbitrary termination.²⁰¹

At the outset, the suggestion in *Castle Rock* that there is a constitutional bar to the recognition of some state-created entitlements as property appears to misunderstand the role of the Court in recognizing property for procedural due process purposes.²⁰² According to *Roth*, state-created entitlements are property under the Due Process Clause.²⁰³ The *Castle Rock* Court's basis for constructing additional barriers for the constitutional recognition of property interests appears to be *Memphis Light, Gas & Water Division v. Craft*'s two-tiered approach to identifying property interests for due process purposes.²⁰⁴ The role for constitutional review in *Memphis Light*, however, was merely that state-created procedures cannot foreclose constitutional recognition of a property

¹⁹⁸ See *id.* at 2809–10.

¹⁹⁹ See *infra* notes 209–228 and accompanying text.

²⁰⁰ See *infra* notes 229–235 and accompanying text.

²⁰¹ See *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (stating that "the Due Process Clause . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government'" (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884))); *Logan*, 455 U.S. at 1155 (writing that "[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause'") (citation omitted).

²⁰² See *Castle Rock*, 125 S. Ct. at 2809 (stating that "[e]ven if we were to think otherwise concerning the creation of an entitlement by Colorado, it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a 'property' interest for purposes of the Due Process Clause").

²⁰³ See *Roth*, 408 U.S. at 577 (holding that property interests are not created by the Constitution).

²⁰⁴ See *Castle Rock*, 125 S. Ct. at 2803–04 (noting that "[a]lthough the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause" (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 10–11 (1978))) (citation omitted).

interest if state common law and constitutional norms clearly recognize such an interest.²⁰⁵ The analysis of property in *Memphis Light* does not contemplate the adoption of new tests unmoored from the examination of positive law envisioned by *Roth* in order to determine whether a state-recognized entitlement rises to a constitutional level of property.²⁰⁶ Given that Supreme Court due process jurisprudence was dominated by an entirely different paradigm prior to *Roth*, there is a notable dearth of constitutional guiding principles to which to turn.²⁰⁷ This lack of constitutional guideposts should at least encourage caution in crafting additional rules to separate state entitlements from constitutional entitlements.²⁰⁸

Even assuming that under *Memphis Light* the Supreme Court has the ability to construct additional hurdles for recognizing procedural due process property interests, the tests that the Court employed in this case are improper.²⁰⁹ The Court first stated that Ms. Gonzales's interest in enforcement of her restraining order fails to fit the definition of property for due process purposes because it does not "have an ascertainable monetary value, as even our *Roth*-type 'property-as-entitlement' cases have implicitly required."²¹⁰ For this proposition, the Court quoted a law review article written by Professor Merrill, but gave no further explanation beyond the inductive rationale that the Court's precedents have implied such a test.²¹¹

Professor Merrill's stated reasons for this test, however, are three-fold.²¹² The first is inductive; most of the interests that the Court has recognized in this area have monetary value.²¹³ This reason fails to account for some of the Court's precedent, as noted below, and also fails by its own terms as applied to Ms. Gonzales's case.²¹⁴ As the dissent notes, if Ms. Gonzales had contracted with a private security firm instead of relying on the Castle Rock Police Department for protection from her husband, that contract would undoubtedly have ascer-

²⁰⁵ See *supra* notes 98–108 and accompanying text.

²⁰⁶ See *supra* notes 98–108 and accompanying text. But see *Castle Rock*, 125 S. Ct. at 2803–04.

²⁰⁷ See *supra* notes 26–42 and accompanying text.

²⁰⁸ See *supra* notes 26–42 and accompanying text.

²⁰⁹ See *Castle Rock*, 125 S. Ct. at 2809; *Memphis Light*, 436 U.S. at 10–11.

²¹⁰ *Castle Rock*, 125 S. Ct. at 2809 (quoting Merrill, *supra* note 1, at 964).

²¹¹ See *Castle Rock*, 125 S. Ct. at 2809.

²¹² Merrill, *supra* note 1, at 964–65.

