WALKING THE LINE: THE REHNQUIST COURT'S REVERENCE FOR FEDERALISM AND OFFICIAL DISCRETION IN *DESHANEY* AND *CASTLE ROCK*

by
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As the Rehnquist Court era has come to a close, a retrospective study of the Court's jurisprudential legacy is inevitable and appropriate. Although legal commentators will pay much attention to the role federalism played in the Court's reallocation of powers between the state and federal governments, the impact of the Rehnquist Court's strong federalism doctrine on the individual should not be overlooked. This impact is felt very strongly in the Court's adjudication of section 1983 due process claims where the plaintiff seeks to hold government actors accountable for injuries inflicted by third parties. The Rehnquist Court passed directly on such claims in DeShaney v. Winnebago County Department of Social Services *and the more recent* Town of Castle Rock v. Gonzales, *and determined that the government has no constitutional duty to protect the individual from harm inflicted by those private actors. This Comment explores how the Rehnquist Court came to such a conclusion and specifically focuses on the Court's reverence for the preservation of official discretion, even where the state has expressly sought to limit that discretion. Further, this Comment looks at the way in which the Rehnquist Court uses state law as a limiting principle in narrowing the scope of section 1983. Hopefully, such a discussion demonstrates that federalism principles, which are often thought of as too abstract or only affecting the balance of power between the state and federal government do in fact touch on the relationship between the state and the individual on a very personal level.*

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I. INTRODUCTION

With Justice Sandra Day O'Connor announcing her retirement in July, 2005 and the passing of Chief Justice William H. Rehnquist the following September, the Rehnquist Court era has come to an end.[1] Because of its long duration and considerable influence on American jurisprudence,[2] commentators and scholars will inevitably study and critique the Rehnquist Court's impact on our legal culture. No doubt much of the ensuing discussion will revolve around the Rehnquist Court's "new federalism" revival,[3] which limited the scope of Congressional power under the Commerce Clause[4] and curtailed Congressional authority under Section 5 of the Fourteenth Amendment[5] and the Tenth

[1] Erwin Chermerinsky, *The End of an Era: October Term 2004*, 8 GREEN BAG 2D 345, 354 (2005) (summing up the end of the October 2004 Supreme Court Term as "the end of an era.").

[2] Upon Rehnquist's death, constitutional law professor Mark Tushnet proclaimed, that the Rehnquist Court had "changed the law in a very dramatic way." Charles Lane, *The Rehnquist Legacy: 33 Years Turning Back the Court; Chief Justice Came to Recognize Limits On His Power to Fight Liberal Drift*, WASH. POST, Sept. 5, 2005 at A8.

[3] For a succinct re-cap and analysis of the Rehnquist Court's new federalism doctrine, see Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court: Reviewing The New Constitutional Order by Mark Tushnet*, 93 GEO. L.J. 1023, 1045−48 (2005).

[4] *See* United States v. Lopez, 514 U.S. 549, 551 (1995) (holding a Congressional act, which made possession of a gun in a school zone a federal criminal offense, was an invalid exercise of power under the Commerce Clause); *see also* United States v. Morrison, 529 U.S. 598, 602 (2000) (ruling that Congress did not have the necessary power under the Commerce Clause to enact the Violence Against Women Act of 1994).

[5] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (finding the Religious Freedom Restoration Act of 1993 unconstitutional as exceeding Congress' scope of power under Section 5 of the Fourteenth Amendment); Kimmel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (finding Congress did not have the power to abrogate state sovereign immunity

Amendment.[6,7] However, the scope of the Rehnquist Court's federalism decisions were not confined to a debate concerning the locus of governmental power but also figured prominently in the Court's section 1983[8] analysis. Accordingly, the Rehnquist Court's federalism doctrine also drew distinct boundaries on a much more individual level by delineating as a matter of federal law where official discretion begins and the rights of the individual litigant ends.

The impact of the Rehnquist Court's federalism revival on the individual—be it the state official or the injured plaintiff—is clearly demonstrated in the Court's adjudication of section 1983 Fourteenth Amendment Due Process claims where the plaintiff seeks to hold the state accountable for injuries directly inflicted by third parties. These claims arise when the state becomes intertwined in the sometimes volatile relationships of private citizens, such as those between a parent and child or between a husband and wife, and fails to prevent one individual from inflicting great harm on the other. The Rehnquist Court passed directly on such claims in *DeShaney v. Winnebago County Department of Social Services*[9] and in the more recent *Town of Castle Rock v. Gonzales*,[10] where it determined that the government has no constitutional duty to protect the individual from harm inflicted by those private actors.

In order to understand better how the Court came to such a conclusion, this Comment focuses on the Court's use of federalism principles in *DeShaney* and *Castle Rock* to achieve broader institutional goals, specifically preservation of official discretion. This Comment also seeks to illuminate the Court's use of state law as a limiting principle in its 1983 analysis which had the effect of further justifying its pro-federalism stance. Hopefully such a discussion demonstrates that federalism principles, which are often thought of as too abstract or only affecting the balance of power between the state and federal

under Section 5 of the Fourteenth Amendment in the Age Discrimination in Employment Act of 1967).

[6] *See* Printz v. United States, 521 U.S. 898, 935 (1997) (ruling under the Tenth Amendment Congress cannot commandeer a state's administrative system set up to conduct background checks on handgun purchasers to enforce federal regulations).

[7] For examples where legal commentators have focused on the Rehnquist Court's new federalism legacy regarding the locus of power between governmental bodies, see generally Eric R. Claeys, Raich *and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791 (2005); Glenn H. Reynolds & Brannon P. Denning, *What Hath* Raich *Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 927−32 (2005); Paul J. Watford, *State Lines: Redefining the Reach of the Commerce Clause May Be One of the Important Legacies of the Rehnquist Court*, 28 L.A. LAW. 24 (Nov. 2005).

[8] Under 42 U.S.C. § 1983 (2000) a private citizen may sue a state or local government employee and recover damages for a violation of their constitutional rights.

[9] 489 U.S. 189 (1989) (ruling the failure of county officials to adequately protect a child from his father's abuse did not violate the child's substantive due process rights). This case is discussed in detail, *infra* Part III.

[10] 125 S. Ct. 2796 (2005) (finding no due process violation occurred where the plaintiff did not have a property interest in police enforcement of a mandatory restraining order). This case is discussed in detail, *infra* Part III.

government,[11] do in fact touch on the relationship between the state and the individual on a very personal level.[12]

Part II of this Comment discusses the import of understanding a judicial legacy in general terms and goes on to examine the Rehnquist Court's federalism revival and its inherent conflict with the overriding principles of section 1983. Part II also examines *Paul v. Davis*[13] as an important decision that forever intertwined state law and 1983 Due Process analysis. Part III of this Comment revisits *DeShaney*, undertakes an in-depth discussion of the more recent decision in *Castle Rock*, and identifies the means by which the Rehnquist Court sought to preserve official discretion in order to strengthen its federalism doctrine. Part IV summarizes and critiques the effect the Rehnquist Court's decision to protect official discretion will have on successive courts and future litigants.

