Intertextuality in *Castle Rock v. Gonzales*: Legal language and the perpetuation of intimate partner violence

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1 Introduction

Gender-based violence is a public health crisis in the United States, yet there is a limited response within the legal system (Rosenfeld, 2022). This is particularly clear in certain Supreme Court cases that deny women the right to challenge gender-based violence under federal law. Specifically, the case *Castle Rock v. Gonzales,* 545 U.S. 748 (2005) determined that victims of intimate partner violence (IPV) have no right to the enforcement of a court issued restraining order even if they live in a state with a law mandating that enforcement.

Research on language and the law has examined how language is used to effect power (Conley et al., 2019). With respect to the connection between language and gendered violence in the legal system and the language of court decisions, many researchers have investigated intertextuality in the reproduction of patriarchal ideologies and the construction of legal authority (e.g., Andrus, 2011; Bakhtin, 1981; Conway, 2003; Ehrlich, 2012, 2016; Mertz, 1988). Thus, in the current study I investigate the use of intertextuality in the opinions of the case *Castle Rock v. Gonzales* to determine if and how language practices perpetuate the lack of response to IPV within the legal system.

The following sections discuss the history of IPV in the United States (1.1), as well research on language and the law focused on gender-based violence (1.2) and on intertextuality in legal texts (1.3). The current study is introduced in Section 1.4, and the background information on *Castle Rock v. Gonzales*, the data, and the analysis framework are described in Section 2. Sections 3 through 6 present the analysis results, and Section 7 concludes the paper.

1.1 Prevalence and history of intimate partner violence in the United States

Intimate partner violence (IPV) – and violence against women in general – is extremely prevalent in the United States, and there is a lack of (effective) interventions. More specifically, the National

Network to End Domestic Violence found that in a 24-hour period (September 6, 2023) domestic violence programs in the United States received 90,310 requests for services, typically for emergency shelter. Of these requests, 13,335 were not met because the responding organizations lacked sufficient resources (NNEDV, 2024, p. 2). Further, across the country an average of three to four women a day are murdered by a current or former partner (NNEDV, 2024, p. 5; Rosenfeld, 2022, p. 16). However, the legal system does not seem to offer a solution. This situation may be best described by Diane Rosenfeld from her experience as the acting chief of the Women's Advocacy Division of the Illinois Attorney General's Office:

> The United States has built and staffed specialized courtrooms filled with terrorized and terrified women desperately pleading for protection from their intimate partners. And rather than provide them with any meaningful help, our system is set up to make it their own responsibility to keep themselves safe[1].
>
> (Rosenfeld, 2022, p. 4)

Rosenfeld (2022) argues that the high rates of IPV and lack of response in the legal system are the result of the legal history of marriage in the United States. First, the Fourth Amendment of the US Constitution protects people from unreasonable search and seizure, which in the context of family traditionally protects men from government interference. Second, the doctrine of coverture, as described by Sir William Blackstone (1765-69), determined that a woman's legal identity merged with that of her husband at marriage. This was the law in the United States until the mid 1800s when new laws were passed allowing women to own property. Additionally, statutes of chastisement gave men permission – and even the duty – to physically "chastise" their wives.

[1] However, when women kill their abusive partners, courts generally do not consider the years of abuse as evidence towards self-defense. Because of this, 92% of women currently in prison are considered to have credible claims of self-defense (Rosenfeld, 2022, pp. 47-57).

Blackstone described civil laws as "allowing [a husband]…to beat his wife severely with scourges or cudgels" (p. 433). Together, these concepts gave men the right to beat their wives without intervention from the state. Although laws have changed and wife beating is no longer legal, the "patriarchal agreement of non-intervention" remains, making new laws "largely ineffectual" (Rosenfeld, 2022, p. 39). The burden for a woman's safety continues to be on the woman herself rather than on the men committing crimes even though the men are under the jurisdiction of the government, which could hold them accountable.

Additionally, research has shown that when women attempt to leave an abusive relationship, they face stalking and murder/suicide threats from their ex-partners (Rosenfeld, 2022). In fact, at least half of women leaving abusers are further attacked by them, and one study has shown that more than half of the men who kill their partners do so once they are separated (Mahoney, 1991). Mahoney (1991) terms this *separation assault*, which is partner violence with the purpose of preventing or retaliating for a separation. It is violence triggered by the separation but can remain ongoing and escalate after the separation. Because of the expectation that offenders will violate orders of protection, there are stalking laws in every state, but both orders of protection and stalking laws are not consistently enforced (Rosenfeld, 2022, p. 56).

Despite this, two United States Supreme Court cases have determined essentially that women have no right to challenge male violence at the level of federal law. First, in *United States v. Morrison et al.,* 529 U.S. 598 (2000), the Court concluded that Congress did not have the authority to enact elements of the Violence Against Women Act of 1994 that provided a federal civil remedy for victims of gender-based violence. In *Castle Rock v. Gonzales,* 545 U.S. 748 (2005) the court determined that restraining orders in Colorado are discretionary in nature, despite a state statute mandating their enforcement. This means that "under US law, you have no right to enforcement of

your order of protection, even if you live in a state that has a specific law mandating such enforcement" (Rosenfeld, 2022, p. 92).

Since language is a mechanism through which legal power is "realized, exercised, reproduced, and occasionally challenged or subverted" (Conley et al., 2019, p. 190), linguistic research in various legal contexts in North America has provided insight into the continued prevalence of gender-based violence. However, few studies have investigated how language at the highest level of law functions to perpetuate a patriarchal legal and social system, and no studies have investigated *Castle Rock v. Gonzales*, specifically.

1.2 Language and intimate partner violence in the legal sphere

Some of the research on language and the law in North America focuses on how the dominant legal discourse is patriarchal, so women are talked about and acted upon as subordinate to men (Conley et al, 2019). For example, several studies show that IPV and rape trial discourse restricts women's agency, constructs real rape as only stranger rape rather than acquaintance rape, conflates silence with consent, and treats women as fundamentally untrustworthy (e.g., Andrus, 2010; Ehrlich, 1998, 2008; Hildebrand-Edgar & Ehrlich, 2017; Matoesian & Gilbert, 2018). Additionally, studies show that police officers' narratives tend to dismiss the culpability of perpetrators and pathologize and/or blame victims for staying in abusive relationships, while they frame their own behavior in terms of law and procedure (Andrus, 2019; Andrus & Clawson, 2022). Other studies investigate descriptions of violence by perpetrators of IPV and find that they use various linguistic strategies to minimize or justify their violence, and in doing so they negotiate their identity in relation to hegemonic masculinity and discourses of male entitlement (e.g., Anderson & Umberson, 2001; Ehrlich & Levesque, 2011; Mullaney, 2007; Schrock & Padavic, 2007; Wood, 2004). Finally, some studies have looked at women's interviews with

paralegals/volunteers when applying for restraining orders. These studies have found that the way women themselves talk about their experiences is not well understood by the interlocutor, which puts the institutional record at risk. This includes women's descriptions of sexual violence and family in the context of IPV, as well as their use of non-standard language varieties and euphemisms (e.g., Trinch, 2001, 2006, 2011, 2013). Thus, studies in a range of contexts with various approaches (e.g., critical discourse analysis, narrative analysis, linguistic ideology) suggest that patriarchal discourses pervade the legal system, undermining women's right to safety.

In addition, many studies have examined the role of intertextuality in discourses of gender-based violence and found that the use of intertextual references impacts people's understanding of IPV by shaping legal evidence and reproducing patterns of inequality. Intertextuality refers to the interrelationships between utterances, languages, speech types, etc. that exist in discourse; every utterance has linguistic norms, social/historical context, and heteroglossia or the interweaving of different voices in a single text (Bakhtin, 1981; Kristeva, 1986).

In trial settings, participants use intertextuality to present evidence in a way that ignores contexts of IPV and sexual violence (Andrus, 2010, 2011; Ehrlich, 2012, 2016; Matoesian, 1999). For example, in the murder trial of Teresa Craig who killed her abusive husband while he slept, the prosecution used intertextuality to argue that her violence was premeditated murder instead of self-defense (Slinkard & Ehrlich, 2020). The prosecution quoted Teresa saying "Enough is enough, get rid of him" during her interview with the police, but the judge recontextualized this utterance as something Teresa thought prior to killing her husband. The prosecution's argument was also reproduced in news articles with pseudo quotes and blurring of sources. That is, they gave the impression that they quoted Teresa directly but in fact misrepresented her utterances or attributed utterances to her that were spoken by the police. This ignores the context of actions occurring

within a violent relationship, and it shapes the public perception of women who kill their partners in general, which reproduces sexist understanding of IPV. Similarly, recontextualizations of utterances in trials can transform events of IPV into other types of violence. For example, in one case, police officers responded to a domestic violence call, and the victim – Mrs. Hadley – ran out of the house and supposedly said, "He has a gun, and he is going to kill me" (Andrus, 2010, 2011). Mr. Hadley was charged with felony possession of a firearm rather than assault, and Mrs. Hadley's utterance was included as evidence (under the excited utterance hearsay exception). Her utterance was recontextualized as a single moment involving a gun rather than as part of on-going discursive event within the history of the Hadley's relationship. Together these studies demonstrate that recontextualizations in trial discourse (and their representation in the media) can sensationalize women's self-defense and can conflate IPV with other forms of violence, which "makes the social problem of domestic violence invisible in the law and keeps the legal status of domestic assault low" (Andrus, 2010, p. 80; Slinkard & Ehrlich (2020).

Other studies look at the presence of intertextuality in victim/survivors' narratives of IPV. These studies suggest that women entextualize normative discourses about family and use reported speech/intertextuality to negotiate their credible, victim identity with varying consequences. Specifically, the idea that children need both a mom and dad is a culturally recognizable, status quo notion of families, and participants in one study include this discourse in their narratives as reasons for staying in relationships (Andrus, 2021). In their descriptions of leaving relationships, they comment on the status quo then explain why leaving was a necessity through descriptions of severe violence, which presupposes that a relationship should remain whole. The intertextual links to recognizable discourse about family connects violence with social norms of marriage, thus maintaining violence socioculturally (Andrus, 2021).

Additionally, women describing IPV when applying for restraining orders tend to use direct, indirect, and quasi-direct reported speech to report on verbal abuse (Trinch, 2010). The use of direct quotes constructed a victim identity and credibility as a narrator, as well as demonstrated how the interviewers should perceive the abusers. In these interviews, women also tended to narrate within the story genre (Trinch, 2005). However, after multiple interactions with institutional representatives, women used some elements of the report genre at the level of the speech event and lexicon but did not acquire it completely. The mixing of genres may impact women's credibility because they cannot produce an authoritative report but may not be seen as a true victim because their narration is an "impure performance of victimhood" (Trinch, 2005, p. 43). In contrast, when the paralegal/volunteer interviewers represented the interviewees' use of reported speech in affidavits, they had a strong preference for indirect reported speech to create a witness identity for women (Trinch, 2010). Further, they used the report genre to elicit information and to describe the abuse in affidavits (Trinch, 2005). In sum, different participants in institutional settings use intertextuality to negotiate identity and credibility in different ways.

Beyond this, intertextuality is a major component of legal texts, so it is a useful framework for understanding the perpetuation of patriarchal violence through relevant case law.

1.3 Intertextuality in legal texts

Analyses of intertextuality in case law can provide insight into how lawyers/judges construct legal authority because intertextuality is an explicit part of legal traditions in the United States. According to Mertz (2007), law professors highlight the authority of legal texts by focusing on legal doctrine from past cases, as well as on technical and procedural terms. In this way, law students learn to focus on intertextual references in case law. In contrast, issues of conflict and social injustice are sidelined, which teaches that legal authority is more important than social

context. Further, there is bi-directional intertextual reference between Supreme Court majority and dissenting opinions. The majority opinion presents the decision of the Court and is seen as the more authoritative text while the dissenting opinion is often viewed as unimportant. However, through the use of bi-directional intertextual references, the dissent presents disagreement, which may force the "hegemonic voice" in the majority to acknowledge multiple points of view (Mertz, 1988, p. 373). This interplay is complicated by the idea that majority opinions and dissenting opinions reflect larger division in the community regarding social conflict, and dissenting opinions in particular may be written with later audiences in mind, supporting future majority opinions in conjunction with social change (Mertz, 1988).

With this in mind, one study has looked at how intertextual references across US Supreme Court opinions create a legal argument that excludes the voices of IPV victims from trial settings while including the voices of male victims of violent crimes. The intertextual references worked to present certain legal decisions and social values as common sense. Specifically, Andrus (2015) investigated intertextuality across four US Supreme Court opinions related to hearsay admissibility. The analysis examined citations to hearsay case law going back to the 1700s, and the development of the concepts of "witness" and "testimony" and the determination that only non-testimonial utterances can be admitted as hearsay. Andrus (2015) compared the construction of these concepts in Supreme Court cases involving male-on-male violence versus cases involving IPV. She found that depending on the context women are either considered victims or witnesses to constrain which of their utterances are admissible in court. The study concludes that the opinions essentialized IPV as private while violence against men is public, and men's speech is considered reliable enough to admit while women's speech is not. Further, the law is reproduced linguistically by intertextually indexing a legal history that is presented as consistent over time, making legal

outcomes seem natural. However, by reproducing prior law in new contexts, the Court ignores relevant issues of gender, power, and IPV. Thus, "the law developed to manage the public domain historically concerned with male experience finds any excuse to not recognize the criminality of domestic violence" (Andrus, 2015, p. 102).