²¹³ See *id.*

²¹⁴ See *infra* notes 215–228 and accompanying text.

tainable monetary value and would qualify as property for due process purposes.²¹⁵

Merrill's second reason for this test is that it differentiates *Roth*-type property interests from procedural due process liberty interests involving prisoners.²¹⁶ Yet this justification fails to explain why monetary value should be used in place of other distinguishing characteristics, or whether such a distinction is necessary at all after *Sandin v. Conner* established a standards-based approach to defining liberty interests.²¹⁷ Indeed, there are easier grounds for distinguishing property and liberty interests; "new" liberty interests can be seen as freedom from state restraint or punishment, while "new" property entails an entitlement to a particular government benefit.²¹⁸

Merrill's final justification for a monetary value test is that it brings the due process definition of property more closely in line with the ordinary understanding of property, which, he argues, connotes something of value that enhances individual wealth.²¹⁹ Pecuniary value is hardly the only measure of value or individual wealth, however, as *Castle Rock* demonstrates.²²⁰ Ms. Gonzales's restraining order enriched her, in that she did not have to seek out a private security firm for protection or move away from her husband.²²¹ The lack of

²¹⁵ *Castle Rock*, 125 S. Ct. at 2823 n.19 (Stevens, J., dissenting). Although it might seem odd that contractual rights are deemed to fit the definition of property as an entitlement, the companion case to *Roth* apparently assumed this very point. See *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (treating a cause of action for breach of contract as property for procedural due process purposes); see also Merrill, *supra* note 1, at 990-92 (examining the Court's treatment of contractual rights as due process property interests).

²¹⁶ Merrill, *supra* note 1, at 964-65.

²¹⁷ See 515 U.S. 472, 484 (1995) (establishing an "atypical and significant hardship" standard for prisoner due process claims).

²¹⁸ See Merrill, *supra* note 1, at 964-65; 2004 Term—Leading Cases, *supra* note 7, at 216.

²¹⁹ Merrill, *supra* note 1, at 965.

²²⁰ See *Castle Rock*, 125 S. Ct. at 2823 (Stevens, J., dissenting).

²²¹ *Id.* at 2824. Professor Merrill himself measured monetary value by looking to the cost of the next-best alternative in an attempt to harmonize *Goss v. Lopez* with his test. Merrill, *supra* note 1, at 964 n.289; see 419 U.S. 565, 576 (1975) (recognizing a due process property interest in public education). Remarking on *Goss*, Professor Merrill stated, "[A]ny parent who has contemplated sending their children to private schools knows that public schooling has a monetary value." Merrill, *supra* note 1, at 964 n.289. The majority in *Castle Rock*, however, responded to the dissent's point that paying a private party for enforcement would have ascertainable monetary value by saying that Ms. Gonzales's interest was in enforcement of the restraining order rather than the abstract right to protection. 125 S. Ct. at 2809 n.12. Therefore, a private party would not legally be able to enforce the restraining order through arrest unless the crime occurred in that party's presence and therefore it was a proper citizen's arrest. See *id.* This response, however, fails to account for other situations where the next-best alternative may not be legally enforceable, such as the cause of action recognized as a type of property in *Logan*. See *Logan*, 455 U.S. at 430.

affirmative reasons for adopting an "ascertainable monetary value" test and the lack of logic underlying its inductive justification counsel against its application.²²²

Perhaps the most compelling argument against an "ascertainable monetary value" requirement for recognizing property for due process purposes, however, is the Court's own precedent.²²³ *Roth* embraced the concept that property under the Due Process Clause comes in "many forms," extending "well beyond real estate, chattels, or money."²²⁴ Decisions after *Roth* have recognized property interests as varied and intangible as entitlements to public education and causes of action.²²⁵ Arguably, neither of these entitlements has an ascertainable monetary value, except in the restraining order's sense of enrichment, and, therefore, each would fail the *Castle Rock* test.²²⁶ Of course, imposing a monetary value requirement could make property for due process purposes more closely approximate a "traditional conception of property."²²⁷ This approach, however, would contradict *Roth*'s explicit language and would contradict the underlying purpose of property under the Due Process Clause: to protect a person's reasonable expectation of reliance on a governmental conferral of benefits without arbitrary termination.²²⁸

The Court in *Castle Rock* also stated that Ms. Gonzales's interest in enforcement failed to reach the level of a constitutional property interest because it arose only incidentally, out of a function that the police have always performed: arresting or seeking warrants for those suspected of a crime.²²⁹ For this proposition, the Court cited *O'Bannon v. Town Court Nursing Center*, where it held that nursing home residents' indirect interest in continued residence based on nursing home regula-

²²² See 2004 Term—Leading Cases, *supra* note 7, at 215 (noting the lack of affirmative reasons for adopting the monetary value test).