II. THE ORIGINS OF THE REHNQUIST COURT'S 1983 FEDERALISM DOCTRINE

Before proceeding with a substantive discussion of the Rehnquist Court's federalism inspired approach to 1983 due process litigation, it is important to understand its historical origins in the conservative jurisprudential movement. Such analysis is necessary because judicial legacies do not exist within vacuums.[14] Instead, a judicial legacy is culled from a series of choices a court makes regarding the inevitable competing social, political, and legal options which present themselves at various times throughout history. Thus, this section begins with a general discussion of the term "legacy," which helps to define the scope of this Comment, and goes on to discuss the extremely

[11] Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 580−81 (2003) (noting that the Supreme Court's new federalism decisions are often perceived by laypeople as "presenting relatively technical issues whose relevance to questions of public policy is not immediately apparent."); *see also* MARK TUSHNET, A COURT DIVIDED 10 (2005) (describing the struggle of Supreme Court correspondent Linda Greenhouse to get an article summing up the Rehnquist Court's new federalism on the front page of the *New York Times* because "no one really cared about the federalism revolution. People care about what government can do; federalism is about which government can do it."); R. Shep Melnick, *The Federal Safeguards of Politics,* 41 WILLAMETTE L. REV. 847 (2005) ("Most Americans don't give a damn about federalism. To the extent they think about politics at all, most people ask, 'What is the best policy for health care, abortion, or gay rights?' not the more abstract question, 'Which level of government should resolve such issues?'").

[12] Mitchell F. Crusto, *The Supreme Court's "New" Federalism: An Anti-Rights Agenda?*, 16 GA. ST. U. L. REV. 517, 533 (2000) (drawing attention to the impact federalism has, not only on the relationship between the state and federal governments, but also between citizens and the states.).

[13] 424 U.S. 693 (1976) (holding damage to a person's reputation alone does not constitute a deprivation of liberty or property in violation of due process). This case is discussed in detail, *infra* Part III.

[14] *See* Michelle Adams, *Causation, Constitutional Principles, and the Jurisprudential Legacy of the Warren Court*, 59 WASH. & LEE L. REV. 1173 (2002) (noting that "one cannot view [the] legacy of the Warren Court in a vacuum.").

influential *Monroe v. Pape*[15] opinion and its fading influence on subsequent Rehnquist Court decisions. This background information is necessary in order to understand the full impact of *DeShaney* and *Castle Rock* on the individual litigant.

A. Defining a Legacy: What Is It and Why Is It Important?

The plain meaning of the word legacy is "something coming from the past (as from an age, event, or policy)."[16] Here, the term legacy describes the Rehnquist Court's opinions that denied litigants the opportunity to hold government officials accountable for failing to protect them from the violent actions of private third parties.[17] This or any judicial legacy may be defined just as much by what is said in the Court's opinions as it is by looking at its relationships with the courts which came before it[18] and even those that will come afterwards.[19] Accordingly, in order to better understand the Rehnquist Court's impact on American legal culture, it's necessary to begin with an analysis of section 1983's origins and its treatment by the Supreme Court before Rehnquist even assumed the bench as an associate justice.

But what is the advantage of critiquing the Court's legacy if it is so amorphous? First, such analysis provides a point of reference for evaluating other periods in Supreme Court history. For instance, much of the discussion regarding the Warren Court's legacy consists of a comparison between it and the Rehnquist Court's subsequent reactions to its jurisprudence.[20] Taking notice of where the Rehnquist Court ends and where the Roberts Court begins enables legal scholars to not only undertake a more accurate evaluation of the Rehnquist Court but also puts the new Roberts Court into perspective. Second, by drawing attention to the Supreme Court's legacy in a specific area of jurisprudence, individuals and groups with a vested interest are put on notice to either work for a change in the law or advocate for its continued viability as

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[15] 365 U.S. 167 (1961).

[16] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1290 (1986).

[17] This Comment is only attempting to understand one of the many legacies of the Rehnquist Court; there are countless areas of law in which the Court left its distinct impression that are not within the scope of this Comment.

[18] *See* TUSHNET, *supra* note 11, at 9 ("To understand the Rehnquist Court, we have to look at the history that gave rise to the arguments about the Constitution's meaning and see how competing visions play out in specific legal settings.").

[19] *See generally* Adams, *supra* note 14 (evaluating the Warren Court legacy by looking at its relationship with the successive Burger and Rehnquist Courts).

[20] *Id.*; *see also* MICHAL R. BELKNAP, THE SUPREME COURT UNDER EARL WARREN 1953−1969 306 (2005) (summing up the symbolic value of the Warren Court's legacy: "It survived also as a symbol, loathed by conservatives, who hated it for the causes it had championed, and romanticized by liberals, who longed for a return to what they recalled fondly as a sort of judicial Camelot."); *see also* D.F.B. TUCKER, THE REHNQUIST COURT AND CIVIL RIGHTS 8 (1995) ("The conservative justices are a product of the very forces that the Warren-Burger Court justices injected into the political arena.").

strong judicial precedent.[21] Accordingly, discussion of the Court's announcement that the state has no duty to protect individuals from private parties provides a point of reference for legal commentators, politicians, interest groups, and individuals to better comprehend the state in which the Rehnquist Court left American jurisprudence and how to react accordingly.

B. Inherent Conflict: 1983 Due Process Claims Versus the Rehnquist Court's New Federalism

When the term "federalism" is mentioned it doesn't necessarily call to mind the plight of the individual citizen. Rather, the Rehnquist Court's "new federalism" decisions, taken at face value, usually focused on the balance of governmental power. For example, in *Printz v. United States* the Court held that Congress could not commandeer state administrative systems into federal service in order to administer the background checks required under the Brady Act.[22] In *Printz*, the Court stepped in to shield the states against what it felt was an inappropriate intrusion by the federal government. As a result, because it was mainly concerned with the relationships between institutions as opposed to institutions and citizens, the Court in *Printz* had no opportunity to analyze federalism's affects on individual litigants. However, as Justice Kennedy noted in his concurrence in *United States v. Lopez*, federalism principles not only concern the relationship between the state and federal government, but also touch on the interaction between the individual and the state.[23] Thus, federalism operates on *two* important levels—"one between the citizens and the Federal Government; the second between the citizens and the States."[24]

Nowhere is the impact of federalism on the individual clearer than in the Court's adjudication of 1983 due process claims. A 1983 claim will always raise federalism concerns because it provides a federal cause of action by which private citizens may sue individual government officials and local governments for injuries inflicted while acting under color of law.[25] As a result, the 1983 claim operates on both planes of federalism as identified by Justice Kennedy because in forcing state officials and local governments to defend themselves in federal court, it immediately raises the issue of federal encroachment on state

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[21] Michael McCann, *How the Supreme Court Matters in American Politics: New Institutionalist Perspectives*, *in* THE SUPREME COURT IN AMERICAN POLITICS 71 (Howard Gillman & Cornell Clayton eds., 1999) (describing the impact of the Supreme Court in American politics: "[T]he Court often influences strategic politics…by stimulating or inviting positive responses to its directives from government actors or citizen groups usually not directly involved in specific cases.").

[22] Printz v. United States, 521 U.S. 898, 935 (1997).

[23] *See* Crusto, *supra* note 12, at 533 (applauding Justice Kennedy for recognizing the effects of federalism principles on individual freedom and liberty).

[24] United States v. Lopez, 514 U.S. 549, 576 (1995).