Several studies have investigated the use of intertextuality in US Supreme Court opinions on other topics, as well. These studies similarly show how intertextual references function to highlight specific legal arguments as the most natural, and they also look at the representation of social voices via intertextual references. For example, Põiklik (2016) analyzed the majority and dissenting opinion in the US Supreme Court case *District of Columbia v. Heller,* 554 U.S. 570 (2008), which addressed the meaning of the Second Amendment and whether the right to bear arms is an individual or state right. Therefore, the analysis focused on the use of intertextual references relating to individual people versus militias in the opposing opinions. The majority opinion interprets "the people" as consistently referring to individuals in the constitution, marginalizes the militia clause, and uses 18th century dictionary definitions of "keep and bear arms." In contrast, the dissenting opinion attends to the militia clause to deny individual rights to guns and defines "keep and bear arms" within the context of contemporary (18th century) state militia laws. The dissenting opinion also recontextualizes the majority opinion to highlight inconsistency and persuade the audience that the argumentation is not sound. Põiklik (2016) concludes that the justices rely on different prior texts to establish their differing arguments as the common sense understanding of the Second Amendment.

Additionally, Conway (2003) analyzed the representation of litigants' voices in the Supreme Court cases *Dred Scott v. Sandford*, 60 U.S. 393 (1857) and *Bowers v. Hardwick,* 478 U.S. 186 (1986). Specifically, she looked at the category terms used to refer to litigants, elements of parody

(Bakhtin, 1981) – such as the merging of legalese and lay language – and omissions of certain participants' version of events (and therefore of their voices). She found that the voices of litigants were indirectly represented in the opinions, which transformed the litigants into parodic spokespersons for the ideologies they seem to represent. The article concluded that in Supreme Court opinions a litigant can simultaneously lose their identity and gain a false voice, which invalidates a litigant's right to be heard in court and accepted in society. Mertz (1988) similarly analyzed the social voices of Supreme Court opinions from the cases *Plessy v. Ferguson,* 163 U.S. 537 (1896) and *Brown v. Board of Education,* 347 U.S. 483 (1954). Specifically, the opinion in *Plessy* is framed as a response to the arguments of the plaintiff (but does not respond to the dissent), it merges the voices of Plessy and his attorney (indirectly reported), only directly quotes statutes and case law, and agents are collective bodies or documents. The opinion only presents the social issues indirectly and filters them through the voice of legal texts. In contrast, the dissent includes individual human agents (although never refers to Plessy by name) and describes the social situation directly. The unanimous opinion for *Brown* discusses social problems with the "key pivot" as a deictic contrast between contemporary times and the history of *Plessy* and the 14th Amendment (p. 382). Overall, in *Plessy* the opinion and dissent "give us both the removed, tradition-bound voice re-telling a story of 'how it has to be,' and a more immediate, critical, personal story of 'why we ought to change it'" (p. 384). Mertz explains that the different texts are in conversation with each other, i.e., *Brown's* primary interlocuter is the *Plessy* opinion, and the *Plessy* dissent's primary interlocuter is the majority opinion. In this way, the narratives allow for change/dissent but maintain the authority of legal language.

Finally, one study looked at the form and function of intertextual reference to case law used in the oral arguments for the Supreme Court case *Adam Samia v. United States,* 599 U.S. 635 (2023)

(Dundon, 2024). The study found that the most frequently cited cases were referred to with shortened versions of the case name, and they are often personified. That is, the case itself is the subject of verbs of communication (e.g., say, talk about) or verbs of emotion/intention (e.g., tries, wants, loves). In contrast, the less frequently cited cases are not personified and are instead contexts of court actions. Dundon (2024) concludes that personification is used to manage information density and facilitate comprehension, at least for participants with shared knowledge (i.e., members of the legal profession).

1.4 The current study

Despite the relatively substantial body of work on intertextuality as it relates to IPV and/or legal texts, no studies have investigated intertextuality in the Supreme Court case *Castle Rock v. Gonzales*. This case is of particular interest because of its implications for how the language practices of case law can perpetuate a patriarchal status quo.

Therefore, in the current study, I examine intertextuality in the *Castle Rock v. Gonzales* majority, concurring, and dissenting opinions to gain insight into how different Justices draw on the same texts to construct opposing views of legal authority. The main question decided in this case was whether restraining orders constituted property under the 14th Amendment because of a Colorado law mandating the enforcement of restraining orders (see Section 2.1 for more details). Therefore, in making their arguments, both sides primarily drew on prior Supreme Court case law relating to the concept of property (Section 4) and on the Colorado statute mandating the enforcement of restraining orders by police officers (Section 5). Thus, these texts are the focus of my analysis.

Additionally, I investigate intertextual references between the opinions, that is the majority opinion's references to the dissenting opinion and vice versa (Section 6). This expands on the work

of Mertz (1988) and provides insight into intertextual processes for texts that are written at the same time but are in conversation with each other.

2 Data and methods

My analysis focuses on intertextuality in the US Supreme Court opinions (majority, concurring, dissenting) for the case *Castle Rock v. Gonzales* (2005). The following section provides details on the events that led to the case being heard by the Court. Following that, I describe the three opinions and the implications of the decision. Lastly, I discuss the theory of intertextuality and how it is applied in the current study.

2.1 Background

Prior to the 1960s, there was almost no police response to IPV in the United States, but from the 1960s on, states started creating legislation to criminalize domestic violence and violations of restraining orders (Curtis, 2006; Hoppe et al., 2020). However, restraining orders are only effective to the extent that they are enforced, and many police departments continued their practice of non-intervention in cases of IPV (Curtis, 2006). In response, several states developed mandatory arrest laws, including Colorado in 1994 with the law CO Rev Stat § 18-6-803.5. This law read, in part:

> (a) Whenever a protection 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 protection order.
> (b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:
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> (I) The restrained person has violated or attempted to violate any provision of a protection order; and
>
> (II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.
>
> (c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the

> registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.

This language was additionally included on the restraining orders in a notice to law enforcement.

In 1999, Jessica Gonzales (now Lenahan) and her daughters, Rebecca, Katheryn, and Leslie (ages 10, 8, and 7, respectively) lived in Castle Rock, CO. Jessica was divorcing her abusive husband, Simon Gonzales. She obtained a restraining order prohibiting Gonzales from coming within 100 yards of her or their children, and the restraining order was served in early June. Approximately two weeks later Gonzales kidnapped the three children. Jessica reported this to the town police department and showed officers the restraining order when they arrived at her house. The officers told her to call again if the children did not return in the next couple hours. Jessica called her estranged husband who admitted to having the girls, but the police refused to help. Over the next several hours Jessica contacted/went to the police department many times and each time they refused to help. During this time Gonzalez murdered their three children (with a gun he purchased that day) then drove to the police station and opened fire. He was in turn killed by a police officer.

Jessica sued Castle Rock in Federal District Court for failing to enforce her restraining order. Specifically, she argued that since the Colorado law mandated the enforcement of restraining orders, holders of restraining orders had the right to enforcement of their restraining order, and this right constituted property under the 14th Amendment. The Due Process Clause of the 14th Amendment says that states cannot "deprive any person of life, liberty, or property, without due process of law." As such, the police department could not deprive her of that property[2] (by not

[2] Although the 14th Amendment also protects people from arbitrary deprivation of life and liberty by the government, it does not require the government to protect people's life, liberty, or property from deprivation by private individuals. For this reason, Jessica could not claim that her and her children's right to life/liberty was violated by

enforcing the restraining order) without following fair procedures. She claimed that the police officers violated her due process rights because "the city maintained a custom and policy of failing to respond properly to complaints of domestic restraining order violations and tolerated the non-enforcement of such protective orders by police officers, resulting in the reckless disregard of a person's right to police protection granted by such orders" (*Gonzales v. City of Castle Rock*, 2004, p. 1098). Thus, the legal questions were (1) did the Colorado statute give people a right to the enforcement of restraining orders? and (2) if it did give people the right to enforcement of a restraining order, is the restraining order a protected property interest under the 14th Amendment? The district court determined that mandated enforcement of a court-issued restraining order did not create a property interest protected by the 14th Amendment. Therefore, they found that Jessica failed "to state a claim upon which relief could be granted" and dismissed the case in 2001 (*Gonzales v. City of Castle Rock*, 2004, p. 1096).

Jessica appealed, and a three-judge panel of the 10th Circuit Court of Appeals reversed the district court's dismissal in 2002. Specifically, they concluded that she had a procedural due process claim[3], meaning the enforcement of the restraining order could not be withheld arbitrarily. In 2004, the case was then reheard *en banc* – by the full 10th Circuit Court of Appeals – at the request of the town of Castle Rock. The full 10th Circuit decision affirmed the panel's decision. They argued that the intent of lawmakers was to hold perpetrators of IPV accountable, and the language of the statute was clearly mandatory. They concluded that restraining orders in the context of mandatory enforcement laws are a constitutionally protected entitlement, and this argument was supported by case law from other jurisdictions. Finally, they argued that the police

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the government. However, if the restraining order was considered property guaranteed by the government, the non-enforcement without due process would be a violation of her property rights.

[3] However, the court held that Jessica did not have a substantive due process claim, meaning she did not have an inherent Constitutional right to police protection.

department's "outright dismissal" of Jessica's claims was a violation of her due process rights (*Gonzales v. City of Castle Rock*, 2004, p. 1115). However, the town of Castle Rock appealed, and the case was brought to the Supreme Court.

2.2 Castle Rock v. Gonzales

In 2005, the Supreme Court heard the oral arguments for the case (No. 04-278). Over the course of an hour, they heard arguments on behalf of the petitioner (Town of Castle Rock, CO), on behalf of the respondent (Jessica Gonzales individually and as next best friend of her deceased minor children, Rebecca Gonzales, Katheryn Gonzales, and Leslie Gonzales), and on behalf of the United States in support of the petitioner. Following this, in a 7 to 2 decision, the Court reversed the 10th Circuit's ruling as explained in the majority opinion. A concurring and dissenting opinion were also written, and these three opinions make up the data for my analysis[4].

Justice Antonin Scalia wrote the majority opinion and was joined by Justices Rehnquist, O'Connor, Kennedy, Souter, Thomas, and Breyer. The opinion is 17 pages and 6,329 words long, including footnotes (5,167 when excluding the facts of the case shared by all three opinions). Scalia argued that a government benefit is not a protected entitlement (or property) if government officials have the discretion to deny it. He determined that it was not appropriate to defer to the 10th Circuit's ruling that Colorado law gave Jessica a protected entitlement to enforcement of the restraining order and instead interpreted the Colorado law himself. He found that the law did not make enforcement of restraining orders mandatory, so it cannot be the basis of a property interest. Further, he argued that even if the law made enforcement of restraining orders mandatory it would

[4] The Court opinions, as well as the transcript of the oral arguments are publicly available at the following links: https://supreme.justia.com/cases/federal/us/545/04-278/index.pdf, https://www.supremecourt.gov/pdfs/transcripts/2004/04-278.pdf.

not be a property interest under the 14th Amendment because it has no monetary value and is an indirect benefit.

Justice David Souter wrote a concurring opinion and was joined by Justice Breyer. The opinion is three pages and 1,026 words long, including footnotes. He agreed with the majority opinion but added to the argument. Specifically, he argued that Jessica claimed a property interest in state-mandated processes but that the 14th Amendment only gives procedural protection against arbitrary deprivation of substantive property. In other words, police enforcement of restraining orders is a state-mandated process, but processes are not property.

Justice John Paul Stevens wrote the dissenting opinion and was joined by Justice Ginsburg. The opinion is 20 pages and 7,811 words long, including footnotes. In contrast to the majority and concurring opinions, Stevens proposed that the Court should defer to the 10th Circuit or to the Colorado Supreme Court – courts in Colorado's jurisdiction – to interpret Colorado state law. Beyond this, Stevens commented on flaws in the majority opinion's analysis. He specifically argued that Colorado law made enforcement of restraining orders mandatory, not discretionary. Further, that enforcement has monetary value and is a direct benefit, and as such constitutes a property interest that could not be deprived without fair procedures.

The Court's majority decision meant that the police were not at fault for deciding not to enforce the restraining order, and Jessica "had no legal recourse, as the police department had done nothing wrong…To be clear, her case was not heard and decided against her; the Supreme Court simply concluded that she had no case at all" (Rosenfeld, 2022, p. 92). This undermined 30 years of legislative reform attempting to protect IPV victims, and it makes constitutional remedies for abuse victims essentially nonexistent (Curtis, 2006). Several legal scholars have commented on the horrifying consequences of this case and also critiqued the majority's argumentation for a variety

of reasons (e.g., Curtis, 2006; Hugenberger, 2006; Pilon, 2004-2005; Quester, 2007). For example, Pilon (2004-2005) describes Scalia's argument as misunderstanding the function of government (as outlined in the Declaration of Independence), the purpose of the 14th Amendment, the distinction between substantive and procedural rights, and the reason for the distinction between civil and criminal proceedings. He describes Scalia's language as at times ambiguous and/or contradictory. Further, Pilon (2004-2005) discusses Scalia's argument that restraining orders have no monetary value, and as such cannot be property; he describes it as "too precious to be credible" (p. 118) and comments on the extreme "lengths [Scalia goes to] to try to disprove what should be clear to all – that there is very little that cannot be monetized" (p. 121). He concludes even more strongly that the Court's repeated failures to clarify/secure people's rights under the 14th Amendment makes it "complicit" in the death of Jessica's three children (p. 122).