²²³ See *Logan*, 455 U.S. at 430 (writing that property interests are varied and often intangible); *Roth*, 408 U.S. at 576 (stating that property may take many forms).

²²⁴ 408 U.S. at 571–72, 576.

²²⁵ See *Logan*, 455 U.S. at 430 (recognizing a cause of action as an entitlement); *Goss*, 419 U.S. at 576 (recognizing a due process interest in public schooling). *Logan*'s decision recognizing a cause of action as a type of property rested on precedent extending back to 1950. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

²²⁶ See *Logan*, 455 U.S. at 430; *Goss*, 419 U.S. at 576; see also *Merrill*, *supra* note 1, at 964 n.289 (acknowledging that *Goss* is a borderline case involving ascertainable monetary value).

²²⁷ See *Castle Rock*, 125 S. Ct. at 2809.

²²⁸ See *Roth*, 408 U.S. at 577 (stating that the purpose of property is to protect claims upon which people rely); *Hurtado*, 110 U.S. at 527 (stating that the purpose of the Due Process Clause is to protect persons from arbitrary government action).

²²⁹ 125 S. Ct. at 2809.

tions did not constitute a property entitlement for due process purposes even though their direct benefits—financial payments for certain medical services—did.²³⁰

Despite its superficial similarity to *Castle Rock*, *O'Bannon* is inapplicable for several reasons.²³¹ First, *O'Bannon* did not address a situation where the underlying nursing home regulations actually created an entitlement, and, therefore, it cannot stand as a bar for the creation of an entitlement in *Castle Rock*'s context.²³² Secondly, the incidental-direct distinction is derived from third-party beneficiary theory, which posits that "intended" beneficiaries can enforce their rights against a promisor whereas "incidental" beneficiaries cannot.²³³ For the analogy to stand in *Castle Rock*, however, the intended beneficiaries of the Colorado restraining order statute—apparently the general public in the eyes of the Court—would have a right to assert their interests in enforcement against the government, an entirely implausible understanding.²³⁴ Furthermore, the Court's use of the incidental-direct distinction is unworkable because the restraining order clearly implied that it *was* intended to benefit specific persons—the protected persons defined by the restraining order statute.²³⁵

V. GIVING SUBSTANCE TO ENTITLEMENT—A REDEFINITION

Underlying much of the U.S. Supreme Court's decision in *Town of Castle Rock v. Gonzales* is a deep skepticism of the means and results of *Board of Regents of State Colleges v. Roth*'s positivist approach towards identifying property interests for due process purposes and a fear that a strict reading of an apparently mandatory state law might uncover "something as vague and novel as enforcement of restraining orders" as property interests.²³⁶ Thus, instead of resting solely on *Roth*'s in-

²³⁰ See *id.* at 2810 (citing 447 U.S. 773, 786–88 (1980)).

²³¹ See *infra* notes 232–235 and accompanying text.

²³² See *Castle Rock*, 125 S. Ct. at 2823 n.18 (Stevens, J., dissenting); *O'Bannon*, 447 U.S. at 785.

²³³ See RESTATEMENT (SECOND) OF CONTRACTS §§ 302, 304, 315 (1981).

²³⁴ See *id.* Because the majority does not indicate who would constitute the intended beneficiary of the statute, one commentator has read the statute equally implausibly as intended to benefit the party most "directly" affected—in this case, Mr. Gonzales. See 2004 *Term—Leading Cases*, *supra* note 7, at 218.