[25] 42 U.S.C. § 1983 (2000); *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135 (1977) ("[The] contemporary conflict between federalism and civil rights is posed perhaps most sharply in lawsuits brought against state and local officials in federal court under 42 U.S.C. § 1983.").

autonomy.[26] Further, the 1983 claim speaks to the relationship between the state and the injured individual because it affords the litigant the opportunity to hold state officials accountable for constitutional and federal law violations. That opportunity gives the citizen the chance to engage in a dialogue with his or her government and hopefully deter government officials from engaging in future wrongful conduct.[27]

It is the ability of the citizen to hold the official accountable which exposes a deep seated debate at the core of the federalism-1983 conflict. This debate concerns the almost mutually exclusive concepts of the preservation of official discretion and the preservation of a plaintiff's right of access to the courts. The tensions arise between recognizing there is a very strong need to preserve the public official's "sphere of autonomy"[28] so that she may carry out her duties without the constant fear of personal liability hanging over her head, and recognizing that citizens who are harmed by the wrongful exercise of official discretion should be compensated accordingly.[29] That tension is especially apparent in *DeShaney* and *Castle Rock* where the alleged abuse of official discretion—in these cases it was the failure to act—was the only claim a plaintiff could make against a state actor because the actual injury was inflicted by a private third party. Thus, concerns over the proper bounds of official discretion were moved to the forefront of the Rehnquist Court's opinions in *DeShaney* and *Castle Rock*.

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[26] Sheldon Nahmod, *Section 1983 Discourse: The Move From Constitution to Tort*, 77 GEO. L.J. 1719, 1745 (1989) ("Federalism concerns are often raised in § 1983 litigation because it is state and local governments or their employees who are § 1983 defendants.").

[27] *See* Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 48 (2005) ("The conventional wisdom of scholars, judges and politicians alike has been that the imposition of civil penalties [via sec. 1983] serves a dual function in this context: it compensates victims of constitutional deprivations, while simultaneously deterring future instances of official misconduct."); Richardson v. McKnight, 521 U.S. 399, 403 (1997) ("§ 1983 basically seeks 'to deter *state* actors from using the badge of their authority to deprive individuals of their federally guaranteed rights' and to provide related relief.") (quoting Wyatt v. Cole, 504 U.S. 158, 161 (1992)).

[28] D.J. GALLIGAN, DISCRETIONARY POWERS 8 (1986) ("To have discretion is, then, in its broadest sense, to have a sphere of autonomy within which one's decisions are in some degree a matter of personal judgment and assessment.").

[29] The classic tension between the need to protect public officials' discretion and the desire to provide the injured party with an opportunity to seek a remedy for their injury as described by Judge Learned Hand:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Gregoire v. Biddle, 177 F.2d 579, 581 (1949).

Further, in *DeShaney* and *Castle Rock*, questions of qualified immunity[30] were not the basis for the Court's analysis.[31] Thus, because questions of individual liability in *DeShaney* and *Castle Rock* were moot, the ensuing discussions of official discretion were decided using the broader principles of federalism and state autonomy. Accordingly, the Rehnquist Court's treatment of official discretion in *DeShaney* and *Castle Rock* reflected the theory that transgression into the official's sphere of autonomy correlated with an unnecessary encroachment on the state's authority. In order to fully appreciate how these principles play out in *DeShaney* and *Castle Rock*, this section first describes the 1983 cause of action itself and then examines its uneasy relationship with the federalism principles at play in *Paul v. Davis*.

1. 1983 Due Process Litigation and the Monroe v. Pape *Revolution*

Section 1983 is the primary method by which individuals bring constitutional claims in federal court for harms inflicted by state officials and local governments acting under color of law.[32] Legislative history indicates that Congress enacted section 1983 to provide a federal remedy where state remedies were inadequate.[33] Congress debated and discussed the statute against the backdrop of state and local law enforcement's failure to protect individuals from racially motivated violence perpetrated by the Klu Klux Klan in the late nineteenth century.[34] Since 1983 effectively allows "federal courts [to] sit in judgment on the misdeeds of state officers,"[35] its intent was to permanently

[30] Qualified immunity is a judge-made doctrine grounded in common-law and applied to public officials acting in their individual capacity as a defense to § 1983. The basis for contemporary qualified immunity analysis is the Court's decision in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) which adopted the following rule: "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Thus, the threshold question is whether or not a constitutional violation has occurred. Only if a constitutional violation has been identified may the court continue in asking whether the law at the time was clearly established.

[31] DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 202 n.10 (1989) ("Because we conclude that the Due Process Clause did not require the State to protect Joshua from his father . . . we have no occasion to consider whether the individual respondents might be entitled to a qualified immunity defense, see *Anderson v. Creighton*."); *Castle Rock*, 125 S. Ct. 2796, 2802 n.3 (noting that the Tenth Circuit concluded that the individual officer's involved were entitled to qualified immunity and that Gonzales did not challenge that decision before the Supreme Court.).

[32] 42 U.S.C. § 1983.

[33] Monroe v. Pape, 365 U.S. 167, 174 (1961) (discussing legislative history of section 1983).

[34] *Id*. at 174−78 (summarizing Congressional debate surrounding the inability of states to effectively combat Klan activities); *see also* Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 WASH. L. REV. 107, 119 (1991) ("[Section 1983 was] originally known as the Ku Klux Klan Act, because it was inspired by Klan violence against blacks and their white supporters.").

[35] *Monroe*, 365 U.S. at 182.

alter the balance of power between the state and federal courts.[36] In doing so, Congress made a conscious choice to rank the interest of the individual in being adequately compensated for wrongs suffered at the hands of the state over the state's interest in maintaining autonomy outside of the federal judiciary's reach.

However, the viability of 1983 as a widely available cause of action was not realized until almost a century after its passage when the Supreme Court decided *Monroe v. Pape*[37] in 1961.[38] In *Monroe*, the plaintiff filed suit under 1983 claiming violation of his constitutional rights to be free from unreasonable search and seizure.[39] Writing for the majority and affirming the plaintiff's claim, Justice Douglas held that in passing section 1983, Congress "meant to give a remedy to parties deprived of constitutional rights"[40] and that an individual officer's actions taken in his or her official capacity were taken "'under color of' law" even if those actions were illegal.[41]

Douglas also ruled that the 1983 remedy "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[42] In that language, Douglas made clear that section 1983 is not a remedy of last resort and is not secondary to a state's interest in providing its own remedial scheme. Further, Douglas brought innumerable injuries within the scope of 1983 by ruling it should be interpreted "against the background of tort liability that makes a man responsible for the natural consequences of his actions."[43] Under *Monroe*'s interpretation of section 1983, a plaintiff should be able to bring a federal claim for relief against a state "different from and additional to what state courts would award for trespass or other common law torts."[44] Thus, in *Monroe*, state law was used in an expansive manner—and served as a guide to plaintiffs in helping them develop parallel and supplemental federal claims.

Monroe's broad reading of section 1983 is enlarged even more under a liberal reading of the Fourteenth Amendment's Due Process Clause. It makes sense that many claims brought under section 1983 are for violations of due process, whether substantive or procedural. First, section 1983 was originally part of a larger statute entitled an "Act to Enforce the Fourteenth Amendment."[45] Second, the open-ended language of the Due Process Clause

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[36] Allen v. McCurry, 449 U.S. 90, 100 (1980) (describing section 1983's intent "to change the balance of power over federal questions between the state and federal courts").

[37] 365 U.S. 167 (1961).

[38] Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts,* 72 CHI.-KENT. L. REV. 661, 664 (1997) ("It is conventional, and correct, to describe *Monroe* as clearing the way for the striking increase in 1983 litigation that has occurred over the past thirty-five years.").

[39] *Monroe*, 365 U.S. at 168.