2.3 Intertextuality

The theory of intertextuality stems from Bakhtin's (1981) work on dialogism, which refers to interrelationships between utterances, languages, speech types, etc. that exist in discourse. According to Bakhtin, every utterance has linguistic norms, social/historical context, and heteroglossia or the interweaving of different voices in a single text. Kristeva (1986) termed the word intertextuality in her description and elaboration of Bakhtin's work. She writes that the "literary word" is in dialogue with other texts and does not represent a fixed meaning. These texts are further situated within history and society. Dialogue is defined by two "axes" – a subject-addressee relationship/axis and a text-context relationship/axis. The notion of intertextuality arises because these axes coincide, and "each text is an intersection of texts where at least one other text can be read" (p. 37). Further researchers have commented on the theory, describing it as the relationship between a text and other texts (Bazerman, 2003) and as the reproduction of the words

of others, which grounds discourses in history and shifts meanings across contexts (Blommaert, 2005).

There are many techniques of intertextual representation in texts of which I will include direct quotation (1a), quasi-direct quotation (1b), indirect quotation (1c), and references to text names (1d) in my analysis (Bazerman, 2003; Lucy, 1993; Trinch, 2010). Direct quotations use the exact words of the original author, but the speaker/writer has control of which words are quoted and what context they occur in (Bazerman, 2003). Quasi-direct quotation is a combination of direct and indirect quotation and includes the voice of the reporter and of the reported (Trinch, 2010, pp. 214-215). For indirect quotation, the speaker/writer reproduces the meaning of the original text in their own words. Meaning is filtered through the speaker/writer's voice and attitude, which allows "meanings to be more thoroughly infused with the [speaker/writer's] purpose" (Bazerman, 2003, p. 88). Finally, mentioning other texts without providing details is a more implicit method of intertextual representation; the author relies on the reader's knowledge of the original text and has opportunities to make claims about the text without substantiating them (Bazerman, 2003).

(1) Intertextual reference types:

a. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564, 577 (1972).

b. Colorado's restraining-order statute appears to contemplate a similar distinction, providing that when arrest is "impractical"—which was likely the case when the whereabouts of respondent's husband were unknown—the officers' statutory duty is to "seek a warrant" rather than "arrest." §18–6–803.5(3)(b).

c. The dissent, after suggesting various formulations of the entitlement in question,[10] ultimately contends that the obligations under the statute were quite precise: either make an arrest or (if that is impractical) seek an arrest warrant, *post,* at 785.

d. That presumption can be overcome, however, see *Leavitt* v. *Jane L.,* 518 U. S. 137, 145 (1996) *(per curiam),* and we think deference inappropriate here.

(Majority opinion, *Castle Rock v. Gonzales*, pp. 756, 763, 764, 757)

Analyses on intertextuality in court decisions focus not just on the techniques of intertextual representation but also on what texts/discourses are referenced. Legal language is often inherently intertextual due to the reliance on precedents and the conventions/styles for writing legal opinions, as well as the approach of textualism, i.e., interpreting meaning based on the text of statutes rather than legislative intent (Tiersma, 1999). More specifically, studies have investigated the development of specific concepts across cases and contrasts between contemporary and historical times (e.g., Andrus, 2015; Mertz, 1988). Others have looked at direct and indirect quotation of voices of participants in the litigation, as well as the merging of voices of participants (e.g., Conway, 2003; Mertz, 1988). Others still have analyzed direct and indirect quotation of case law and legal statutes and/or direct and indirect quotation of opposing opinions within the same case; these analyses may also look at different recontextualizations of the same phrases across texts (e.g., Mertz, 1988; Põiklik, 2016). Finally, some studies look at references to the social context, which can be direct or filtered through legal language (e.g., Mertz, 1988).

Finally, many studies also look at the interpretation of intertextual references based on language ideologies, framing devices, and the connection with larger systems of knowledge/power. First, there is a language ideology of referentialism, which is the belief that language is a transparent means of conveying information and that meaning is context free (Bauman & Briggs, 1990; Hodges, 2015; Silverstein, 1976). This is comparable to the legal approach of textualism, which emphasizes the interpretation of laws based solely on their language rather than the legislative history and intent (Tiersma, 2007; Tiersma & Solan, 2004). Therefore, intertextual references or reported speech may be taken as self-evident even though the prior and new contexts shape their understanding (e.g., Andrus, 2011). This can also be seen in the phenomenon of selective literalism: courts/judges use pragmatic information to interpret the meaning of utterances

in only some situations, and this is done in a way that appears to benefit the government over individuals (Tiersma & Solan, 2004). Framing devices are one method of shaping meaning. For example, Sclafani (2008) investigated framing devices for intertextual references in newspaper articles on the 1996 Oakland School Board Resolution on Ebonics. She showed that the categorization of the original speakers of quoted texts, the presuppositions based on lexical choice, the presentation of certain "facts"/statistics without citation, and the use of mock language all contextualized the issues within racist ideologies of language and education. The inclusion of certain voices and the exclusion of others additionally served to promote mainstream interpretations and suppress dissenting viewpoints (see also Hodges, 2008). Hodges (2015) provides an in-depth review of the foundations and applications of intertextuality.

2.4 Analysis

Based on this, I present four analyses of intertextuality in the *Castle Rock, Colorado v. Gonzales* majority, concurring and dissenting opinions. First, I compare the frequency of intertextual references to the following texts in the three opinions:

a. The 14th Amendment
b. Supreme Court case law relating to property, e.g., *Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564 (1972); *DeShaney* v. *Winnebago County Dept. of Social Servs.,* 489 U. S. 189 (1989)
c. CO Rev Stat § 18-6-803.5
d. The *Castle Rock v. Gonzales* majority, concurring, and dissenting opinions
e. Other *Castle Rock* texts, e.g., 10th Circuit decision*,* Supreme Court oral arguments and briefs, events of the case
f. Supreme Court case law unrelated to property
g. Case law from states
h. Miscellaneous, e.g., non-legal texts, commentary on social context of IPV

Specifically, I look at the distribution of direct quotation, quasi-direct quotation, indirect quotation, and text names (definitions from Bazerman (2003) and Trinch (2010)). I do not investigate the more implicit forms of intertextual reference although they do occur in the texts.

For example, the use of the term "property" is inherently intertextual in the context of the case, linking back to the 14th Amendment, but it is not included in my analysis.

As part of this analysis, I also look at how sections of these intertextual references come together in larger sections to define property, to interpret the CO statute, and to (dis)agree with the other opinions. I again compare the frequency of these concepts across the three opinions.

I next present three qualitative analyses. First, I look at the development of the concept of property in the three opinions. Specifically, I investigate how the three opinions use intertextual references to the same or different texts to create their definitions or property. Second, I look at the interpretation of CO Rev Stat § 18-6-803.5 – the statute mandating the enforcement of restraining orders – by the majority and dissenting opinions. Again, I investigate how the two opinions use intertextual references to the same or different texts to demonstrate that this statute is discretionary (majority) or mandatory (dissent). Third, I look at intertextual references to opposing opinions within *Castle Rock v. Gonzales*, that is references to the dissenting opinion by the majority opinion and vice versa. My goal with this analysis is to gain insight into how these texts are in conversation with each other. Specifically, how are intertextual references organized when the temporal sequence of texts is not clear, and does the bi-directional intertextuality effectively force the "hegemonic voice" of the majority to acknowledge multiple points of view (Mertz, 1988, p. 373)? For these analyses I focus on how the types of intertextual references and the framing devices shape meaning and the development of legal authority in different ways across the opinions.

3 Results: Overview of intertextual references

Table 1 shows the frequency of intertextual references by type in the three *Castle Rock* opinions. The three opinions each include between 19 to 25 intertextual references per 1000 words. Although

these frequencies may seem low, the average length of the intertextual references ranges from 44 to 58 words. This means that almost the entirety of each text is made up of intertextual references.

Table 1. Frequency of intertextual references by type and opinion (total number / percentage / per 1000 words)

Reference type	Majority	Dissent	Concurrence
Direct quote	16 / 15.84 / 3.1	30 / 17.34 / 3.97	3 / 12.00 / 2.92
Quasi-direct quote	26 / 25.74 / 5.03	48 / 27.75 / 6.02	1 / 4.00 / 0.97
Indirect quote	43 / 42.16 / 8.32	82 / 47.4 / 10.75	13 / 52.00 / 12.67
Text name	17 / 16.83 / 3.29	13 / 7.51 / 1.66	8 / 32.00 / 7.8
Total	102 / 100 / 19.74	173 / 100 / 22.4	25 / 100 / 24.37

The average word count (standard deviation) of intertextual references in the three opinions is 57.32 (35.82), 54.43 (31.22), and 44.72 (26.24), respectively.

Overall, all three opinions most frequently use indirect quotes. For the majority and dissenting opinions, this is followed by quasi-direct quotes, while direct quotes and text names are less frequent. For the concurring opinion, this is followed by text names, while direct and quasi-direct quotes are less frequent. However, there are more differences between the three opinions when the text type is also considered. Table 2 shows the frequency of intertextual reference by type and text in the three opinions.

Table 2. Frequency of intertextual references by text, type, and opinion (total number / percentage / per 1000 words)

Text	Reference type	Majority	Dissent	Concurrence
Property Case Law and 14th Amendment	Direct quote	6 / 23.08 / 1.16	9 / 25.71 / 1.15	2 / 13.33 / 1.95
	Quasi-direct quote	6 / 23.08 / 1.16	8 / 22.86 / 1.02	1 / 6.67 / 0.97
	Indirect quote	3 / 11.54 / 0.58	13 / 37.14 / 1.66	4 / 26.67 / 3.9
	Text name	11 / 42.31 / 2.13	5 / 14.29 / 0.64	8 / 53.33 / 7.8
	Total	26 / 100 / 5.03	35 / 100 / 4.48	15 / 100 / 14.62
CO Rev Stat § 18-6-803.5	Direct quote	1 / 5.88 / 0.19	4 / 12.12 / 0.51	
	Quasi-direct quote	5 / 29.41 / 0.97	9 / 27.27 / 1.15	
	Indirect quote	10 / 58.82 / 1.94	19 / 57.58 / 2.43	3 / 100 / 2.92
	Text name	1 / 5.88 / 0.19	1 / 3.03 / 0.13	
	Total	17 / 100 / 3.29	33 / 100 / 4.22	3 / 100 / 2.92
Dissenting opinion	Direct quote	2 / 15.38 / 0.39		
	Quasi-direct quote	2 / 15.38 / 0.39		

	Indirect quote	8 / 61.54 / 1.55		
	Text name	1 / 7.69 / 0.19		
	Total	13 / 100 / 2.52		
Majority opinion	Direct quote		3 / 9.09 / 0.38	
	Quasi-direct quote		13 / 39.39 / 1.66	
	Indirect quote		17 / 51.52 / 2.18	2 / 100 / 1.95
	Text name			
	Total		33 / 100 / 4.22	2 / 100 / 1.95
Concurring opinion	Direct quote			
	Quasi-direct quote		2 / 50 / 0.26	
	Indirect quote		2 / 50 / 0.26	
	Text name	1 / 100 / 0.19		
	Total	1 / 100 / 0.19	4 / 100 / 0.51	
Other *Castle Rock* case texts	Direct quote	3 / 11.54 / 0.58	1 / 3.85 / 0.13	1 / 20 / 0.97
	Quasi-direct quote	8 / 30.77 / 1.55	4 / 15.38 / 0.51	
	Indirect quote	14 / 53.85 / 2.71	20 / 76.92 / 2.56	4 / 80 / 3.9
	Text name	1 / 3.85 / 0.19	1 / 3.85 / 0.13	
	Total	26 / 100 / 5.03	26 / 100 / 3.33	5 / 100 / 4.87
Other Supreme Court case law	Direct quote	1 / 25 / 0.19	4 / 26.67 / 0.51	
	Quasi-direct quote	1 / 25 / 0.19	4 / 26.67 / 0.51	
	Indirect quote		3 / 20 / 0.38	
	Text name	2 / 50 / 0.39	4 / 26.67 / 0.51	
	Total	4 / 100 / 0.77	15 / 100 / 1.92	
States' case law	Direct quote	1 / 12.5 / 0.19	5 / 35.71 / 0.64	
	Quasi-direct quote	1 / 12.5 / 0.19	3 / 21.43 / 0.38	
	Indirect quote	6 / 75 / 1.16	5 / 35.71 / 0.64	
	Text name		1 / 7.14 / 0.13	
	Total	8 / 100 / 1.55	14 / 100 / 1.79	
Miscellaneous	Direct quote	2 / 28.57 / 0.39	5 / 33.33 / 0.64	
	Quasi-direct quote	3 / 42.86 / 0.58	4 / 26.67 / 0.51	
	Indirect quote	2 / 28.57 / 0.39	5 / 33.33 / 0.64	
	Text name		1 / 6.67 / 0.13	
	Total	7 / 100 / 1.35	15 / 100 / 1.92	

First, there are some differences between the three opinions in terms of which texts they reference most frequently. The majority opinion primarily uses references to property case law/the 14th Amendment and *Castle Rock* related texts (i.e., case briefs, 10th Circuit decision) while

references to all other texts are less frequent. Similarly, the concurring opinion most frequently references property case law/the 14th Amendment, followed by *Castle Rock* related texts, and tends not to reference other texts at all. Thus, in terms of general frequencies, the majority and concurring opinions pattern in the same way, but the dissenting opinion does not. The dissenting opinion has a relatively even distribution of references to property case law/the 14th Amendment, to the Colorado law, and to the majority opinion. In fact, the dissenting opinion references the majority opinion almost twice as frequently as the majority opinion references the dissenting opinion, and the concurring opinion never refers to the dissent. The dissent also uses references to Supreme Court case law unrelated to property twice as frequently as the majority does. While dissenting opinions can encourage majority opinions to respond to different legal arguments (Mertz, 1988), these results suggest that the majority and concurring opinions have no obligation to take the dissent into account and highlight their greater legal authority.