²³⁵ See COLO. REV. STAT. § 18-6-803.5(1.5)(a) (1999) (defining "protected person" as "the person or persons identified in the protection order as the persons or persons for whose benefit the protection order was issued") (emphasis added); *Castle Rock*, 125 S. Ct. at 2821–22 (Stevens, J., dissenting) (citing the text of the Colorado statute).

²³⁶ See *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2809 (2005). At oral argument, Justice Scalia seemed to suggest that a property interest in enforcement of a restraining order

quiry as to whether the state law gives rise to a legitimate claim of entitlement, the Court looks to other sources—the law of contracts for the direct-incidental distinction and a law review article for a monetary value test—to serve as constitutional limits to recognition of certain government benefits as property for due process purposes.²³⁷ Given the Court's repudiation of *Roth's* positivist approach in defining liberty interests for prisoners after *Sandin v. Conner* and its general aversion to recognition of "new" property interests after the 1970s, perhaps the Court's deployment of other standards of law to limit the interpretation of positive law in *Castle Rock* is not particularly surprising.²³⁸ But neither is it inevitable.²³⁹

Much of the difficulty in determining what rises to the level of a property interest for purposes of due process—beyond the traditional conceptions of ownership in real estate, money, and chattels—stems from the articulation of the constitutional test.²⁴⁰ The definition for property laid out in *Roth* is perhaps deliberately vague: an entitlement rooted in an independent source such as state law.²⁴¹ By allowing the constitutional guarantee to adapt to the contours of other sources of law, the Court avoided having to list precisely what property for procedural due process encompasses, and risk either omitting certain types of property or becoming outdated.²⁴² The property-as-entitlement approach also avoided requiring the Court to repudiate its own precedents that recognized a variety of property interests.²⁴³ Perhaps most

would be "utterly zany." See Transcript of Oral Argument at 14, *Castle Rock*, 125 S. Ct. 2796 (No. 04-278), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-278.pdf.

²³⁷ See *Castle Rock*, 125 S. Ct. at 2809 (citing Merrill, *supra* note 1, at 964 for the implicit ascertainable monetary value requirement, and *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 775 (1980) for the indirect benefit concept).

²³⁸ See *Sandin v. Conner*, 515 U.S. 472, 484 (1995) (replacing the positivist approach to identifying procedural due process liberty interests with an atypical hardship standard); Pierce, *supra* note 26, at 1973 (predicting and applauding a due process counterrevolution in the 1990s that would overturn many of the early 1970s due process cases).

²³⁹ See *infra* notes 240–283 and accompanying text.

²⁴⁰ See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); Shapiro & Levy, *supra* note 1, at 113.

²⁴¹ See *Roth*, 408 U.S. at 577; Merrill, *supra* note 1, at 921 (noting *Roth's* deliberate vagueness).

²⁴² See *Roth*, 408 U.S. at 577 (asserting that "[p]roperty interests, of course, are not created by the Constitution").

²⁴³ See, e.g., *Bell v. Burson*, 402 U.S. 535, 539 (1971) (recognizing due process protections in a driving license); *Goldberg v. Kelly*, 397 U.S. 254, 261–62 (1970) (recognizing a property interest in welfare benefits); see also *Roth*, 408 U.S. at 576 (recognizing that "property interests . . . may take many forms").

importantly in the *Roth* Court's view, it limited the breadth of *Goldberg*-era due process, which threatened to subject any and all interests deemed important to due process protections.²⁴⁴ What the concept of entitlement gains in flexibility, however, it lacks in clear parameters.²⁴⁵ The "new" property interests that the Court has identified since *Roth*, however, do have certain common attributes, the articulation of which can give clearer meaning to *Roth*'s concept of entitlement.²⁴⁶

The common theme for "new" property interests since *Roth* is the recognition of a benefit rooted in a source of law independent from the Constitution that is conferred on a specific class subject to specific conditions and terminable only under specific conditions.²⁴⁷ Identifying these common attributes allows for a more particularized definition of entitlement, and may better guide courts attempting to define property.²⁴⁸ It also allows for an approach that embraces property's many forms, tangible and not, without federalizing tort law.²⁴⁹ Additionally, this definition calls into question *Castle Rock*'s statutory interpretation and its application of monetary value and incidental-direct benefit tests.²⁵⁰