[40] *Id*. at 172.

[41] *Id*. at 187.

[42] *Id*. at 183.

[43] *Id*. at 187.

[44] Nahmod, *supra* note 26, at 1722.

[45] Lisa J. Banks, Bray v. Alexandria Women's Health Clinic: *The Supreme Court's License for Domestic Terrorism*, 71 DENV. U. L. REV. 449, 450 n.9 (1994) ("42 U.S.C.

("nor shall any State deprive any person of life, liberty, or property, without due process of law"),[46] allows plaintiffs to potentially "turn any tort by a governmental official into a federal claim."[47] It is the specter of the federal courts being flooded with 1983 claims, and the "nationalizing purpose" of section 1983 to which the Rehnquist Court reacted.[48]

2. Setting the Stage: Paul v. Davis

The Supreme Court's fear of federal courts being overwhelmed by 1983 due process claims is most famously illustrated in *Paul v. Davis*,[49] and its holding serves as the foundation for subsequent decisions denying plaintiffs access to federal court. In addition, although *Paul* was announced prior to the new federalism decisions of the 1990s, because it involves a suit against state officials, state autonomy and federalism concepts abound throughout the opinion. Further, the Court's use of state law as a limiting principle in *Paul* foreshadows the role state law later plays in the *DeShaney* and *Castle Rock* opinions.

In *Paul*, police distributed a flier which named the plaintiff as an active shoplifter, even though he had not actually been found guilty of the crime of shoplifting.[50] Plaintiff brought a 1983 due process claim alleging that by publicly branding him a shoplifter, the police impinged upon his due process liberty rights to enter business establishments and impaired his future employment prospects.[51] Then associate Justice Rehnquist,[52]writing for the

1985(3) was passed as H.R. 320 under the title of 'Act to Enforce the Fourteenth Amendment' and is now known as the Ku Klux Klan Act. The Act was enacted in response to the racially and politically motivated violence and terror that infused the post-Civil War South. Section 1 (later codified at 42 U.S.C. 1983) of the Ku Klux Klan Act of 1871 provided a federal remedy to those deprived of their constitutional rights by persons acting under the color of law.").

[46] U.S. CONST. amend. XIV § 1.

[47] Barbara E. Armacost, *Race and Reputation: The Real Legacy of* Paul v. Davis, 85 VA. L. REV. 569, 586 (1999).

[48] Sheldon H. Nahmod, *State Constitutional Torts:* Deshaney*, Reverse-Federalism and Community*, 26 RUTGERS L. J. 949, 950 (1995).

[49] 424 U.S. 693.

[50] *Id*. at 695−96.

[51] *Id*. at 697.

[52] Rehnquist's sympathetic attitude towards state and governmental officials provides additional context from which to analyze the Court's opinion in *Paul v. Davis*. This sympathy or deference resulted in a fairly strict hierarchy of judicial values that Rehnquist rarely deviated from in his opinions, which placed a preeminent value on federalism and state autonomy and afforded individual rights little protection. *See* SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 18−19 (1989). Rehnquist was so consistent in his respect for state authority that author David L. Shapiro in his article *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976), was able to look at Rehnquist's opinions as an associate justice in 1976 and make several observations which have often been cited as accurate predictors for the positions Rehnquist would advocate in subsequent decisions. Shapiro's most relevant prediction to 1983 due process litigation was that "[c]onflicts between the individual and the government should, whenever possible, be resolved against the individual." *Id*. at 294. Accordingly, when the opportunity arose to reject the creation of

majority, was unsympathetic to the plaintiff's claim and held that "reputation alone, apart from some more tangible interests such as employment" is neither a liberty or property interest sufficient to invoke the protection of the Due Process Clause.[53] Rehnquist based his holding on the premise that since the state of Kentucky had not explicitly recognized an individual's right to his own reputation, the plaintiff in *Paul* was not actually deprived of any cognizable constitutional right entitling him to due process.[54] In other words, the "state's power is limited only by its own decisions as to which interests should be recognized and protected, since it is only deprivation of these interests that must be accompanied by procedural fairness."[55] Thus, in *Paul*, Rehnquist turned the 1983 due process claim on its head, and insisted its strength originated not from the federal constitution, but from the state itself. How did Rehnquist go about giving the state such a powerful interest in *Paul*, at the expense of the individual?

Rehnquist successfully shielded the state from liability in *Paul* by invoking the specter of the floodgates of 1983 litigation which would take over federal courts and place the state at the mercy of the individual litigant. The possibility that the 1983 claim would become too powerful and too distracting took shape in *Paul* through Rehnquist's utilization of tort language in his treatment of the plaintiff's claim.[56] Rehnquist opened the decision by remarking that the plaintiff's complaint "would appear to state a classical claim for defamation actionable in the courts of virtually every State."[57] Rehnquist then asserted that if an individual were able to bring a due process claim under 1983 for every instance where the state could be characterized as a tortfeasor, such a reading "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[58] The overall effect of Rehnquist's use of tort language in *Paul* was the promotion of state power through the characterization of 1983 as a tort statute[59] and the development of the idea that because some 1983 due process claims resemble common law torts, such actions belong in state court.[60] This entire "floodgate" analysis is buoyed by federalism principles because from the Court's perspective if the Due Process Clause were interpreted "as a font of tort

new constitutional remedies, and in the process narrow the Due Process Clause, Rehnquist gladly obliged in order to maintain "state autonomy in a federal system." *Id*. at 307.

[53] *Paul*, 424 U.S. at 701.

[54] *Id*. at 711−12 ("Kentucky law does not extend to [plaintiff] any legal guarantee of present enjoyment of reputation.").

[55] Shapiro, *supra* note 52, at 328.

[56] Nahmod, *supra* note 26, at 1728 ("In its 1976 decision in *Paul v. Davis* . . . the Court moved tort rhetoric to the foreground of its analysis.").

[57] *Paul*, 424 U.S. at 697.

[58] *Id*. at 701.

[59] Nahmod, *supra* note 26, at 1746.

[60] *Id*. at 1742.

law . . . [it] would displace traditional state authority and thereby alter longstanding balances of power in the federal system."[61]

Thus, in *Paul*, Rehnquist ranked the protection of a federalist system and the maintenance of strong boundaries between the states and the federal government ahead of the individual's interest in seeking redress for injuries suffered at the hands of the state in federal court. As a result, *Paul* moved 1983 jurisprudence away from the Court's previous proclamations in *Monroe v. Pape* and diminished the notion of 1983 as a supplemental remedy at least in the due process context. Further, where the Court in *Monroe* used state law as a model to provide plaintiffs with an expansive view of the number of federal claims they might bring under 1983, in *Paul*, the Court used state law to create its often cited "flood-gate" principle to condemn federal claims parallel or very similar to state tort claims.[62] It is the Court's use of state law as justification for the unavailability of the 1983 action that informed the Rehnquist Court's *DeShaney* and *Castle Rock* decisions.[63]

III. *DESHANEY & CASTLE ROCK*: DRAWING THE LINE BETWEEN OFFICIAL DISCRETION AND RIGHTS OF LITIGANTS

If the Rehnquist Court is forever linked in history to the promotion of federalism principles, then it will also necessarily be remembered for its unwillingness to side with the individual litigant in the most factually disturbing situations in cases such as *DeShaney* and *Castle Rock*. It is against the backdrop of such difficult cases that the tension between the need to preserve officials' discretion so that they may perform their work without the fear of constant litigation and the ability of the plaintiff to seek compensation for his or her injuries becomes so apparent. The resolution of that tension plays an important role in the Court's decision in *DeShaney* and is at the core of its decision in *Castle Rock* where the Court is asked to validate the state of Colorado's express desire to limit police discretion. Influenced by a strong sense of federalism, the Rehnquist Court made the ultimate choice to preserve official discretion. In doing so, the Court marked the boundary where the

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[61] Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 350 (1993).