Additionally, the three opinions differ in their distribution of reference type when referencing property case law /the 14th Amendment. Specifically, the majority and concurring opinions use references to text names most frequently in this subset of data, despite indirect quotes being most frequent overall in the data. The dissenting opinion uses indirect references to property case law/the 14th Amendment most frequently in this subset of data and overall. According to Bazerman (2003), indirect quotation tries to reproduce the original meaning of the text while also reflecting the author's interpretation or spin on the original text; however, mentioning a document/person without providing details allows the author to more easily make conclusions about a text without substantiating them. It is possible that the majority and concurring opinions use this type of intertextual reference to maintain legal authority by highlighting legal doctrine (Mertz, 2007) while

presenting a definition of property that is not truly faithful to that case law (Section 4.3 discusses this in more detail).

Throughout the opinions, the Justices use combinations of intertextual references to more thoroughly develop certain concepts. First, since the idea of property is central to this case, the Justices needed to define property[5], and they commented on several relevant features from prior case law: direct v. indirect benefits, substantive v. procedural benefits, benefit source, lack of discretion, monetary value, vague/ambiguous benefit, and benefit recipients. For example, (2) shows a quasi-direct and direct intertextual reference to another Supreme Court case focused on the indirect nature of certain benefits[6]. The direct quote also draws on the language of the 14th Amendment.

(2) Perhaps most radically, the alleged property interest here arises *incidentally,* not out of some new species of government benefit or service, but out of a function that government actors have always performed… {The indirect nature of a benefit was fatal to the due process claim of the nursing-home residents in *O'Bannon* v. *Town Court Nursing Center,* 447 U. S. 773 (1980). We held that, while the withdrawal of "direct benefits" (financial payments under Medicaid for certain medical services) triggered due process protections, *id.*, at 786–787, the same was not true for the "indirect benefit[s]" conferred on Medicaid patients when the Government enforced "minimum standards of care" for nursing-home facilities, *id.*, at 787.}QUASI {"[A]n indirect and incidental result of the Government's enforcement action … does not amount to a deprivation of any interest in life, liberty, or property." *Ibid.*}DIRECT

(Majority Opinion, *Castle Rock v. Gonzales*, pp. 765-767)

[5] Legal terminology can be inherently intertextual because it refers back to prior statutes and case law, so every use of the term "property" could be considered an intertextual reference to the 14th Amendment. However, this is not one of the four types of intertextual references that my analysis focuses on (see Section 2.4).

[6] In all examples, I use {} to demarcate intertextual references, which I additionally label as DIRECT, QUASI, INDIRECT, or TEXTNAME. For sentences that include intertextual references of different types to multiple texts, labels for all relevant types are included. I also added underlining to indicate the sections of the examples that I discuss in more detail. Any other formatting within the examples is original to the *Castle Rock* opinions. The opinions primarily include formatting related to quotation practices (i.e., quotation marks, brackets, italicized citations). In the opinions, the Justices additionally add italics for emphasis and use quotation marks with non-quoted words to seemingly express emphasis, doubt, irony, etc.

Second, the Court opinions discuss the meaning of the Colorado Statute mandating the enforcement of restraining orders, and in doing so they discuss the tradition of police discretion, the mandatory-ness of the statute's language, the legislature's intent, and other Colorado laws. Example (3) shows an indirect reference to the majority opinion which is also a quasi-direct reference to the 10th Circuit Court's opinion. This is followed by an indirect reference to the 10th Circuit Court's opinion. Together these point out the intention of Colorado lawmakers to mandate enforcement of restraining orders despite the general preference for police discretion.

(3) {Moreover, unlike today's decision, the Court of Appeals was attentive to the legislative history of the statute, focusing on a statement by the statute's sponsor in the Colorado House, *ante,* at 759, n. 6 (quoting statement), which it took to "emphasiz[e] the importance of the police's mandatory enforcement of domestic restraining orders." 366 F. 3d 1093, 1107 (CA10 2004) (en banc).}INDIRECT, QUASI {Far from overlooking the traditional presumption of police discretion, then, the Court of Appeals' diligent analysis of the statute's text, purpose, and history led it to conclude that the Colorado Legislature intended precisely to abrogate that presumption in the specific context of domestic restraining orders. That conclusion is eminently reasonable and, I believe, worthy of our deference.}INDIRECT

(Dissenting opinion, *Castle Rock v. Gonzales*, pp. 775-776)

Additionally, when commenting on the other opinions in this case, the Justices use intertextual references that either suggest agreement (4) or counter arguments (5) to the opinions. As is clear from these examples, the apparent agreement is not always a faithful representation of the other opinions (for more details see Section 6).

(4) {The dissent correctly points out that, in the specific context of domestic violence, mandatory-arrest statutes have been found in some States to be more mandatory than traditional mandatory-arrest statutes.}INDIRECT

(Majority Opinion, *Castle Rock v. Gonzales*, p. 762)

(5) {Indeed, the Court fails to come to terms with the wave of domestic violence statutes that provides the crucial context for understanding Colorado's law.}INDIRECT {The Court concedes that, "in the specific context of domestic violence, mandatory-arrest statutes have been found in some States to be more mandatory than traditional mandatory-arrest

> statutes," *ante*, at 762, but that is a serious understatement.}DIRECT The difference is not a matter of degree, but of kind.
>
> (Dissenting opinion, *Castle Rock v. Gonzales*, p. 784)

Table 3 shows the frequency of these various themes in the three opinions. Because several intertextual references can work together to make a broader point the totals in Table 3 do not match those in Tables 1 and 2.

Table 3. Frequency of themes of intertextual references by theme and opinion (per 1000 words / total number)

Concept/text	Theme	Majority	Dissent	Concurrence
Property	14th Amendment	2.32 / 12	0.51 / 4	2.92 / 3
	(In)direct benefits	0.58 / 3	0.26 / 2	0.97 / 1
	Substantive/procedural benefits	0.58 / 3	0.64 / 5	8.77 / 9
	Benefit source	0.58 / 3	0.9 / 7	2.92 / 3
	Discretion	0.39 / 2	0.26 / 2	0.97 / 1
	Monetary value	0.39 / 2	0.38 / 3	
	Vagueness	0.39 / 2	0.51 / 4	
	Recipients	0.19 / 1	0.26 / 2	
CO Statute	Police discretion	1.94 / 10	1.28 / 10	1.95 / 2
	Mandatory language	1.35 / 7	0.38 / 3	
	Legislature	0.58 / 3	1.15 / 9	
	Other CO laws	0.39 / 2	0.13 / 1	
Majority	Agreement	NA	0.38 / 3	2.92 / 3
	Counter Argument	NA	3.84 / 30	
Dissent	Agreement	0.97 / 5	NA	
	Counter Argument	1.16 / 6	NA	
Concurrence	Agreement	0.19 / 1		NA
	Counter Argument		0.26 / 2	NA

4 Defining "property": Intertextual references to Supreme Court case law

To determine if restraining orders constitute property under the 14th Amendment, the Justices needed to define property. In the majority opinion, Scalia discusses several specific features of property, including monetary value and directly benefiting the recipient, among others. He argues that restraining orders do not meet these criteria. In the concurring opinion, Souter adds to the

defining features of property: property must be a substantive entitlement that is distinguishable from the processes in place to protect that property. Souter also claims that Jessica's claims do not meet this criterion. Finally, in the dissenting opinion, Stevens generally agrees with the defining features of property but explains that restraining orders do meet these criteria.

The following three sections focus on the Justices' intertextual references related to the concept of property. Specifically, Section 4.1 focuses on references to monetary value, Section 4.2 focuses on references to (in)direct benefits, and Section 4.3 focuses on references to substantive entitlements. Throughout the opinions, Scalia primarily uses direct and quasi-direct quotations of case law, and Souter primarily uses text names and indirect quotations of prior case law and of Jessica Gonzales's claims. Stevens also uses intertextual references to the same prior cases as the other Justices and to Jessica Gonzales's claims.

4.1 Monetary value

The majority and dissenting opinions use intertextual references to the same texts when making opposing arguments about the monetary value of restraining orders. First, the majority opinion argues that property must have a monetary value (6). The example shows a quasi-direct quote to an article reviewing property case law, which then directs readers to a footnote.

(6) {Such a right would not, of course, resemble any traditional conception of property. Although that alone does not disqualify it from due process protection, as *Roth* and its progeny show, the right to have a restraining order enforced does not "have some ascertainable monetary value," as even our *"Roth*-type property-as-entitlement" cases have implicitly required. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 964 (2000).[12]}$_{\text{QUASI}}$

Footnote 12: {The dissent suggests that the interest in having a restraining order enforced does have an ascertainable monetary value, because one may "contract with a private security firm … to provide protection" for one's family. *Post,* at 773, 790, 791, and n. 19. That is, of course, not as precise as the analogy between public and private schooling that the dissent invokes. *Post,* at 791, n. 19.}$_{\text{QUASI}}$ {Respondent probably could have hired a private firm to guard her house, to prevent her husband from coming onto the property, and perhaps even to search for her husband after she discovered that her

> children were missing. Her alleged entitlement here, however, does not consist in an abstract right to "protection," but (according to the dissent) in enforcement of her restraining order through the arrest of her husband, or the seeking of a warrant for his arrest, after she gave the police probable cause to believe the restraining order had been violated. {A private person would not have the power to arrest under those circumstances because the crime would not have occurred in his presence. Colo. Rev. Stat. §16–3–201 (Lexis 1999).}INDIRECT And, needless to say, a private person would not have the power to obtain an arrest warrant.}INDIRECT, INDIRECT
>
> (Majority opinion, *Castle Rock v. Gonzales*, pp. 766-767)[7]

In this example, the quasi-direct quote to the article Merrill (2000) is used to summarize prior property case law. By using this intertextual reference as a summary, the quoted phrase "ascertainable monetary value" reads as attributed to "Roth-type" cases rather than to the author of the article. This seems to conflate legal doctrine and the interpretation of that doctrine, giving authority to this interpretation of property case law. However, the original text notes that this interpretation is not specifically addressed in prior cases (7).

(7) Although there are no precedents that directly address the question, it also seems implicit in the concept of the *Roth*-type property-as-entitlement that these interests have some ascertainable monetary value. One basis for this conclusion is again inductive. The various interests recognized as property for procedural due process purposes nearly all have a monetary value.

(Merrill, 2000, p. 964)

Additionally, the footnote in Example (6) includes an indirect quotation of the dissent. This is a response to the dissent's discussion of this feature of property, particularly a critique of the comparison of restraining orders and private security, so it is also an indirect quotation of the events of the case. This section repeats the quoted phrase from the law review article, and it includes an intertextual reference to a Colorado law (§16-3-201). By repeating the quoted phrase from the

[7] To clarify the coding of this example, the larger section of the footnote labelled INDIRECT, INDIRECT is both an indirect quotation of the dissenting opinion and an indirect quotation of Gonzales's claims/the facts of the case. Within this larger reference there is also an indirect reference to a Colorado law about citizens' arrests. å

article without any citation to the original source, it is transformed from evidence supporting a certain understanding of property into an uncontested characteristic of property.

The dissenting opinion also references elements of Merrill (2000) and the Colorado law (§16-3-201) in a response to the majority opinion. Specifically, the dissent compares a contract with a private security firm to the obligations of police officers enforcing restraining orders as evidence that the restraining order constitutes property. The dissent then directs readers to the footnote which uses this comparison to discuss the potential monetary value of restraining orders (8).

(8) {As the analogy to a private security contract demonstrates, a person's interest in police enforcement has " 'some ascertainable monetary value,' " *ante*, at 766.}QUASI {Cf. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 964, n. 289 (2000) (remarking, with regard to the property interest recognized in *Goss* v. *Lopez*, 419 U. S. 565 (1975), that "any parent who has contemplated sending their children to private schools knows that public schooling has a monetary value").}QUASI {And while the analogy to a private security contract need not be precise to be useful, I would point out that the Court is likely incorrect in stating that private security guards could not have arrested the husband under the circumstances, see *ante*, at 766-767, n. 12.}INDIRECT {Because the husband's ongoing abduction of the daughters would constitute a knowing violation of the restraining order, see n. 13, *supra*, and therefore a crime under the statute, see §18–6–803.5(1), a private person who was at the scene and aware of the circumstances of the abduction would have authority to arrest.}INDIRECT {See §16–3–201 ("A person who is not a peace officer may arrest another person when any crime has been or is being committed by the arrested person in the presence of the person making the arrest").}DIRECT {Our cases, of course, have never recognized any requirement that a property interest possess " 'some ascertainable monetary value.' "}QUASI {Regardless, I would assume that respondent would have paid the police to arrest her husband if that had been possible; at the very least, the entitlement has a monetary value in that sense.}INDIRECT

(Dissenting opinion, *Castle Rock v. Gonzales*, p. 791)

In this example, the dissent quotes the same phrase, "some ascertainable monetary value" from Merrill (2000) as the majority opinion, but states that restraining orders do have value. However, the dissent cites the phrase as coming from both the majority (i.e., "*ante* at 766") and from the original article, using extra quotation marks to indicate both sources. This highlights the majority's

insistence on this feature in contrast to the dissent's seeming indifference to it. This becomes clear towards the end of the footnote when the dissent repeats "some ascertainable monetary value." Here the quoted element is still cited as coming from the majority opinion and the law review article. However, it is also attributed to "our cases" with the quotative "never recognized," which focuses on the potential mismatch between legal precedents and the interpretation of those precedents by other sources.

The last sentence is also an intertextual reference to the events of the case, and it alludes to the vagueness of "ascertainable monetary value" and to the potential pricelessness of restraining orders. Had Jessica Gonzales's restraining order been enforced, her daughters might not have been murdered, and there is certainly value to that (see Hugenberger, 2006 and Poster, 2007 for related critiques on defining monetary value). The majority opinion does not acknowledge this counter argument.