A. Independent Source of Law

Perhaps the one undisputed element of the post-*Roth* definition of property under the Due Process Clause is that entitlements arise from a source of law independent from the Constitution.²⁵¹ Commentators

²⁴⁴ Compare *Roth*, 408 U.S. at 571 (looking to the nature, rather than the weight, of the interests at stake to determine due process protections), with *Bell*, 402 U.S. at 539 (stating that a driving license "may become essential in the pursuit of a livelihood" and that its suspension "adjudicates important interests of the licensees").

²⁴⁵ See Merrill, *supra* note 1, at 921.

²⁴⁶ See *Roth*, 408 U.S. at 577; *infra* notes 247-283 and accompanying text.

²⁴⁷ See, e.g., *Castle Rock*, 125 S. Ct. at 2803 (stating that the existence of an entitlement turns on whether government officials can grant or deny it in their discretion); *Logan*, 455 U.S. at 1155 (identifying the hallmark of property as an individual entitlement grounded in state law which cannot be removed except for cause); *Roth*, 408 U.S. at 577 (stating that property interests are rooted in positive law and that benefits that give rise to a legitimate claim of entitlement are protected property interests).

²⁴⁸ See Merrill, *supra* note 1, at 968 (noting that a refined definition of property for due process purposes would clarify the Court's jurisprudence).

²⁴⁹ See *Logan*, 455 U.S. at 430 (noting that the Court has recognized a wide variety of property interests, both tangible and intangible); *Roth*, 408 U.S. at 576 (stating that property may take many forms); see also *Castle Rock*, 125 S. Ct. at 2810 (noting that the Court's approach to due process jurisprudence avoids treating the Fourteenth Amendment as a "font of tort law") (citation omitted).

²⁵⁰ See *Castle Rock*, 125 S. Ct. at 2805-07, 2809-10.

²⁵¹ See *id.* at 2803 (quoting *Roth*, 408 U.S. at 577).

have bemoaned the fact that *Roth's* definition of property leaves due process protections to the whim of the legislature and administrators who can grant or decline to grant government benefits at their discretion.²⁵² Nevertheless, the difficulty of establishing a workable framework that incorporates a person's subjective expectation of or reliance on a benefit without grounding that reasonable expectation in a source of law has made the Court wary of straying from *Roth's* positivist approach.²⁵³ In addition, the Court's repudiation of the "bitter with the sweet" hypothesis—the notion that the procedures in a law could provide all the due process protections the Constitution requires—blunted some of the criticism that the Court was allowing legislative and administrative bodies to avoid constitutional review.²⁵⁴ Furthermore, government entities are arguably not acting arbitrarily if they are proceeding within the letter of the law, thereby avoiding the pitfall that the Due Process Clause was designed to prevent.²⁵⁵

B. Benefit or Service

The post-*Roth* definition of property also clearly contemplates that the independent source of law must confer a benefit on the claimant for the interest to rise to the level of a procedural due process property interest.²⁵⁶ The interests that the Court has recognized as

²⁵² See generally MASHAW, *supra* note 21. (advocating for a broader, non-instrumentalist view of due process); Shapiro & Levy, *supra* note 1 (contending that a standards-based approach to applying due process protections to government benefits better comports with rule of law principles); Van Alstyne, *supra* note 26 (stating that under the Court's analysis, the Due Process Clause protects only what the legislature wants it to protect).

²⁵³ See *Castle Rock*, 125 S. Ct. at 2803 (reaffirming *Roth's* approach to identifying property interests); Pierce, *supra* note 26, at 1988 (noting and praising the Court's complete retreat from the "important interest" weighing approach to identifying due process protections); see also Notes, *Statutory Entitlement and the Concept of Property*, 86 YALE L.J. 695, 709–14 (1977) (arguing that a concept of property based on a person's subjective reliance would be inconsistent with the underlying purpose of property, would be inconsistent with the Court's jurisprudence, and would radically expand the ambit of the Due Process Clause).