[62] *See* Kristin J. Brandon, Casenote, *Taking the Tort Out of Constitutional Law: The "Constitutional Tort" of Malicious Prosecution,* Albright v. Oliver*, 114 S. Ct. 807 (1994)*, 63 U. CIN. L. REV. 1447, 1457 (1995) ("The Court [in *Paul v. Davis*] emphasized that the Due Process Clause should not be 'superimposed' upon the various state law torts.")

[63] That is not to say, however, that *Paul v. Davis* is the only major due process Supreme Court case affecting the scope of section 1983 and due process analysis. *See generally* Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) which when read together stand for the proposition that no 1983 due process claim is available where an official engaged in a random, unforeseeable act (either unintentional or intentional) and a post-deprivation remedy was available under state law. Other significant developments in the Court's due process analysis include Daniels v. Williams, 474 U.S. 327 (1986) which held that negligent acts cannot be deprivations of life, liberty, or property in violation of due process. For an overview and critique of these decisions see generally Fallon, *supra* note 61. Such analysis, however, is outside of the scope of this Comment.

official's right to be free from suit begins and the litigant's right to access federal courts ends, even where state law spoke to the contrary.

A. DeShaney*: Substantive Individual Rights vs. State Official Discretion*

1. DeShaney *Revisited*

The *DeShaney v. Winnebago County Department of Social Services*[64] decision plays an important role in the creation of the Rehnquist Court's legacy not only because it reinforces the notion of a marginalized 1983 due process claim as set forth in *Paul v. Davis*,[65] but it also dictates the outcome in the *Castle Rock* some sixteen years later. In *DeShaney*, county authorities placed four year-old Joshua DeShaney in the care of his father even though he had a history of abusing his son.[66] Over the ensuing six month period in which Joshua was in his father's custody, county officials noted that Joshua had "a number of suspicious injuries" and that at least once Joshua had been treated in the emergency room for suspected child abuse.[67] Still, the county did not remove Joshua from his father's home and eventually the elder DeShaney beat four year old Joshua so severely he suffered permanent and severe brain damage.[68] Subsequently, on behalf of Joshua his mother filed a 1983 claim alleging that the county's failure to remove Joshua from an abusive situation had deprived her son of his liberty without due process of law.[69]

2. The Role of Official Discretion: Fear of Displacing Traditional State Functions

Although Chief Justice Rehnquist, writing for the majority, noted that Joshua's situation was "undeniably tragic,"[70] he nevertheless held that the county's inaction did not deny Joshua's his right to liberty under the Fourteenth Amendment Due Process Clause. The majority drew a sharp distinction between state inaction and the acts of private party and held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[71] The weight of *DeShaney*'s holding rested heavily on a desire to protect and preserve state official discretion. As Rehnquist argued, if child services had moved to take Joshua from his father too early, they would have been liable under the Due Process Clause for "improperly intruding into the parent-child relationship."[72]

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[64] 489 U.S. 189 (1989).

[65] Eaton & Wells, *supr*a note 34, at 136 (discussing that both *Paul* and *DeShaney* reflect the Court's uneasiness with making 1983 due process claims sources of "tort recovery.").

[66] 489 U.S. at 192−93.

[67] *Id*.

[68] *Id*. at 193.

[69] *Id*.

[70] *Id*. at 191.

[71] *Id*. at 197.

[72] *Id*. at 203.

In drawing attention to the issue of official discretion, Rehnquist asked us to step back and not only feel sympathy for Joshua, but also for the official in question. Such sympathy reflects the high value the Rehnquist Court attributed to maintaining official discretion, even in the most unfortunate instances.[73] This reverence for official discretion as suggested by the Court also posited that it may be inappropriate to turn every instance of a questionable exercise of official discretion into a constitutional error because it would be ineffective in addressing the greater institutional failure.[74] The Court then directed Joshua to look to state law to remedy his injuries, and in the process deferred to local authorities as the entity in the best position to "respond to the delicate social problem of child abuse."[75] Thus, ultimately the Court's concern for official discretion in *DeShaney* reflects a federalist desire to preserve traditional state roles and prevent the federal government from intruding where it arguably should not be.[76]

3. The Role of State Law: Echoes of Paul v. Davis

By focusing the discussion on issues of state law in *DeShaney*, the Court was empowered to narrow the scope of 1983 in two ways. First, just as in *Paul*, state law in *DeShaney* was relied upon to conjure up the image of federal courts being flooded with state tort claims. For instance, while Rehnquist acknowledged that the state may have acquired a duty by voluntarily undertaking a protective role towards Joshua, he cautioned that the Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation."[77] The specter of reducing the Fourteenth Amendment

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[73] *See* Benjamin Zipursky, DeShaney *and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1109 (1990) (referring to Rehnquist's discussion of official discretion in *DeShaney*:

> This argument apparently aims to show that the result reached by the Court, although at first appearance harsh, was not fundamentally unfair. Moreover, it is careful to remind us that the respondents had not directly inflicted harm on Joshua and had performed within a delicate context in which one too many interventionist steps would have exposed them to a different set of liabilities. In addition to raising some sympathy for the respondents, these remarks shift the focus of the opinion to more general questions about social-worker liability.

[74] Charles R. Wise & Robert K. Christensen, *Sorting Out Federal and State Judicial Roles in State Institutional Reform: Abstention's Potential Role*, 29 FORDHAM URB. L.J. 387, 419 (2001) (regarding the Court's discussion of official discretion in *DeShaney*: "[T]he attempt to eliminate error by making every injury a constitutional issue will not eliminate error from the administration of programs.").

[75] Eaton & Wells, *supra* note 34, at 130−31 (discussing the tradeoff the Court made in DeShaney which sacrificed Joshua's interests in favor of state discretion); Nahmod, *supra* note 26, at 1747 (finding that the Supreme Court in *DeShaney* was worried about the effect of federal judicial intervention on the "displacement of state and local decisionmaking.").

[76] William W. Watkinson, Jr., *Shades of* DeShaney*: Official Liability Under 42 U.S.C. § 1983 for Sexual Abuse in the Public Schools*, 45 CASE W. RES. L. REV. 1237, 1270−71 (1995) (arguing the Court's reverence for official discretion in *DeShaney* was done in the interest of preserving state autonomy and strong federalism principles).

[77] *DeShaney*, 489 U.S. at 202.

to a font of tort litigation[78] that Rehnquist was so concerned about in *Davis* loomed over the result in *DeShaney*.