That being said, Examples (6) and (8) demonstrate circular or bi-directional intertextuality between the majority and the dissent about the interpretation of the comparison between restraining orders and private security (see Section 6 for more examples). Broadly, (8) is the dissent's response to the majority's claim that restraining orders have no monetary value (6), then the footnote in (6) is a response to (8). However, within the two footnotes there are additional intertextual references between the two texts. First, the dissent presents the example of a contract with a private security firm as analogous to a restraining order. Then, the majority uses a quasi-direct quote from the dissent[8] to explain this example and describes it as not "precise." Specifically, the majority indirectly quotes a Colorado law to show that private security and law enforcement do not have comparable powers. The dissent then draws on language from the majority's critique to point out

[8] The directly quoted elements come from the main text of the dissenting opinion and are not shown in Example (8).

issues with that critique. The dissent writes that the analogy doesn't need to be "precise to be useful," and directly quotes the Colorado law to show that in this instance private security would have the same powers as law enforcement. These examples show that the texts are in conversation, and the dissent does force the majority to respond to other ideas and interpretations of law (Mertz, 1988). However, this only works to a limited extent. Both opinions acknowledge arguments from the opposing side, but they do not come to an agreement. Indeed, the majority only responds to the idea of the private security contract but does not acknowledge the dissent's defense of that analogy.

In sum, both the majority and the dissent use intertextual references to the same texts – Merril (2000) commenting on *Roth* and CO Rev. Stat. §16–3–201 – to make their opposing arguments. Specifically, the dissent uses intertextual references to the majority that in turn quote the same texts as the majority to show that the majority's interpretation of monetary value in this context is wrong. The examples show that the two opinions are in conversation with each other, but they can pick and choose which elements they respond to.

4.2 Direct benefits

In discussing the features of property, the two opinions also use intertextual references to different texts. To start, the majority opinion states that property must be a benefit directly impacting the recipient. The opinion relies on intertextual references to two other Supreme Court cases. In Example (9), Scalia uses quasi-direct and direct quotations to *O'Bannon v. Town Court Nursing Center* to define the difference between direct and indirect benefits and claim that restraining orders are an indirect benefit.

(9) {The indirect nature of a benefit was fatal to the due process claim of the nursing-home residents in *O'Bannon* v. *Town Court Nursing Center,* 447 U. S. 773 (1980). We held that, while the withdrawal of "direct benefits" (financial payments under Medicaid for certain medical services) triggered due process protections, *id.,* at 786–787, the same was not true for the "indirect benefit[s]" conferred on Medicaid patients when the Government enforced "minimum standards of care" for nursing-home facilities, *id.,* at 787.}$_{\text{QUASI}}${"[A]n indirect

> and incidental result of the Government's enforcement action … does not amount to a deprivation of any interest in life, liberty, or property." *Ibid.*} DIRECT {In this case, as in *O'Bannon,* "[t]he simple distinction between government action that directly affects a citizen's legal rights … and action that is directed against a third party and affects the citizen only indirectly or incidentally, provides a sufficient answer to" respondent's reliance on cases that found government-provided services to be entitlements. *Id.,* at 788.} QUASI, INDIRECT {The *O'Bannon* Court expressly noted, *ibid.,* that the distinction between direct and indirect benefits distinguished *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U. S. 1 (1978), one of the government-services cases on which the dissent relies, *post,* at 789.} INDIRECT, INDIRECT
>
> (Majority opinion, Castle Rock v. Gonzales, pp. 767-768)

The opinion first explains the conclusions of the *O'Bannon* case with a quasi-direct quotation. This reference is attributed to the pronoun "we." While "we" represents the Court in 1980, it does not distinguish that Court from the Court in 2005 although only two Justices were part of both Courts. This collapses time and participants indicating the assumed consistency of Supreme Court decisions and the legal history in the United States (Andrus, 2015, p. 108; Mertz, 2007, pp. 63-64). The next quasi-direct quote is not attributed to a speaker or introduced with a quotative verb. Instead, it follows the prepositional phrase "In this case," which implies that the conclusions of *O'Bannon* apply perfectly to *Castle Rock* – the facts of the prior case are included as the facts of the current case. The quoted element of *O'Bannon* then transitions into an indirect intertextual reference of Jessica Gonzales's claims, dismissing much of her argument.

The use of quasi-direct quotes in (9) is consistent with quotation practices by American judges. Specifically, judges tend to use very short quotations of prior cases meant to summarize the entire holding of that case. This practice indicates that judges view prior cases as authoritative texts and the language of those texts is treated like a statute/rule (Tiersma, 2007, p. 1247). This may influence the difference in intertextual reference type between the majority and dissenting opinions in the *Castle Rock*. As discussed in Section 3, both opinions use indirect quotation more frequently overall. However, when referring to property case law the majority opinion uses quasi-direct and

direct quotation more frequently than indirect quotation, while the dissenting opinion still uses indirect quotation most frequently. This suggests that Scalia uses these intertextual reference types when referring to prior case law particularly to highlight the authority of precedent and present his argument as following established legal rules. In contrast, Stevens's argument is less focused on precedent and more focused on Colorado law/the domestic violence context. He does not reference property case law as frequently as Scalia does, and when he does, he uses indirect quotations more frequently that quasi-direct and direct quotations. Within the stylistic framework of judicial decisions, his use of intertextual reference types may function to limit the authority or rule-based interpretation of prior cases.

Finally, Example (9) combines an indirect quotation of the *O'Bannon* case with an intertextual reference to the dissent. The relevance of the case *Memphis Light, Gas & Water Div.* v. *Craft* is attributed to the dissent with the verb "relies." This suggests that the case makes up a major component of the dissenting opinion and functions to discredit the dissent. However, the dissent mentions *Memphis Light, Gas & Water Div.* v. *Craft* only once (10); the example does not relate to the (in)direct nature of benefits but instead on the various property interests already recognized by the Court.

(10) {This Court has "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.*, at 571–572.}$_{\text{DIRECT}}$…{Thus, our cases have found "property" interests in a number of state-conferred benefits and services, including welfare benefits*, Goldberg* v. *Kelly*, 397 U. S. 254 (1970); disability benefits, *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); public education, *Goss* v. *Lopez*, 419 U. S. 565 (1975); utility services, *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1 (1978); government employment, *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532 (1985).}$_{\text{INDIRECT}}$

(Dissenting opinion, *Castle Rock v. Gonzales*, pp. 789-790)

Instead, when commenting on the (in)direct nature of benefits, the dissent assumes that indirect benefits are not property, following the majority opinion's argument. However, the dissent states that restraining orders are a direct benefit (11).

(11) {Because the statute's guarantee of police enforcement is triggered by, and operates only in reference to, a judge's granting of a restraining order in favor of an identified " 'protected person,' " there is simply no room to suggest that such a person has received merely an " 'incidental' " or " 'indirect' " benefit, see *ante*, at 766-767.}$_{\text{QUASI}}$ {As one state court put it, domestic restraining order statutes "identify with precision when, to whom, and under what circumstances police protection must be afforded. The legislative purpose in requiring the police to enforce individual restraining orders clearly is to protect the named persons for whose protection the order is issued, not to protect the community at large by general law enforcement activity." *Nearing*, 295 Ore., at 712, 670 P. 2d, at 143.}$_{\text{DIRECT}}$

(Dissenting opinion, *Castle Rock v. Gonzales*, p. 788)

To make this argument, the dissent uses a quasi-direct quotation of the majority opinion, which includes words from other texts. Specifically, "protected person" is cited as coming from the majority, but it is also the way recipients of restraining orders are described in the Colorado law. Although the Colorado law is not cited, the phrase is included with two sets of quotation marks, which points to the two sources. This allows the dissent to highlight the recipients of restraining orders and show that the majority opinion has recognized those recipients. The words "incidental" and "indirect" are also cited as coming from the majority, and they are words used in the *O'Bannon* case. This allows the dissent to imply that its definition of restraining orders as property meets the exact definition presented in the majority taken from prior case law. Additionally, these are introduced with the phrase "there is no room to suggest…," which indicates that the majority's interpretation of restraining orders within this defining framework of property is blatantly wrong. The dissent further supports this claim with a direct quote to state case law to show that other courts have determined that restraining orders directly benefit their recipients.

Thus, in discussing (in)direct benefits, the majority and dissenting opinions primarily use intertextual references to different texts. That is, the majority refers to the Supreme Court case *O'Bannon* to define property as a direct benefit then assumes that restraining orders do not meet this feature without providing evidence. In contrast, the dissent assumes this feature of property to be true and references *Nearing v. Weaver* (1983), a state case, as evidence that restraining orders are a direct benefit.

4.3 Substantive entitlement

The concurring opinion is much shorter than the majority and dissenting opinions. It agrees with the majority opinion in general but adds that there is a distinction between property (a substantive entitlement) and the processes in place to avoid deprivation of that property (procedural due process). The concurrence claims that restraining orders are not a substantive right while the dissent claims that they are, and to do so, the two opinions use references to different texts. Souter primarily uses intertextual references to Supreme Court case law and to the 14th Amendment (12).

(12) {When her argument is understood as unconventional in this sense, a further reason appears for rejecting its call to apply *Roth*, a reason that would apply even if the statutory mandates to the police were absolute, leaving the police with no discretion when the beneficiary of a protective order insists upon its enforcement.}TEXTNAME {The Due Process Clause extends procedural protection to guard against unfair deprivation by state officials of substantive state-law property rights or entitlements; the federal process protects the property created by state law.}INDIRECT {But Gonzales claims a property interest in a state-mandated process in and of itself.}INDIRECT {This argument is at odds with the rule that "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim* v. *Wakinekona,* 461 U. S. 238, 250 (1983);}DIRECT {see also *Doe by Fein* v. *District of Columbia*, 93 F. 3d 861, 868 (CADC 1996) *(per curiam);*}TEXTNAME {*Doe by Nelson* v. *Milwaukee County*, 903 F. 2d 499, 502–503 (CA7 1990).}TEXTNAME

…

{There is no articulable distinction between the object of Gonzales's asserted entitlement and the process she desires in order to protect her entitlement; both amount to certain steps to be taken by the police to protect her family and herself. {Gonzales's claim would thus take us beyond *Roth*}TEXTNAME {or any other recognized theory of Fourteenth

> Amendment due process,}TEXTNAME by collapsing the distinction between property protected and the process that protects it, and would federalize every mandatory state-law direction to executive officers whose performance on the job can be vitally significant to individuals affected.}INDIRECT
>
> (Concurring opinion, *Castle Rock v. Gonzales*, pp. 771, 772)

First, there is a reference to the case *Board of Regents of State Colleges v. Roth*, which appears as just a shortened version of the text name. Throughout the concurring opinion (and to a lesser extent the majority opinion), this case seems to stand in for all Supreme Court cases granting property rights. Therefore, this intertextual reference brings these cases and the idea of legitimate property to mind and contrasts them with the current case. Since the intertextual reference provides no further explanation, the reader is left to assume that the contrast is justified. Additionally, the concurrence uses an indirect quotation of the Due Process Clause of the 14th Amendment. Indirect quotations are understood as reproducing the meaning of the original text from the perspective of the second author (Bazerman, 2003; Trinch, 2010), and the reference is attributed to the Due Process Clause with the verb "extends," which implies that the clause itself creates the distinction between procedure and substantive rights. However, the Due Process Clause (in both the 5th and 14th Amendments) does not make this distinction. Instead the Supreme Court first applied the doctrine of substantive due process in the early 1900s, and its use is particularly controversial; it is not well supported by the Constitution, and it allows the Supreme Court to "impose their policy preferences on the nation," politicizing the Court (Chapman, n.d.). Therefore, this intertextual reference allows Souter to present Supreme Court case law as historically consistent with the 14th Amendment and ignore potential disagreement. He then supports this interpretation with a quote from prior case law and additional citations to other cases. The direct quotation is described as a rule, which again presents the distinction between process and substantive entitlements as uncontroversial and reflects the textualization of precedent (Tiersma, 2007).

Finally, the opinion assumes that the property interest in Gonzales's claim is a process not a substantive entitlement. To do so, the opinion uses an indirect quotation of her claim but does not clarify what her "asserted entitlement" is or what "the process she desires" is. Instead, Souter describes both as "steps to be taken by the police." Thus, like the majority opinion, the concurring opinion presents a feature of property using evidence from prior case law then states that restraining orders do not have that feature without elaboration[9].

In contrast, the dissent again assumes that property is defined in part by this feature (i.e., is a substantive entitlement protected by fair processes), but that Gonzales's claims meet this definition, as shown in (13).

(13) {According to JUSTICE SOUTER, respondent has asserted a property interest in merely a "state-mandated process," *ante*, at 771 (concurring opinion), rather than in a state-mandated "substantive guarantee," *ibid*. This misunderstands respondent's claim. Putting aside the inartful passage of respondent's brief that JUSTICE SOUTER relies upon, *ante*, at 770, it is clear that respondent is in fact asserting a substantive interest in the "enforcement of the restraining order." Brief for Respondent 10.}$_{\text{QUASI, QUASI}}$ {Enforcement of a restraining order is a tangible, substantive act. If an estranged husband violates a restraining order by abducting children, and the police succeed in enforcing the order, the person holding the restraining order has undeniably just received a substantive benefit. As in other procedural due process cases, respondent is arguing that the police officers failed to follow fair procedures in ascertaining whether the statutory criteria that trigger their obligation to provide enforcement—*i.e.*, an outstanding order plus probable cause that it is being violated—were satisfied in her case.}$_{\text{INDIRECT}}$ {Cf. *Carey* v. *Piphus*, 435 U. S. 247, 266–267 (1978) (discussing analytic difference between the denial of fair process and the denial of the substantive benefit itself).}$_{\text{INDIRECT}}$ {It is JUSTICE SOUTER, not respondent, who makes the mistake of "collapsing the distinction between property protected and the process that protects it," *ante*, at 772.}$_{\text{QUASI}}$

(Dissenting opinion, *Castle Rock v. Gonzales*, pp. 791-792)

[9] As a reminder, the recipients of the restraining order and the respondents in the case included Jessica Gonzales's three children. Although the children are rarely mentioned in the opinions, Gonzales's argument is that their property rights were denied, as well. This resulted in their murder, so it is challenging to understand how protection in the form of enforcement of the restraining order would not be considered a substantive entitlement directly benefiting them.