²⁵⁴ See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (discarding the bitter-with-the-sweet approach); Merrill, *supra* note 1, at 890–91 (noting that academic interest in the definition of property for procedural due process flagged after *Loudermill*). But see generally Shapiro & Levy, *supra* note 1 (urging due process protection for government benefits grounded in a standards-based approach).

²⁵⁵ See *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (writing that "the Due Process Clause . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government'" (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884))).

²⁵⁶ See *Roth*, 408 U.S. at 577 (stating that, although property under the Due Process Clause does not protect all benefits, it does protect those benefits to which the party can claim a legitimate entitlement).

due process property all connote value, as opposed to freedom from restraint.²⁵⁷ Although *Castle Rock* attempted to limit this concept of "benefit" to pecuniary value, "benefit" should instead be defined as an enrichment for two reasons.²⁵⁸ First, the Court's own precedents recognize property interests that do not have a measurable monetary value, except insofar as a person's reliance on the benefit provided allows that person to avoid the cost of the next-best alternative.²⁵⁹ Additionally, the idea of a benefit as enrichment better comports with the underlying purpose of subjecting benefits to due process protection—to protect people's reliance on a relationship rooted in the law.²⁶⁰ Taken out of context, the notion of "value" of "benefit," unconnected to pecuniary value, does have the potential to be overbroad.²⁶¹ However, the other proposed requirements for property interests under the Due Process Clause—the conditions imposed in the law for provision of the benefit and the conditions providing for termination of the benefit—prevent the entitlement concept from ballooning to include "all interests valued by sensible men."²⁶²

C. Direct Benefit

The Court's precedents also make clear that for an asserted interest to constitute a property interest for procedural due process purposes, the source of law must confer a benefit *on the claimant*.²⁶³ *Castle Rock* seemed to suggest that even if the enforcement of a restraining order constituted an entitlement under state law, the indirect nature of the benefit on a claimant could bar constitutional recognition of that entitlement.²⁶⁴ The indirect benefit test, however, as applied in *O'Bannon v. Town Court Nursing Center* and stated in contract principles, presupposes that there is a direct beneficiary of the

²⁵⁷ See *Castle Rock*, 125 S. Ct. at 2809; Merrill, *supra* note 1, at 964.

²⁵⁸ See *Castle Rock*, 125 S. Ct. at 2809; Logan, 455 U.S. at 430 (noting that the Court had recognized both tangible and intangible property interests "relating to the whole domain of social and economic fact").

²⁵⁹ See Logan, 455 U.S. at 430 (recognizing a cause of action as a species of property); Goss v. Lopez, 419 U.S. 565, 573–74 (1975) (recognizing a property interest in free public school education).

²⁶⁰ See *Roth*, 408 U.S. at 577 (stating that the purpose of property is to protect claims upon which people rely).

²⁶¹ See Merrill, *supra* note 1, at 964 (proposing an ascertainable monetary value test to limit the breadth of the entitlement concept).

²⁶² See Monaghan, *supra* note 18, at 409; *infra* notes 263–283 and accompanying text.

²⁶³ See *Castle Rock*, 125 S. Ct. at 2809–10.

²⁶⁴ See *id.* at 2809 (noting that even if Colorado law created an entitlement, it is by no means clear that this would create a due process property interest).

statute who could claim an entitlement to the benefit.²⁶⁵ The key questions for the Court to determine, therefore, are first whether the underlying source of law creates an entitlement, and then to whom it confers the entitlement.²⁶⁶

D. *Satisfaction of Specific Conditions for Conferral of Benefit*

The Court has recognized property interests rooted in sources of law other than the Constitution where the claimant fulfills certain criteria according to which the government provides a benefit.²⁶⁷ This judicial requirement is generally satisfied because almost all claimants have already satisfied the conditions for the provision of the benefit and are now trying to prevent termination of that benefit.²⁶⁸ A key condition, however, is whether the claimant is part of the class receiving the benefit as defined in the source of law.²⁶⁹ Although the requirement that the government confer a benefit on a defined class does not explicitly appear in any previous Court formulations of how to define property, several cases have impliedly required it.²⁷⁰ Such a requirement would avoid the *Castle Rock* Court's palpable fear that recognizing a property interest in enforcement of a restraining order would open the floodgates to property interests in general protection laws.²⁷¹ Such a requirement also makes intuitive sense; for example, a fire department regulation requiring that the department respond to any fire, absent directives for its conferral on a discrete class of

²⁶⁵ See *O'Bannon*, 447 U.S. at 786–88; RESTATEMENT (SECOND) OF CONTRACTS §§ 302, 304, 315 (1981); *supra* notes 229–235 and accompanying text.