Second, the Court in *DeShaney* used state law as a justification for its seemingly harsh decision because it allowed the Court to recognize that Joshua should have some venue in which to bring his claim. It is at the state level, Rehnquist asserted, that the people of Wisconsin could provide litigants such as Joshua an appropriate remedy through state tort law.[79] This solution overlooks the role that *Monroe v. Pape* carved out for 1983 claims to serve as an alternative or supplementary cause of action, not one of last resort. Forcing Joshua into state court is also slightly disingenuous, since remedies under state tort law in Wisconsin at the time *DeShaney* was decided were difficult to obtain against government officials and arguably inadequate since the state capped plaintiff's tort recovery at a rather low threshold.[80]

Accordingly, *DeShaney* laid the groundwork for the outcome in *Castle Rock* because it expressed a desire to preserve official discretion even in the most egregious instances and relied on state law as a limiting factor in determining the applicability of section 1983 to the plaintiff's claim. These themes serve as the foundation for the Rehnquist Court's decision in *Castle Rock*. *Castle Rock* picks up where *DeShaney* left off, and addresses the availability of any *procedural* rights an individual may have resulting from seeking protection from a private third party by relying on police enforcement of a mandatory restraining order.

B. Castle Rock*: Procedural Individual Rights vs. State Official Discretion*

The facts in *Town of Castle Rock v. Gonzales*[81] are as horrible and tragic as the facts in *DeShaney*.[82] The plaintiff in *Castle Rock*, Jessica Gonzales, suffered a terrible personal loss—her children were kidnapped and killed by her husband in violation of a court issued restraining order. Consequently, she brought a 1983 procedural due process claim against the city for the failure of its police officer's to enforce the "mandatory" restraining order.[83] Gonzales was forced to bring a procedural due process claim because the Court's decision in *DeShaney* foreclosed any substantive due process challenge to the

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[78] Paul v. Davis, 424 U.S. 693, 701 (1976).

[79] *DeShaney*, 489 U.S. at 203.

[80] *See* Eaton & Wells, *supra* note 34, at 134 (discussing the remedies Joshua could have obtained at the state level in Wisconsin at the time of his injuries: "In Joshua's case, for example, a Wisconsin Court might deny a tort claim by characterizing the caseworker's decision not to intervene as discretionary. Even if the claim was not barred on this ground, a Wisconsin statute places a $50,000 ceiling on tort recovery against government subdivisions or agencies."); *see also* Jack M. Beerman, *Administrative Failure and Local Democracy: The Politics of* DeShaney, 1990 DUKE L.J. 1078, 1109−10 (1990) (noting that state law often "discriminates against claimants who seek damages against government officials for tortious conduct.").

[81] 125 S. Ct. 2796 (2005).

[82] Even Justice Scalia, writing for the majority in *Castle Rock* agreed. *See id*. at 2800 (describing the facts in *Castle Rock* as "horrible.").

[83] *Id*. at 2800, 2804.

state's failure to protect the life and liberty of an individual from the acts of a private citizen.[84] Not surprisingly, the Rehnquist Court denied Gonzales' 1983 procedural claim, leaving state remedies as her only potential recourse.[85] As a result, the decision in *Castle Rock*, when read in conjunction with *DeShaney*, confirms that there is no constitutional duty "to provide protection except in circumstances where the government literally creates the danger."[86] In addition, the Rehnquist Court's refusal to impose such a constitutional duty on the government cemented its legacy as unwilling to yield to the individual litigant where an official's exercise of discretion is threatened.

1. Castle Rock*'s Tortured Facts*

Jessica Gonzales obtained a restraining order from a Colorado trial court in conjunction with her divorce proceedings in May, 1999.[87] The restraining order, which the court made permanent in June, 1999, gave Gonzales' husband the right to spend time with their three daughters (aged 10, 9, and 7) on alternative weekends and upon reasonable notice for a mid-week dinner visit.[88] The restraining order called for mandatory enforcement by police and stated on its face that law enforcement officials "*SHALL* USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER."[89] The order complied with a directive from the Colorado state legislature which statutorily defined the duties of a police officer in responding to violations of domestic restraining orders.[90] Colorado's mandatory restraining order enforcement statute dictated that a police officer, upon probable cause of a violation "s*hall* use every reasonable means to enforce a restraining order."[91] The Colorado statute was modeled after a number of similar state statutes which sought to address lax enforcement of domestic restraining orders by police officers—

[84] *Id*. at 2803 (discussing that the opinion in *DeShaney* left the question of procedural due process attacks on state inaction unanswered).

[85] *Id*. at 2810.

[86] Chermerinsky, *supra* note 1, at 354.

[87] *Castle Rock*, 125 S. Ct. at 2800.

[88] *Id*. at 2801.

[89] *Id*. (emphasis added, all capitals in original). The notice of law enforcement printed on the back of the restraining order reads in is entirety:

> YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLY CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER.

[90] *Id*. at 2805.

[91] *Id*. (emphasis added).

many of whom viewed domestic violence as a "private, 'family' matter" where arrest was only to be used as a "last resort."[92]

With the mandatory restraining order in place, on June 22, 1999 Gonzales' husband took the three children from the family home front yard without advance notice.[93] Suspecting that her husband had taken the children, Gonzales called the Castle Rock Police department at 7:30 p.m.[94] Gonzales showed the officers dispatched to her home a copy of the mandatory restraining order and requested that it be enforced.[95] However, despite the mandatory notice language printed on the back of the order, the responding police officers took no action and advised Gonzales to call if her husband had not returned the children by 10 p.m.[96] Around 8:30 p.m. Gonzales' husband called to say he had the children at an amusement park, at which point Gonzales called the police department and demanded that the police put out an all points bulletin for her husband and check the amusement park where he allegedly had taken the children.[97] The police once again told her to wait until 10:00 p.m. to call back—however, when she did, the police refused to take any action on what was now an obvious violation of the restraining order by Mr. Gonzales.[98] Finally, a little after midnight, Gonzales went to the police station and submitted an incident report, which elicited no response by the police and resulted in no attempt on the police department's behalf to enforce the mandatory order.[99] At three in the morning, Mr. Gonzales showed up at the police department and opened fire.[100] The Castle Rock police shot and killed Mr. Gonzales[101] and then discovered the bodies of his three children in his truck whom he had already murdered.

Jessica Gonzales filed a 1983 claim against the Town of Castle Rock claiming the police had violated her Fourteenth Amendment right to procedural due process by failing to respond properly to the restraining order violation.[102] The Tenth Circuit upheld held her claim and found Gonzales had a protected property interest in the "enforcement of the terms of her restraining order" and that the town had "deprived her of due process because the police never 'heard' nor seriously entertained her request to enforce and protect her interests in the restraining order."[103] Writing for the majority, Justice Scalia reversed the Tenth

[92] *Id*. at 2817 (Stevens, J., dissenting). For a comprehensive discussion of the nationwide movement to develop mandatory enforcement of domestic restraining orders, see Justice Stevens' dissent at 2817−18.

[93] *Id*. at 2801.

[94] *Id*.

[95] *Id*.

[96] *Id*.

[97] *Id*. at 2802.

[98] *Id*.

[99] *Id*.

[100] *Id*.

[101] *Id*.

[102] *Id*.

[103] *Id*. For a comprehensive discussion of the Tenth Circuit's decision, see Michael Mattis, *Protection Orders: A Procedural Pacifier or a Vigorously Enforced Protection Tool?*

Circuit and refused to recognize that Colorado state law gave an individual a property right in police enforcement of a mandatory restraining order.[104] The Court couched its opinion in terms of preserving government official discretion.[105] Accordingly, the decision in *Castle Rock* is particularly enlightening because it presented a situation where issues of state law and official discretion directly conflict—and the inability of state law to trump official discretion was formally announced. It is in that sense that *Castle Rock* closes the chapter started in *DeShaney* and revealed that the role of state law in the Rehnquist Court's decision making process was ultimately a yardstick by which to measure the strength of the Court's own federalism doctrine.