The dissent starts with a quasi-direct quote of the concurring opinion's description of Jessica Gonzales's claims. The intertextual reference is attributed to Justice Souter with the phrase "according to." This highlights that the reference is one person's interpretation of Gonzales's claims, which the dissent then describes as a misunderstanding. Following this, the dissent presents its own interpretation but uses a quasi-direct quotation of the respondent's brief to do so. This reference is attributed to the respondent with the verb "asserting," which presents the interpretation as Gonzales's rather than as Stevens's. Additionally, the reference directly quotes the phrase "enforcement of the restraining order" from the brief to make the substantive interest explicit[10]. The dissent next uses an intertextual reference to "other procedural due process cases" to show that this argument aligns with precedent. This reference includes the name of one case as supporting evidence. The dissent ends this paragraph with another intertextual reference to the concurring opinion. Here the dissent uses the concurrence's own criticism of the respondent to criticize the concurrence. This seems to mock Souter and attempts to persuade the audience that Souter's argument is not sound. The concurring opinion does not respond to this critique and does not refer to the dissent at all.

In these examples, the concurrence and dissent use intertextual references to different texts related to property, but they both also reference Gonzales's claim (Respondent's brief). The concurrence references the Supreme Court cases *Roth* and *Olim* v. *Wakinekona*, two lower court cases, and the 14th Amendment while the dissent references the Supreme Court case

[10] The quoted element comes from the following section of the respondent's brief: "There can be no doubt Ms. Gonzales and her daughters relied on the State's promises of enforcement of the restraining order to go about their daily lives…..

The process set up in Colorado's statutory scheme was that the police must, in a timely fashion, consider the merits of any request to enforce a restraining order and, if such a consideration reveals probable cause, the police must enforce the order. Here, Ms. Gonzales alleges that due to the city's policy and custom of failing to properly respond to complaints of restraining order violations, she was denied the process laid out in the statute." (p. 10).

Carey v. *Piphus* and the concurrence. The two opinions additionally use different types of intertextual references to these different texts. The concurrence uses primarily indirect quotations and text names without providing additional details both of which allow Souter to incorporate his own meaning/purpose more thoroughly than with direct quotations (Bazerman, 2003). The dissent uses primarily quasi-direct quotations.

Overall, when defining the features of property, all the Justices seem to agree. However, their interpretation of how restraining orders meet that definition differs. The majority and concurring opinions include many intertextual references to prior case law, but they seem to make broad claims about restraining orders with little supporting evidence. This relates to ideologies about texts within the legal profession: legal conclusions require textual authority, but social considerations are accepted with no data or analytic standards (Mertz, 2007, pp. 76-77). This is one way in which legal language perpetuates a patriarchal status quo; while the Justices are experts in Constitutional law, the controversy in this case is the interpretation of restraining orders (and Colorado law; see Section 5). The Justices' reliance on intertextual references to prior case law and the exclusion of texts related to IPV "sidesteps the very real bodies risked in legal discussions of domestic violence" and maintains a system that refuses to respond IPV at the level of federal law (Andrus, 2015, p. 108). In contrast, the dissent does not focus on legal doctrine relating to property and instead provides evidence that restraining orders are property, using intertextual references to other states' case law and the respondent's brief (as well as using analogies). While the majority takes the dissent's evidence into account to some extent, it fails to do so in a serious way. It ignores many of the dissent's argument's, suggesting that bi-directional intertextuality between the opinions does not truly force the "hegemonic voice" of the majority to consider other points of view (Mertz, 1988). This suggests that legal authority comes not just from prior texts and legal

doctrine, but from the distribution of power and political ideologies on the Court (Põiklik, 2016, p. 189).

5 Mandated enforcement: Intertextual references to statutes and state case law

Another characteristic of property according to the majority opinion, is that government officials do not have the discretion to grant or deny the entitlement. Therefore, the Court needed to determine if CO Rev Stat § 18-6-803.5 truly mandated the enforcement of restraining orders, and the majority and dissenting opinions present opposing interpretations of the statute. The majority opinion argued that there is a history of police discretion in the United States, and that the mandatory language in this statute was not strong enough to override the expectation of police discretion. It concluded that the statute did not mandate the enforcement of restraining orders, so the restraining order could not be a protected property interest. In contrast, the dissenting opinion argued that the Colorado statute purposefully counters the tradition of police discretion, mandating the enforcement of restraining orders, and that this is clear in its language. Since the dissenting opinion critiques the majority opinion's analysis of the statute, many examples of intertextual references to the statute also involve intertextual references to the majority opinion.

The following sections focus on the Justices' discussion of traditions of police discretion (Section 5.1), the practicality of police discretion (Section 5.2), and the language of the statute (Section 5.3). Throughout their parallel discussions, they use intertextual references to completely different texts, the same references from the same texts used in different contexts, and different references from the same texts.

5.1 Traditions of police discretion

The majority opinion states that there is a tradition of police discretion despite the existence mandatory arrest statutes (14). This is followed by a direct quote of the ABA Standards for

Criminal Justice (1980), which states that mandatory arrest statutes cannot be interpreted as mandatory. The opinion then references the case *Chicago v. Morales* as evidence that the Supreme Court has historically accepted the tradition of police discretion.

(14) We do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*. A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.

{"In each and every state there are long-standing statutes that, by their terms, seem to preclude nonenforcement by the police… . However, for a number of reasons, including their legislative history, insufficient resources, and sheer physical impossibility, it has been recognized that such statutes cannot be interpreted literally."}DIRECT …. 1 ABA Standards for Criminal Justice 1–4.5, commentary, pp. 1–124 to 1–125 (2d ed. 1980)

{The deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands, is illustrated by *Chicago* v. *Morales*, 527 U. S. 41 (1999), which involved an ordinance that said a police officer " 'shall order' " persons to disperse in certain circumstances, *id.*, at 47, n. 2. This Court rejected out of hand the possibility that "the mandatory language of the ordinance … afford[ed] the police no discretion." *Id.*, at 62, n. 32. It is, the Court proclaimed, simply "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances."}QUASI

(Majority Opinion, *Castle Rock v. Gonzales*, pp. 760-761)

The ABA Standards for Criminal Justice are not introduced with any quotative and are instead written as a fact. This ignores that they were published in 1980 when mandatory arrest statutes in cases of domestic violence were only starting to be passed across the United States (Hoppe et al., 2020). It further ignores that the ABA Standards for Criminal Justice are not a legal decision or statute; the weight given to this in conjunction with the dismissal of the text of the statute is particularly out of character for Scalia who is a textualist (Pilon, 2004, p. 116). This is also an example of selective literalism (Tiersma & Solan, 2004) – Scalia acknowledges the contextual information that suits his argument and ignores contextual information that does not (e.g., prevalence of IPV, tradition of non-intervention).

The opinion then states that the *Chicago v. Morales* case is illustrative of this fact. It presents the ordinance relevant to the case with the neutral quotative "said." The only quoted element of the ordinance is "shall order," which parallels the language of the Colorado statute: "A peace officer shall arrest." The majority opinion then directly quotes the opinion of *Chicago v. Morales* to show that mandatory language allows for police discretion, and the attribution of the quote is "This Court." This highlights the expected consistency of Supreme Court decisions/precedents, and it presupposes that the current Justices generally agree with precedent and in particular with the quoted element – especially since the Justices deciding that case were the same as the Justices deciding *Castle Rock v. Gonzales*. Interestingly, Stevens wrote the majority opinion for *Chicago v. Morales* while Scalia was one of the dissenting Justices, so any agreement with precedent is not straightforward. The use of the quotative "rejected out of hand" implies an instant, common sense denial of mandatory ordinances. This is followed by another quote introduced with "the Court proclaimed," suggesting that police discretion is an official conclusion of the Court. In fact, the ordinance in more detail states that "Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area" (Chicago v. Morales, 1999, p. 47). The Supreme Court (affirming lower court decisions) concluded that "the ordinance enacted by the city of Chicago [was] unconstitutionally vague," and it provided law enforcement too much discretion in determining what activities were "loitering" (p. 50-51). The quoted element of the *Chicago v. Morales* opinion in (14) comes from a footnote that suggests that the use of the word "shall" alone is not mandatory or does not limit discretion completely rather than from a main conclusion of the court. However, by quoting only this section of *Chicago v. Morales*, the Court in *Castle Rock v. Gonzales* implies that the prior case focused on

maintaining police discretion. This type of intertextual reference points towards the textualization of case law. That is, a brief quote of authoritative text is applied as a rule regardless of its original intention (or "obscure location"), making legal language more important than legal analysis (Tiersma, 2007, p. 1262).

The dissenting opinion criticizes the Court's focus on police discretion in the domestic violence context. It uses intertextual references to four different state court cases to show that mandatory arrest statutes in this context purposefully counter law enforcement's traditional discretion and are truly mandatory (15).

(15) {While Colorado case law does not speak to the question, it is instructive that other state courts interpreting their analogous statutes have not only held that they eliminate the police's traditional discretion to refuse enforcement, but have also recognized that they create rights enforceable against the police under state law.}$_{\text{INDIRECT}}$ {For example, in *Nearing* v. *Weaver*, 295 Ore. 702, 670 P. 2d 137 (1983) (en banc), the court held that although the common law of negligence did not support a suit against the police for failing to enforce a domestic restraining order, the statute's mandatory directive formed the basis for the suit because it was "a specific duty imposed by statute for the benefit of individuals previously identified by judicial order." *Id*., at 707, 670 P. 2d, at 140.[11] }$_{\text{QUASI}}$ {In *Matthews* v. *Pickett County*, 996 S. W. 2d 162 (Tenn. 1999) (on certification to the Sixth Circuit), the court confirmed that the statute mandated arrest for violations of domestic restraining orders, and it held that the "public duty" defense to a negligence action was unavailable to the defendant police officers because the restraining order had created a "special duty" to protect the plaintiff. *Id*., at 165.}$_{\text{QUASI}}$ {See also *Campbell* v. *Campbell*, 294 N. J. Super. 18, 24, 682 A. 2d 272, 274 (1996) (domestic restraining order statute "allows no discretion" with regard to arrest; "[t]he duty imposed on the police officer is ministerial");}$_{\text{QUASI}}$ {*Donaldson* v. *Seattle*, 65 Wash. App. 661, 670, 831 P. 2d 1098, 1103 (1992) ("Generally, where an officer has legal grounds to make an arrest he has considerable discretion to do so. In regard to domestic violence, the rule is the reverse. If the officer has the legal grounds to arrest pursuant to the statute, he has a mandatory duty to make the arrest").}$_{\text{DIRECT}}$

(Dissenting Opinion, *Castle Rock v. Gonzales*, pp. 782-783)

This example starts with an intertextual reference to other states' case law, summarizing them (indirect quotation) as eliminating police discretion. This reference is introduced with the verb

"held." Unlike the majority opinion which provides evidence for the tradition of police discretion, with this intertextual reference, the dissent assumes there is a tradition of police discretion then provides evidence that this tradition is not relevant and that in the specific context of domestic violence restraining orders the purpose of mandatory arrest statutes is to restrict police discretion. This is followed by specific details of the cases in the form of both direct and indirect quotations, which are introduced with "the court held," "the court confirmed," and "it held." The use of these quotative verbs implies that the statutes were widely understood as mandatory and that the courts agreed that they were mandatory.

Thus, in order to argue for their opposing views of the relevance of police discretion, the majority and dissent use intertextual references to completely different texts. The majority quotes the ABA Standards for Criminal Justice (1980) and the Supreme Court case *Chicago v. Morales*. The dissent never references either of those texts at all. Instead, the dissent quotes the state court cases *Nearing v. Weaver* (1983), *Matthews v. Picket County* (1999), *Donaldson v. Seattle* (1992), and *Campbell v. Campbell* (1996)[11].

5.2 Practicality of police discretion

The majority does include two references to *Donaldson v. Seattle* to highlight the impracticality of mandatory arrest statutes when the person violating the restraining order is no longer present (16).

(16) {{As one of the cases cited by the dissent, *post*, at 783, recognized, "there will be situations when no arrest is possible, *such as when the alleged abuser is not in the home*." *Donaldson*, 65 Wash. App., at 674, 831 P. 2d, at 1105 (emphasis added).}TEXTNAME That case held that Washington's mandatory-arrest statute required an arrest only in "cases where the offender is on the scene," and that it "d[id] not create an on-going mandatory duty to conduct an investigation" to locate the offender. *Id.*, at 675, 831 P. 2d, at 1105.}QUASI

(Majority Opinion, *Castle Rock v. Gonzales*, p. 763)

[11] The majority references these four cases once in a footnote that says that the creation of rights enforceable against the police are relevant for state claims not federal, due process claims. The dissent interprets the rights enforceable against police as evidence that the statutes are mandatory.