²⁶⁶ See RESTATEMENT (SECOND) OF CONTRACTS §§ 302, 304, 315; *supra* notes 229–235 and accompanying text.

²⁶⁷ See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (recognizing a property interest in Social Security disability benefit payments based on the plaintiff's satisfaction of statutory criteria); see also Massey, *supra* note 1, at 542–45 (noting in passing that the Court has recognized property interests in statutory entitlements based on the fulfillment of criteria under which the government provides a benefit or the inapplicability of the conditions depriving the person of that benefit).

²⁶⁸ See generally *Castle Rock*, 125 S. Ct. 2796 (refusing to examine whether Ms. Gonzales was qualified to receive the benefit of police enforcement of the restraining order).

²⁶⁹ See *id.* at 2821 (Stevens, J., dissenting) (noting that Ms. Gonzales was identified as the protected person in the restraining order statute); see also *Logan*, 455 U.S. at 430 (declaring that the hallmark of property is an individual entitlement).

²⁷⁰ See *Castle Rock*, 125 S. Ct. at 2809–10 (majority opinion) (stating that the benefit to Ms. Gonzales is only incidental); *id.* at 2822 (Stevens, J., dissenting) (arguing that enforcement of the restraining order benefits Ms. Gonzales directly); see also *Logan*, 455 U.S. at 430 (declaring that the hallmark of property is an individual entitlement).

²⁷¹ See *Castle Rock*, 125 S. Ct. at 2808 (stating that the criminal law performs functions other than conferring a benefit on a specific class of persons).

beneficiaries, should not rise to the level of a procedural due process property interest, but a government contract with a company providing fire protection should.²⁷²

E. Conditions for Termination

The Court's jurisprudence likewise clearly requires that a protected property interest can only be terminated under certain conditions.²⁷³ There are two varieties of conditions for termination: (1) non-discretionary termination of a benefit, or (2) termination made "for cause" or its equivalent.²⁷⁴ As the Court in *Castle Rock* stated and the prisoners' liberty cases demonstrated, the existence of a protected interest often turns on whether officials can grant or deny a benefit at their discretion because a discretionary benefit cannot lead to a reasonable expectation of its continuance.²⁷⁵ Therefore, this definition of entitlement follows the Court's lead in recognizing that a benefit rooted in positive law must be couched in non-discretionary terms.²⁷⁶

Another iteration of a termination condition is the "for cause" variety appearing in *Logan* and *Memphis Light*: "[t]he hallmark of property for procedural due process purposes is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"²⁷⁷ The "for cause" requirement has its roots in employment common law, but, more generally, it stands for the idea that if an entitlement can only be terminated upon certain acceptable conditions, this is enough

²⁷² See *supra* notes 190–192 and accompanying text; see also *Gonzales v. City of Castle Rock*, 366 F.3d 1092, 1101–05 (10th Cir. 2004) (en banc) (basing its holding that enforcement of a restraining order is a protected property interest in part on the restraining order's specific conferral on protected persons defined in the statute), *rev'd sub nom.* *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005).

²⁷³ See *Castle Rock*, 125 S. Ct. at 2803 (declaring that a benefit is not a protected entitlement if a government official can grant or deny it in his or her discretion); *Logan*, 455 U.S. at 430 (stating that the hallmark of property is entitlement that can only be terminated for cause).

²⁷⁴ See *Castle Rock*, 125 S. Ct. at 2803 (stating that a benefit is not a protected entitlement if a government official can grant or deny it in his or her discretion); *Bishop v. Wood*, 426 U.S. 341, 344–47 (1976) (finding no property interest in continued employment because, by ordinance, there were no exclusive conditions under which the petitioner could be deprived of the job).