2. The Tradition of Discretion

In denying that Colorado law granted Gonzales a property right in the enforcement of Gonzales' restraining order, the Court spent considerable time describing the long tradition of police discretion and its relationship to other mandatory enforcement laws.[106] Scalia, writing for the majority, referred to law-enforcement discretion as a "deep-rooted"[107] principle and accordingly could not imagine a mandatory statute where "a Colorado peace officer would not have some discretion to determine that—despite probable cause to believe a restraining order has been violated—the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance."[108] The Court found that preserving police discretion was a valuable concept warranting much deference that could not be negated by the strong mandatory language in the underlying Colorado statute and the order itself. Justice Scalia argued that "a true mandate of police action would require some stronger indication from the Colorado Legislature" than the use of mandatory language such as "shall."[109]

Just as in *DeShaney*, the Court in *Castle Rock* drew the line at protection of official discretion, especially where the official did not directly cause the alleged harm. It is only from that point where the Court began to consider the rights of the individual litigant in accessing federal court. The lesser value that the Court ascribed the litigant becomes clear after exploring the Court's refusal to abide by the explicit wishes of the Colorado legislature to limit official discretion.

3. Where Official Discretion and State Law Meet

The import that the Court is unwilling to place on Colorado state law which explicitly sought to limit official discretion reflects the dominant influence of federalism in its 1983 analysis, and becomes more apparent upon a

A Discussion of the Tenth Circuit's Decision in Gonzales v. Castle Rock, 82 DENV. U. L. REV. 519 (2005).

[104] *Castle Rock*, 125 S. Ct. at 2810.

[105] *Id*. at 2806.

[106] *Id*. at 2806−08.

[107] *Id*. at 2806.

[108] *Id*.

[109] *Id*.

comparison between the Tenth Circuit's adjudication of Gonzales' claim and the Rehnquist Court's approach. By framing the police discretion discussion through the lens of the individual property right at stake, the Tenth Circuit held that because the restraining order so clearly spelled out the objective steps a police officer must take in enforcing it, "an officer's determination of probable cause is not so discretionary as to eliminate the protected interest asserted here in having the restraining order enforced according to its terms."[110] The Tenth Circuit found that any other result "would render domestic abuse restraining orders utterly valueless."[111]

The Supreme Court vehemently disagreed with the Tenth Circuit's approach, labeling it "sheer hyperbole."[112] The Court viewed the Gonzales' attempt to characterize her injury as a violation of procedural due process as "novel"[113] and refused to construe state law in a manner that would permit the break down of the federalist system. In doing so, the Court read the word "shall" in the restraining order statute as a space filler of sorts, and cited other statutory schemes where seemingly mandatory language created no duty on the official in question to dispense with the proper exercise of discretion.[114] Further, the Court stated that even if the statute's language was "mandatory," it at most conferred a benefit on the society at large which has an interest in the preservation of public safety, but did not grant Gonzales as an individual any right to enforcement of the restraining order taken in her name.[115]

The lengths to which the Court went to interpret the Colorado restraining order statute as advisory in nature rather than a mandatory limit on the bounds of police discretion illustrates the degree to which the Court felt preservation of the official sphere of autonomy furthered the preservation of state autonomy and conformed with its federalism doctrine. Thus, it seems that the debate swirling around the police officers' individual actions in *Castle Rock* had more to do with preventing the invasion of traditional state powers by the federal

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[110] Gonzales v. City of Castle Rock, 366 F.3d 1093, 1106 (10th Cir. 2004).

[111] *Id*. at 1109.

[112] *Castle Rock*, 125 S. Ct. at 2805.

[113] *Id*. at 2809 ("The creation of a personal entitlement to something as vague and novel as enforcement of restraining orders cannot 'simply go without saying.'").

[114] *Id*. at 2806 ("That language is not perceptibly more mandatory than the Colorado statute which has long told municipal chiefs of police that they 'shall pursue and arrest any person fleeing from justice in any part of the state' and that they 'shall apprehend any person in the act of committing any offense . . . and, forthwith and without any warrant, bring such person before a . . . competent authority for examination and trial.'").

[115] *Id*. at 2808 ("Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people . . . The serving of public rather than private ends is the normal course of the criminal law"). Scalia's argument that Gonzales could not recover for a right available only to the public at large is similar to the Court's efforts to deny plaintiffs standing for generalized grievances. *See* John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANSNAT'L L. 73, 95−108 (2002) (arguing that federalism and standing concerns influenced the Court's decision to adopt and maintain a narrow standing doctrine which limits the relief available to plaintiffs injured by state action).

government and less to do with resolving an officer's responsibilities and duties toward the citizen seeking their assistance.

While the Court's federalism doctrine advanced in *Castle Rock* did not yield to state law in matters of interpretation, it did cite state law as a limiting principle—as a harbinger of the floodgates of litigation and as a justification of sorts for denying Gonzales access to federal court. At the end of its opinion, the Court reiterated its reluctance to "treat the Fourteenth Amendment as 'a font of tort law.'"[116] Although this *Davis*-inspired language is only a small part of *Castle Rock's* reasoning, its presence in the city of Castle Rock's and amicus briefs[117] confirms that federalism concerns were a factor in the Court's adjudication of Gonzales' 1983 due process claim. In addition, just as in *DeShaney* where Rehnquist suggested Joshua turn to the state to compensate him for his injuries, Scalia argued in *Castle Rock* that denial of Gonzales' claim in federal court "does not mean that States are powerless to provide victims with personally enforceable remedies."[118] Thus, the concept of state law as the primary tool to resolve the conflicts between the state and the individual is repeated and relied upon by the Court in *Castle Rock*. Such a use of state law serves to lessen the blow of the Court's denial to Gonzales' request to seek relief in federal court.

Accordingly, the outcome in *Castle Rock* demonstrates federalism's impact on the Rehnquist Court's resolution of official discretion issues in 1983 due process claims. Federalism's influence becomes apparent in the Court's refusal to acknowledge the state's express desire to statutorily limit official discretion. Even though the state itself was willing to re-draw the boundaries of official discretion, the Court could not because to do so would endanger its own traditional notions of federalism and state power. Thus, the effect of the Court's decision in *Castle Rock* was the preservation of strong state boundaries that once again moved 1983 jurisprudence away from its former incarnation under *Monroe* as a broadly available supplemental remedy.[119] Accordingly, it is the state forum where Gonzales' conflict with the police began, remained, and will stay—with the federal government unwilling to become involved.

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[116] *Id*. at 2810.

[117] *See* Opening Brief for Petitioner at 35, Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796 (2004) (No. 04-278), 2004 WL 3007308 ("Under the Tenth Circuit's reasoning, countless other statutes already on the books will give rise to constitutional claims asserting procedural due process violations whenever the police or other governmental officials are unsuccessful at thwarting private violence."); Brief for International Municipal Lawyers Association et al. as Amici Curiae Supporting Petitioner at 9-10, Town of Castle Rock Colo. v. Gonzales, 125 S. Ct. 2796 (2004) (No. 04-278), 2004 WL 3038117 ("[T]he federal courts would see their dockets swell because there would be no reason and no incentive for citizens who believe that their rights have been violated through the inaction of local government to use the state courts to press a tort claim for redress of their grievance.").

[118] *Castle Rock*, 125 S. Ct. at 2810.