The quoted element is attributed to *Donaldson v. Seattle* but via the dissent, which is referenced as just the text name "dissent" with no details of the content of that opinion. This implies that the dissent included this quote, but it did not. The use of the quotative verb "recognized" also presupposes that the quote is an existing fact, and it continues the suggestion that the dissent agrees with the fact. Additionally, direct quotes allow the author to select which parts of the original text are quoted (Bazerman, 2003), which can simplify the original context or delink the text from the original context (Andrus, 2011). In this example, Scalia quoted just the parts of the text that supported his point but excluded the surrounding sentences, which are more in line with a mandatory arrest interpretation (17). Thus, Scalia's use of a quasi-direct quotation allowed him to present the case in a misleading way whereas an indirect quotation would be expected to represent the original meaning of the text, which makes it clear that if an arrest is not possible, the police are still obligated to protect the victim.

(17) In the past, a common police response to domestic violence calls was to treat the matter as a family quarrel, try to mediate the situation and walk the abuser around so he could "cool off". Mandatory arrest policies eliminate this practice and require the police to treat domestic assaults the same as any other assault, arresting the offender and removing him/ her from the scene. <u>However, there will be situations when no arrest is possible, such as when the alleged abuser is not in the home.</u> In such a case the law directs the police to offer alternate means to protect the victim.

(*Donaldson v. Seattle*, 674)

In response, the dissent uses an intertextual reference to the majority opinion which also references *Donaldson v. Seattle* with an indirect quotation (18). This highlights the distinction between the facts of that case with the facts of *Castle Rock v. Gonzales*. That is, the dissent notes that in *Donaldson v. Seattle* the perpetrator left the scene, which parallels the quoted elements in the majority (16). However, the dissent points out that in *Castle Rock v. Gonzales*, Simon Gonzales had not left the scene because the restraining order prohibited him from being near the daughters.

(18) {In any event, the Court's speculations are off-base.}INDIRECT {{First, this is not a case like *Donaldson* v. *Seattle*, 65 Wash. App. 661, 831 P. 2d 1098 (1992), in which the restrained person violated the order and then left the scene.}INDIRECT Here, not only did the husband violate the restraining order by coming within 100 yards of the family home, but he continued to violate the order while his abduction of the daughters persisted. This is because the restraining order prohibited him from "molest[ing] or disturb[ing] the peace" of the daughters. See 366 F. 3d, at 1143 (appendix to dissent of O'Brien, J.). Because the "scene" of the violation was wherever the husband was currently holding the daughters, this case does not implicate the question of an officer's duties to arrest a person who has left the scene and is no longer in violation of the restraining order.}QUASI

(Dissenting Opinion, *Castle Rock v. Gonzales*, p. 786)

In these examples, the majority and dissent use intertextual references to the same elements of *Donaldson v. Seattle* but for different purposes. By selectively quoting the original text, the majority is able to imply that other courts have concluded that mandatory arrest statutes only apply in limited situations. This allows the majority to ignore the rest of the decision in *Donaldson v. Seattle*. This reflects the general quotation style of American judges, which involves using "sound bites" to represent a larger holding of the case (Tiersma, 2007, p. 1260). However, the decontextualization of texts/utterances can reframe the interpretation of events of a case (Ehrlich, 2016), and the use of this intertextual reference transforms the events leading up to *Castle Rock v. Gonzales* from an abduction to a perpetrator leaving the scene. In contrast, the dissent uses the intertextual reference to contrast the events of the two cases, which emphasizes inconsistency in the majority's argument. Although intertextual references between majority and dissenting opinions can force Justices to acknowledge multiple points of view (Mertz, 1988), the majority opinion makes no response to this particular reference. Thus, the majority presents the idea that police discretion is a practical necessity as an uncontroversial conclusion.

5.3 Statute language and the meaning of "shall"

With the context of police discretion in mind, the Court argues that the language of CO Rev Stat § 18-6-803.5 is not interpretable as mandatory because seemingly mandatory statutes are actually

discretionary in general. The opinion supports this argument by comparing intertextual references to various Colorado statutes related to law enforcement (19).

(19) {Against that backdrop, a true mandate of police action would require some stronger indication from the Colorado Legislature than "shall use every reasonable means to enforce a restraining order" (or even "shall arrest … or … seek a warrant"), §§18–6–803.5(3)(a), (b). 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." Colo. Rev. Stat. §31–4–112 (Lexis 2004). It is hard to imagine that a Colorado peace officer would not have some discretion to determine that—despite probable cause to believe a restraining order has been violated—the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance.}QUASI

(Majority Opinion, *Castle Rock v. Gonzales*, p. 761)

In this example, the opinion quotes parts of the relevant statute, specifically two of the directives to law enforcement: "shall use every reasonable means" and "shall arrest." This is compared to the directives "shall pursue" and "shall apprehend" from another statute. These intertextual references are attributed to that Colorado statute (CO Rev Stat §31-4-112) and are introduced with the quotative "has long told…that." The use of "long" in the quotative parallels the descriptions of police discretion as a "well established" or "deep rooted" tradition (see 14). This seems to give CO Rev Stat §31-4-112 more weight than CO Rev Stat § 18-6-803.5, and "shall" in both statutes is interpreted as optional.

The dissenting opinion argues that the language of the Colorado statute mandates enforcement of restraining orders. Example (20) demonstrates how the opinion supports this argument with intertextual references to different parts of CO Rev Stat § 18-6-803.5, as well as to CO Rev Stat §31-4-112.

(20) {For it is certainly plausible to construe "*shall* use every reasonable means to enforce a restraining order" and "*shall* arrest," Colo. Rev. Stat. §§18–6–803.5(3)(a)–(b) (Lexis 1999)

> (emphases added), as conveying mandatory directives to the police, particularly when the same statute, at other times, tellingly employs different language that suggests police discretion, see §18–6–803.5(6)(a) ("A peace officer *is authorized to* use every reasonable means to protect …"; "Such peace officer *may* transport …" (emphases added)).}QUASI …
>
> {Given the specific purpose of these statutes, there can be no doubt that the Colorado Legislature used the term "shall" advisedly in its domestic restraining order statute. While "shall" is probably best read to mean "may" in other Colorado statutes that seemingly mandate enforcement, cf. Colo. Rev. Stat. §31–4–112 (Lexis 2004) (police "*shall suppress* all riots, disturbances or breaches of the peace, *shall apprehend* all disorderly persons in the city …" (emphases added)), it is clear that the elimination of police discretion was integral to Colorado and its fellow States' solution to the problem of underenforcement in domestic violence cases.[10]Since the text of Colorado's statute perfectly captures this legislative purpose, {it is hard to imagine what the Court has in mind when it insists on "some stronger indication from the Colorado Legislature." *Ante*, at 761}DIRECT}QUASI
>
> (Dissenting Opinion, *Castle Rock v. Gonzales*, pp. 775, 782)

The dissenting opinion quotes directives to law enforcement from the relevant statute and other elements of the same statute that do not use mandatory language: "shall use every reasonable means," "shall arrest," "a peace officer is authorized to use," and a "peace officer may transport." When referencing CO Rev Stat § 18-6-803.5, the dissenting opinion attributes the quotes either to the text itself or to the Colorado legislature. It uses the quotatives "tellingly employs" and "used…advisedly," which express some amount of agency. This connects the language of the statute with the intention of mandating enforcement, and it suggests the language was used purposefully. The opinion makes this explicit by writing that "the text…captures this legislative purpose." The dissenting opinion also includes an intertextual reference to CO Rev Stat §31-4-112, which includes other directives to law enforcement (e.g., "shall suppress all riots"). However, it introduces the directives that use "shall" with the frame "is probably best read to mean "may."" This is a passive way of introducing the reference; the reader and interpretation of the statute is highlighted in place of the purpose of the law. This seems to imply that "shall" traditionally is mandatory, but it can be interpreted as discretionary when the intent of the law was not to be

mandatory. The dissent presents the language of these statutes as taking on meaning based on the intention/context rather than as having some inherent meaning.

The dissent also directly quotes the majority opinion in the last sentence of the example. First, "it is hard to imagine" – while not highlighted with quotation marks – is a direct quote from the majority opinion's statement that "it is hard to imagine that a Colorado peace officer would not have some discretion" (19). The use of the same language points to a disbelief of the majority and implies that the thing that is hard to imagine is the legitimacy of the Court's argument, not the lack of police discretion based on the statute. Additionally, the final direct quote "some stronger indication from the Colorado Legislature" is attributed to the Court and introduced with the verb "insists," which implies uncalled for stubbornness. This quote also highlights that the Court wanted the intent of the law to be clearer in its language, but the Court did not actually interpret the law with its intention in mind. This merging of voices and points of view could be considered parody and is used to mock to the majority opinion (Bakhtin, 1981; Conway, 2003).

In conclusion, the two opinions use intertextual references to different elements of the same statutes to present opposing interpretation of the Colorado law. The majority only quotes law enforcement directives that use the word "shall," while the dissent quotes more from CO Rev Stat § 18-6-803.5. The majority's more limited selection of intertextual references makes it appear that the use of "shall" in this statute is not more mandatory than any other statutory language. This interpretation relies on a referentialist language ideology, which treats language as transparent and the meaning of words as context-free (Bauman & Briggs, 1990; Hodges, 2015; Silverstein, 1976). The dissent's use of additional intertextual references serves to undermine this argument, but the majority does not respond in turn.

6 Texts in conversation: Intertextual references to the majority and dissent

As mentioned above, there are many examples of intertextual references between the three *Castle Rock* opinions. In particular, the dissenting opinion references the majority opinion 33 times, and these are primarily counter points to the majority's argument. The majority opinion references the dissenting opinion only 13 times about half of which include counter points to the dissent and half of which seem to agree with the dissent.

In general, the use of intertextual references to present counter arguments to the opposing opinions involves commenting on the other opinion's interpretation of other texts or of the events of the case. This was discussed in relation to Examples (6), (8), (9), (11), (13), (18), and (20). Of note, the majority opinion only minimally responds to counter arguments in the dissenting opinion. The dissent does respond to counter arguments by the majority but with additional counter arguments, so no agreement is reached.

Beyond this and to a lesser extent, the majority and dissent also use intertextual references to the opposing opinion to disagree with the approach of other Justices, not just with their interpretation of texts. For example, (21) is a footnote in the majority opinion that critiques a major component of the dissenting opinion. That is, the dissent argues that the interpretation of the Colorado statute should be left to the 10th Circuit Court unless that court was clearly wrong. If the 10th Circuit Court was clearly wrong the US Supreme Court should ask the Colorado Supreme Court to interpret Colorado law, rather than interpreting it themselves. This is an argument for how the court should behave, not an argument answering the questions of the case, and in (21), the majority opinion disagrees with this suggested approach.

(21) {In something of an anyone-but-us approach, the dissent simultaneously (and thus unpersuasively) contends not only that this Court should certify a question to the Colorado Supreme Court, *post,* at 776-778 (opinion of STEVENS, J.), but also that it should defer to the Tenth Circuit (which itself did not certify any such question), *post,* at 775-776.}INDIRECT,

> INDIRECT {No party in this case has requested certification, even as an alternative disposition. See Tr. of Oral Arg. 56 (petitioner's counsel "disfavor[ing]" certification); *id.,* at 25–26 (counsel for the United States arguing against certification). At oral argument, in fact, respondent's counsel declined JUSTICE STEVENS' invitation to request it. *Id.,* at 53.}QUASI
>
> (Majority opinion, *Castle Rock v. Gonzales*, p. 758)

In this example, the majority introduces the indirect quote as an "anyone-but-us approach." This phrase uses casual, non-legal language, while much of the rest of the example uses legalese. The combination of styles is a feature of parody according to Bakhtin (1981), which has been shown to equate the authority of legal and non-legal discourses and to present opposing arguments as facetious (Conway, 2003, p. 501). Thus, by using this introductory phrase, the majority suggests that the dissent does not take the issues of the case seriously. In addition, the indirect quote is attributed to the dissent with the verb "contends," which is qualified with "simultaneously (and thus unpersuasively)." Apart from overtly disapproving of the dissent, this is a misleading representation of the dissent's arguments. The dissent suggests deferring to the 10th Circuit Court or certifying the question to the Colorado Supreme Court, not doing both. Although indirect quotation generally attempts to reproduce the meaning of the original text, it can also reflect the author's "spin" on the original text (Bazerman, 2003, p. 88). However, it is particularly problematic for Supreme Court Justices to inaccurately paraphrase texts. Since Supreme Court opinions are increasingly textualized, meaning the language of the opinions is treated as law (Tiersma, 2007), these paraphrases may be interpreted as legal rules with the assumption that they accurately reflect the legal history, when in fact they do not. This raises the questions of what is the extent of intertextual references that are not faithful to original texts across Supreme Court opinions and is this purposeful manipulation or honest misunderstanding by Justices. Finally, Scalia references the oral arguments of the case to support his counter argument – that the Supreme Court should

interpret Colorado law, not the Colorado Supreme Court – because no participants requested certification[12].

In response, the dissent wrote a footnote that seems to agree with elements of the majority opinion's argument but is in fact a counter argument (22). Specifically, there is agreement with the majority opinion's description of the dissent's "anyone-but-us approach," which then transitions into support for that approach/counter points to the majority's approach. Interestingly, Stevens does not comment on the misrepresentation of his argument by the majority.