²⁷⁵ See *Castle Rock*, 125 S. Ct. at 2803 (stating that a discretionary benefit is not a protected entitlement). See generally *Meachum v. Fano*, 427 U.S. 215 (1976) (denying a prisoner's liberty interest claim based on the degree of discretion granted to the prison official by the regulation).

²⁷⁶ See *Castle Rock*, 125 S. Ct. at 2803.

²⁷⁷ See *Logan*, 455 U.S. at 430 (citations omitted); *Memphis Light*, 436 U.S. at 10.

to create an entitlement to its continuation.²⁷⁸ As both *Logan* and *Memphis Light* demonstrate, this requirement not only allows the removal of property interests if good cause is provided, but also can serve as a shield against the arbitrary termination of entitlements if the written procedures providing for their termination do not comport with those required under the common law or the Constitution.²⁷⁹

Lastly, it should be noted that this approach to entitlement serves other goals of property and due process that do not explicitly appear as elements within the definition—namely, protecting one's reasonable expectation of reliance on the law and avoiding arbitrary governmental decision making.²⁸⁰ The definition of entitlement under *Roth*, however, assumes that these elements are only measured indirectly.²⁸¹ The Court, in reaction to the excesses of *Goldberg's* important interest approach, has assiduously avoided any measurement of the reliance of the individual on the government benefit or the arbitrariness of a decision in determining whether an interest rises to the level of property.²⁸² Nevertheless, a statute that confers a direct benefit subject to conditions for its conferral and only terminable for cause, under the definition of entitlement fleshed out by the Court's jurisprudence, is likely to serve these goals.²⁸³

²⁷⁸ See *Logan*, 455 U.S. at 430 (requiring a for-cause termination provision in order to recognize a property interest); *Bishop*, 426 U.S. at 344–47 (declining to find a property interest in continued employment because there were no conditions under which the petitioner could be deprived of the job). This concept also implicitly acknowledges that if the denial of the benefit did not follow the stated conditions for termination, the termination was likely done arbitrarily, and hence in violation of due process. *Logan*, 455 U.S. at 430; *Bishop*, 426 U.S. at 344–47.

²⁷⁹ See *Logan*, 455 U.S. at 430 (holding that an employee's property interest in an adjudicatory procedure could not be deprived without cause, notwithstanding company procedures); *Memphis Light*, 436 U.S. at 10–11 (recognizing a property interest in continued utility service based on common-law precedents, notwithstanding the utility company's procedures).

²⁸⁰ See *Daniels*, 474 U.S. at 331 (writing that "the Due Process Clause . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government'" (quoting *Hurtado*, 110 U.S. at 527)); *Roth*, 408 U.S. at 577 (noting that a purpose of property in due process is to protect those claims upon which people rely).

²⁸¹ See *Roth*, 408 U.S. at 577.

²⁸² See *id.*

²⁸³ See *Merrill*, *supra* note 1, at 967 (contending that a refined definition of the property-as-entitlement concept would protect one's reasonable reliance on the law); *supra* notes 236–282 and accompanying text.

CONCLUSION

The U.S. Supreme Court's decision in *Town of Castle Rock v. Gonzales* marked a major stride towards undoing much of the so-called "Due Process Revolution." Through its narrow reading of a seemingly mandatory statute, and its adoption and expansion of both a monetary value and an incidental benefit test, the Court put sharp limits on *Board of Regents of State Colleges v. Roth*'s continued viability in identifying property for procedural due process purposes. The two requirements it adopted in dicta—an ascertainable monetary value and a direct benefit on the recipient—are on shaky constitutional ground and should be used sparingly, if at all, in determining whether a benefit rises to the level of a property interest. In their place, the Court should adopt a clearer articulation of the defining characteristics of *Roth*'s definition of entitlement—a benefit rooted in a source of law independent from the Constitution that is conferred on a specific class subject to specific conditions and terminable under specific conditions—to guide them, as well as to bring the Court's jurisprudence more closely in line with the underlying purposes of protecting property under the Due Process Clause.

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