[119] *See* discussion, *supra* at p 8–10.

IV. THE LEGACY: WHERE OFFICIAL DISCRETION BEGINS AND ACCESS TO FEDERAL COURT ENDS

The immediate impact of the Rehnquist Court's new federalism legacy is the black-letter law derived from *DeShaney* and *Castle Rock*. Reading the two opinions as companions, it becomes immediately clear that no matter whether the claim is labeled as a substantive or procedural violation, and no matter the degree of governmental intervention, state officials and local governments have no constitutional duty to protect the individual from harm inflicted by private actors.[120] The restriction of the 1983 remedy in both cases also permanently narrows the scope of the Fourteenth Amendment's Due Process Clause because it "allows the state affirmatively to invade that interest."[121] Thus, the Rehnquist Court's decisions in *DeShaney* and *Castle Rock* not only marginalized the federal cause of action itself, but reduced or restricted the number of individual rights protected by the constitution.

The legacy left by *DeShaney* and *Castle Rock* also speaks to the overall import of official discretion in the adjudication of 1983 claims, especially where the connection between the official's involvement and the injury inflicted is tenuous at best. In both *DeShaney* and *Castle Rock*, the Court articulated its federalism concerns through its reverence for official discretion. This reverence is so strong, that in *Castle Rock*, the Court was unwilling to undercut official discretion even where the state sought expressly to limit it. Thus, the Roberts Court is left with considerable mandate to preserve official discretion and delegate similar conflicts to the state.

On a more generalized level, the Rehnquist Court's legacy affects a litigant's strategy in making successful 1983 claims against state officials and local governments. In order to bring a potentially successful 1983 claim for a Fourteenth Amendment Due Process violation, especially where an aspect of official discretion is in issue, a litigant must first try to distinguish his or her claim as much as possible from traditional tort claims. In addition, litigants should not limit their quest for relief to the court system—they should also consider the political process as another avenue to obtain redress for their injuries.

For instance, after *Castle Rock* was announced, Lenora Lapidus, Director of the ACLU Women's Right's Project stated: "The Supreme Court's ruling makes it clear that state legislatures must take the lead in protecting victims of domestic violence and pass laws that will hold police accountable for taking protection orders seriously."[122] Thus, after *DeShaney* and *Castle Rock*,

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[120] Chermerinsky, *supra* note 1, at 354.

[121] Kevin J. Hamilton, *Section 1983 and the Independent Contractor*, 74 GEO. L.J. 457, 465 n.76 (1985). Conversely, *see* Nahmod, *supra* note 26, at 1740 ("Because § 1983 provides a remedy for violations of the fourteenth amendment, every decision narrowing the scope of the fourteenth amendment also narrows the scope of § 1983.").

[122] Press Release, American Civil Liberties Union, ACLU Disappointed with the Supreme Court Ruling on Domestic Violence Orders of Protection (June 27, 2005) (on file with author).

concerned citizens should lobby to make state judicial systems more amenable to providing adequate remedies for injuries inflicted by state officials. In order to be effective, plaintiffs would have to seek changes to state immunity laws and lobby for special exceptions to the low caps on damages or almost blanket immunity that some states use to protect their employees from suit.

More specifically, the Rehnquist Court's decision in such cases as *DeShaney* and *Castle Rock* to place such a paramount value on official discretion even when the facts are so terrible and where the state expressed a desire to do otherwise, leaves the successor Court a very strong federalism doctrine from which to defeat 1983 claims. This is because if federalism prevails against the backdrop of such horrific injuries, it will certainly prevail in less dire circumstances. While this Comment does not argue that the Court should have based its ruling in either *DeShaney* or *Castle Rock* purely on sympathy for the plaintiffs' horrible situations, alternatives to the rigid attention paid to federalism principles were available. The Court could have at the very least given more weight to the individual's interests, perhaps recognizing principles of fundamental justice.[123] Or the Court could have recognized that there are instances in which official discretion should be limited and the 1983 remedy is the proper mechanism by which to establish those limits in the appropriate circumstances.[124]

However, given the conservative majority of the Roberts Court, it is unlikely that this approach to 1983 due process litigation will be much altered.[125] *DeShaney* was a 6-3 decision,[126] and *Castle Rock* was 7-2.[127] If anything, the numbers by themselves demonstrate that *Castle Rock* reinforced *DeShaney*'s core holding and that there is not an up swell of support for reversal of either case. Further, there is nothing in Chief Justice Roberts[128] or Justice Alito's background[129] which suggests they would approach the holdings

[123] *See* DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 212-13 (1989) (Blackmun, J., dissenting) (known as the "Poor Joshua!" dissent, Blackmun discusses the role moral judgment plays in the law).

[124] *See* James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 450 (2003) (describing the prevailing assumption "that constitutional tort actions are only valuable to the extent that they compensate and deter rights violations" as "incomplete." Park argues that instead, 1983 should also be viewed as a "remedy establishing limits on government officials' discretion to inflict injury.").

[125] *See* Chermerinsky, *supra* note 1, at 354 (arguing that "anyone appointed by President George W. Bush likely would be similar to Rehnquist in ideology and voting behavior on the Court."); *see also* Mark Tushnet, *Understanding the Rehnquist Court*, 31 OHIO N.U. L. REV. 197, 209 (2005) (predicting "A Supreme Court remade with two or three appointments drawn, as they are highly likely to be, from the modern Republican Party, will be a consistently conservative Court.").

[126] *DeShaney*, 489 U.S. at 203 (Brennan, Blackmun and Marshall, JJ., dissenting).

[127] Town of Castle Rock, Colo. v. Gonzales, 125 S. Ct. 2796, 2813 (2005). (Stevens and Ginsberg, JJ., dissenting).

[128] Prior to assuming the role as Chief Justice, John Roberts served as a federal appeals judge for just two years. As a result his paper trail is fairly short.

[129] For an in-depth discussion of Justice Alito's judicial pedigree see ALLIANCE FOR JUSTICE, REPORT ON THE NOMINATION OF SAMUEL A. ALITO TO THE UNITED STATES SUPREME COURT (2004), www.supremecourtwatch.org/alitofinal.pdf. Although the report takes a

of *DeShaney* or *Castle Rock* any differently and therefore alter the course already charted by the Rehnquist Court.

V. CONCLUSION

As this Comment demonstrates, the successive evaluation and critique of the Rehnquist Court's legacy, particularly in the realm of federalism, should focus not only on the distribution of power between levels of government, but also on the balance of power between the state and the individual as it plays out in 1983 due process litigation. Federalism's impact on the relationship between the state and its citizens is great in *DeShaney* and *Castle Rock* because it is the foundation for the Rehnquist Court's ultimate determination that that the government has no constitutional duty to protect the individual from harm inflicted by private actors, no matter the degree of the state's involvement in the situation giving rise to the injury. The Rehnquist Court arrived at that decision by drawing a distinct line over which it felt the plaintiff and the state could not step in challenging official discretion. The line drawn by the Rehnquist Court is arguably permanent, as not even state law expressing a desire to limit discretion could overcome the Court's fear that an intrusion into the official's sphere of autonomy would lead to a weakening of its federalism doctrine.

decidedly anti-Alito position, it does provide insight into Alito's judicial philosophies. *See id*. at 35 ("One of the first things that commentators noted about Judge Alito was his strong belief in the federalism revolution of the 1990s."); *see also id.* at 54−58 for a discussion of Alito's conservative adjudication of due process claims.