(22) {The Court is correct that I would take an "anyone-but-us approach," *ante*, at 758, n. 5, to the question of *who* decides the issue of Colorado law in this case.}QUASI Both options that I favor—deferring to the Circuit's interpretation or, barring that, certifying to the Colorado Supreme Court—recognize the comparative expertise of another tribunal on questions of state law. And both options offer their own efficiencies. {By contrast, the Court's somewhat overconfident "only us" approach lacks any cogent justification. The fact that neither party requested certification certainly cannot be a sufficient reason for dismissing that option.}INDIRECT {As with abstention, the considerations that weigh in favor of certification—federal-state comity, constitutional avoidance, judicial efficiency, the desire to settle correctly a recurring issue of state law—transcend the interests of individual litigants, rendering it imprudent to cast them as gatekeepers to the procedure. See, *e.g., Elkins* v. *Moreno*, 435 U. S. 647, 662 (1978) (certifying state-law issue absent a request from the parties);}INDIRECT {*Aldrich* v. *Aldrich*, 375 U. S. 249 (1963) *(per curiam)* (same);}TEXTNAME {see also 17A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4248, p. 176 (2d ed. 1988) ("Ordinarily a court will order certification on its own motion")}DIRECT

(Dissenting opinion, *Castle Rock v. Gonzales*, pp. 778-779)

This example starts with a quasi-direct intertextual reference attributed to the majority opinion. The use of "is correct" suggests agreement with the majority, particularly agreement with the quoted element, "anyone-but-us approach." This reference uses non-legal language, and it is followed by an explanation of the approach, which uses legal language. Like with (21), this

[12] To clarify, the respondent's counsel declined the invitation to request certification because they argued the Supreme Court was obligated to defer to the 10th Circuit Court's interpretation of Colorado law.

merging of contrasting styles is an example of parody, mocking the majority argument (Bakhtin, 1981; Conway, 2003). Next, the dissent uses an indirect quotation of the majority that summarizes the opinion as using an ""only us" approach." This parallels the majority's description of the dissent, and the use of scare quotes – quoting the voice of another while showing disagreement – indicates skepticism or derision of the majority's approach. Finally, the dissent argues that participants' disfavoring of certification to the Colorado Supreme Court is irrelevant and uses intertextual references to two US Supreme Court cases and to a legal encyclopedia as evidence. Although both opinions do reference other texts in support of their approaches, they reference entirely different texts. The majority never references the Supreme Court cases cited by the dissent in this example. The majority did not respond to this critique. Like with prior examples, this indicates that the majority does not truly have to acknowledge the dissent even though bi-directional could force the majority to take alternate views into account (Mertz, 1988). This highlights the greater legal authority of majority opinions.

These examples demonstrate how the two opinions are in conversation with each other. The dissenting opinion made an argument, the majority opinion made a counter argument, and finally the dissenting opinion critiqued the majority's counter argument. This suggests that the two opinions were developed together; the intertextual references to the opposing opinions are really references to prior drafts of the opinions. This process likely impacts which texts and legal analyses become the focus of the final versions as the two opinions are built off of each other.

In fact, there is even an example of intertextual references between the two opinions in which the origin of the referenced content, i.e., from the majority or from the dissent, is not clear. First, Example (23) from the majority shows an indirect quotation describing the domestic violence context for mandatory arrest statutes.

(23) {The dissent correctly points out that, in the specific context of domestic violence, mandatory-arrest statutes have been found in some States to be more mandatory than traditional mandatory-arrest statutes. *Post,* at 779-784 (opinion of STEVENS, J.).}INDIRECT {The Colorado statute mandating arrest for a domestic-violence offense is different from but related to the one at issue here, and it includes similar though not identical phrasing. See Colo. Rev. Stat. §18–6–803.6(1) (Lexis 1999) ("When a peace officer determines that there is probable cause to believe that a crime or offense involving domestic violence … has been committed, the officer shall, without undue delay, arrest the person suspected of its commission …").}QUASI

(Majority opinion, *Castle Rock v. Gonzales*, p. 762)

In this example, the intertextual reference is attributed to the dissent with the quotative verb "points out," which implies that the dissent first wrote this information. The majority opinion appears to agree with the dissenting opinion, using the adverb "correctly" along with the quotative verb. However, in (24) the dissent includes and disagrees with an intertextual reference to the majority opinion that is a direct quotation of the underlined element from (23).

(24) {Indeed, the Court fails to come to terms with the wave of domestic violence statutes that provides the crucial context for understanding Colorado's law.}INDIRECT {The Court concedes that, "in the specific context of domestic violence, mandatory-arrest statutes have been found in some States to be more mandatory than traditional mandatory-arrest statutes," *ante*, at 762, but that is a serious understatement.}DIRECT The difference is not a matter of degree, but of kind… {The innovation of the domestic violence statutes was to make police enforcement, not "more mandatory," but simply *mandatory*.}QUASI

(Dissenting opinion, *Castle Rock v. Gonzales*, p. 784)

In this example, the direct quotation is attributed to the majority using the quotative verb "concedes." The use of this verb is suggestive of the majority admitting to being partially wrong in its overall denial of the mandatory nature of these arrest statutes (although the majority itself in no way admits that). The dissent goes on to describe this as an "understatement," which indicates that the dissent disagrees with the majority. Finally, the dissent explains the disagreement using a quasi-direct quotation of the majority. Specifically, the dissent writes that the statues are "not

"more mandatory," but simply mandatory" to highlight the distinction between the majority's interpretation of these statutes and lawmakers' intention in making the statutes.

These two examples again demonstrate that the two opinions are in conversation and written together, but the timeline and origin of the text is more convoluted. Presumably, the indirect quotation in the majority opinion was intended to summarize several paragraphs in the dissenting opinion that describe the domestic violence context. Then, the direct quotation in the dissent is a critique of the majority's interpretation of those paragraphs. However, as they are written, the majority attributes the sentence to the dissent and seems to agree with the dissent, while the dissent attributes the same sentence to the majority and disagrees with it.

In sum, the use of intertextual references to the majority by the dissent and vice versa indicates that the language of the two opinions is interwoven. That is, despite presenting completely opposing arguments throughout, the opinions take on the language of the same prior texts and of the opposing opinion in an effort to discount the opposing opinion.

7 Conclusion

In this study, I investigated the use of intertextual references in the US Supreme Court case *Castle Rock v. Gonzales* to determine if and how language use in judicial decisions perpetuates patriarchal violence. Because the legal arguments in this case revolved around the concept of property and the Colorado law mandating the enforcement of restraining orders, my analysis focused on intertextual references related to those two themes. In comparing these intertextual references in the majority and dissenting opinions some broader patterns of text type, reference type, and framing devices became clear.

First, when developing the concept of property, the majority/concurring and dissenting opinions referenced different text types and used different intertextual reference types. The

majority and concurring opinions supported their arguments with intertextual references to Supreme Court case law and determined that restraining orders do not meet the definition of property, but they did not provide substantial evidence for this conclusion. This is consistent with the finding that legal decisions require authority based in prior texts whereas social considerations are seen as self-evident (Mertz, 2007, pp. 76-77). By following this norm, the two opinions can avoid discussions of the people who are harmed by domestic violence. The dissenting opinion references prior case law but less frequently than the majority and concurring opinions. The dissent also references the events of the case/Jessica's claim, as well as state case law, as evidence that restraining orders meet the definition of property, which brings attention to the domestic violence context. Further, the majority and dissenting opinions use different intertextual reference types when referring to prior Supreme Court case law. The majority opinion uses more quasi-direct and direct quotations than indirect quotations (which differs from the overall frequency of reference types), and the dissent uses indirect quotations more than other reference types (matching the overall frequency). The use of quasi-direct quotation is common in American judicial opinions and reflects the textualization of case law; small sections of prior texts are interpreted as legal rules or standards (Tiersma, 2007). The differing use of intertextual reference types indicates that Scalia in writing the majority opinion is attempting to present a certain interpretation of precedent as a binding rule to highlight its legal authority, while Stevens in writing the dissenting opinion is less focused on precedent or presents precedent in a way that limits its authority. This suggests that in judicial opinions the type of intertextual reference used is related to the type of text cited and the authority of that text (or the authority imposed on/given to that text). In other words, in judicial opinions quasi-direct quotation may give precedent more authority due to the traditions of quotation practices in legal texts. This raises the question of how the function of intertextual

references is linked to the referring context and if the same intertextual reference type functions differently when used in different genres of texts.

Second, when discussing the meaning of CO Rev Stat § 18-6-803.5 the majority and dissenting opinions use intertextual references to different texts and to different elements of the same texts. I argue that that these uses of intertextual references indicate that the majority opinion relies on selective literalism and a referentialist ideology. Specifically, the majority opinion uses intertextual references to texts that support police discretion and avoids texts that focus on the prevalence of IPV and the intent of Colorado law makers. Alternatively, the dissenting opinion acknowledges traditions of police discretion but uses intertextual references to texts that demonstrate the purpose of this statute was to counter this tradition. Thus, the majority opinion only uses certain contextual information to interpret the meaning of the Colorado law and does so in a way that benefits the government (i.e., Castle Rock police). This aligns with other findings that judges often rely on selective literalism, inconsistently considering pragmatic information, in a way that tends to benefit the government (Tiersma & Solan, 2004). Similarly, the majority opinion uses intertextual references to various statutes to suggest that the word "shall" always means "may," while the dissent uses intertextual references to the statutes to suggest that the meaning of "shall" is context dependent. The majority opinion's interpretation relies on a referentialist ideology that assumes the meaning of the Colorado statute is context-free (Bauman & Briggs, 1990; Hodges, 2015; Silverstein, 1976). Although the dissent's interpretation does acknowledge the broader context, the majority opinion has more legal authority. Thus, by using these intertextual references, the *Castle Rock* decision in general and the language of the statute are abstracted away from the events of the case and the personal stories of the people involved (see also Ehrlich, 2016 and Mertz, 2007). To some extent, by nature Supreme Court decisions abstract away from individual events to make

broader legal decisions. However, this allows the Court to disregard the consequences of IPV and of allowing the continuation of police discretion, which calls attention to the importance of understanding which texts are ignored in the creation of politically powerful texts (Hodges, 2015, p. 56).

Additionally, throughout the opinions certain framing devices are used to present legal conclusions as historically consistent. Many intertextual references to prior Supreme Court case law are attributed to "this Court," "our cases," and even "we." Although the prior cases come from many different years and were decided by different justices, these attributions collapse time. The implication arises that all historical cases are equally relevant in contemporary times and that all justices spanning all Courts should agree with/follow precedent. Also, the use of quotative verbs such as "held," "proclaimed," "confirmed," "recognized" and "rejected" present intertextual references to case law as uncontested rules without acknowledging if there were dissenting opinions. Lastly, the majority opinion introduces intertextual references related to police discretion with the descriptors "well-established," "long co-existed," and "deep rooted nature." Again, this indicates a constant rule of police discretion across history. The use of these framing devices highlights that legal authority comes in part from applying existing laws in new contexts, but in the context of IPV, this ignores how the existing system explicitly allowed this violence[13] (Andrus, 2015). Therefore, the reliance on precedent and intertextual references can, at least in some cases, be used to deny marginalized people rights and limit social progress.

[13] This is especially clear with certain intertextual references. For example, the *Castle Rock* majority opinion references Blackstone (1765-69): "The serving of public rather than private ends is the normal course of the criminal law because criminal acts, "besides the injury [they do] to individuals, . . . strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity."" (Majority opinion, p. 765). However, Blackstone (1765-69) encouraged wife beating (see Section 1.1).

Finally, I also investigated the use of intertextual references between the majority and dissenting opinions, which provides insight into how these texts are in conversation with each other. In general, it seems that through the process of writing, each opinion takes on elements of language from the opposing opinion and references the same texts as the opposing opinion. In particular, the dissent uses intertextual references to the majority opinion to present counter arguments to that opinion. These references include elements of parody, seemingly mocking the argumentation of the majority opinion. Further, parody can be used to subvert established meanings and resist hegemonic power, so these intertextual references may be a particularly useful tool for dissenting opinions (Hodges, 2015). However, the majority opinion only minimally responds to the counter arguments in the dissent (and the concurring opinion agrees with the majority opinion but never references the dissenting opinion), so bi-directional intertextuality is not equal across the opinions. This points to the idea that the legal system in the United States is dependent on procedure to achieve justice, meaning that as long as both sides in a dispute are heard justice is done regardless of the outcome (Mertz, 2007, p. 59). Thus, the existence of both the majority and dissenting opinions may be considered sufficient, and the majority does not truly have to acknowledge the dissent, the events of the case that resulted in the death of three children, or the future consequences for victims of IPV. Instead, the distribution of power on the Court and its political ideology are most important for determining the outcome of the case (Põiklik, 2016, p. 189). Further, this indicates that Supreme Court opinions could be considered a régime of truth with truth understood as a set of rules to distinguish true from false in a given context and the power that is associated with what is defined as true. This truth is produced and sustained by dominant institutions (Foucault, 1980, pp. 132-133).

In sum, my analyses show that the three opinions use intertextual references in different ways to make their legal arguments. The majority and concurring opinions rely on a referentialist language ideology – interpreting intertextual references as context free – to present their arguments as self-evident. However, since there is also selective literalism, the opinions are not consistent in applying their referentialist approach. The opinions also use framing devices to characterize precedent as historically consistent. These findings align with those of prior studies (e.g., Andrus, 2015; Bauman & Briggs, 1990; Ehrlich, 2016; Hodges, 2008, 2015; Sclafani, 2008). The dissent uses intertextual references to other texts commenting on the domestic violence context and to the majority opinion to point out flaws in the argument. However, by not responding to the dissent, the majority opinion dismisses the widespread problem of domestic violence. My results also show that in Supreme Court opinions the stylistic norms/textualization of precedent may impact the interpretation of intertextual reference types with quasi-direct quotations used to present prior texts as authoritative rules. This connection between text type, intertextual reference type, and meaning should be explored more in future research.

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