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No Relief: Understanding the Supreme Court's Decision in *Town of Castle Rock V. Gonzales* Through the Rights/Remedies Framework

Tritia L. Yuen

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No Relief: Understanding the Supreme Court's Decision in *Town of Castle Rock V. Gonzales* Through the Rights/Remedies Framework

Keywords

Rights, Remedies, Framework, Procedural Due Process, *Rock V. Gonzales*

NO RELIEF:

UNDERSTANDING THE SUPREME COURT'S DECISION IN *TOWN OF CASTLE ROCK V.* *GONZALES* THROUGH THE RIGHTS/REMEDIES FRAMEWORK

TRITIA L. YUEN*

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INTRODUCTION

The events on June 22, 1999 leading up to the brutal killings of Rebecca, Katheryn, and Leslie Gonzales in Castle Rock, Colorado were undeniably shocking.¹ Simon Gonzales abducted his three daughters, ages seven, nine, and ten, violating a court-issued Temporary Restraining Order (TRO) that prohibited him from “molest[ing] or disturb[ing]” his daughters and ex-wife.² Jessica Gonzales, the girls’ mother, called Castle Rock police six times to report that Mr. Gonzales violated the TRO. Ms. Gonzales also verified speaking with Mr. Gonzales and provided the police with the

1. The nine amicus briefs signed by one-hundred-thirteen organizations that were filed on Ms. Gonzales’ behalf demonstrate the shock from the community. See Brief of International Law Scholars et al. as Amici Curiae in Support of Respondents, Town of Castle Rock, Colorado v. Gonzales, 125 S. Ct. 2796 (2005) (No. 04-278); Brief Amicus Curiae of the National Ass’n of Women Lawyers and the National Crime Victims Bar Ass’n in Support of Respondent, *Gonzales*, 125 S. Ct. 2796 (No. 04-278); Brief Amicus Curiae of the American Civil Liberties Union et al. in Support of Respondent, *Gonzales*, 125 S. Ct. 2796 (No. 04-278); Brief of National Black Police Ass’n et al. as Amici Curiae Supporting Respondent, *Gonzales*, 125 S. Ct. 2796 (No. 04-278) [hereinafter NBPA Amicus Brief]; Brief Amici Curiae of National Network to End Domestic Violence et al. in Support of Respondent, *Gonzales*, 125 S. Ct. 2796 (No. 04-278) [hereinafter National Network Amicus Brief]; Brief Amicus Curiae of AARP in Support of Respondent, *Gonzales*, 125 S. Ct. 2796 (No. 04-278) [hereinafter AARP Amicus Brief]; Brief of Amicus Curiae the Family Violence Prevention Fund et al. in Support of Respondent, *Gonzales*, 125 S. Ct. 2796 (No. 04-278); Brief of Peggy Kerns, Former Member of the House of Representatives of the State of Colorado, and the Texas Domestic Violence Direct Service Providers, as Amici Curiae In Support of Respondent, *Gonzales*, 125 S. Ct. 2796 (No. 04-278) [hereinafter Kerns Amicus Brief]; Brief of National Coalition Against Domestic Violence and National Center for Victims of Crime as Amici Curiae in Support of Respondent, *Gonzales*, 125 S. Ct. 2796 (No. 04-278);

2. See *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1143-44 (10th Cir. 2004) (attaching copies of the TRO issued against Mr. Gonzales on May 21, 1991 as an appendix to the case); see also Colorado Judicial Branch, Common Legal Terms, <http://www.courts.state.co.us/chs/court/forms/commonterms.htm#T> (last visited July 20, 2006) (defining a TRO as “[a]n order granted without notice or hearing, maintaining the status quo until a hearing to determine the propriety of injunctive relief, temporary or permanent. In other states and in the federal courts this can be referred to as a protective order”).

girls' likely location. Nevertheless, the police failed to respond to Ms. Gonzales' requests for enforcement of the TRO. Rather, they told Ms. Gonzales six times to wait and call back later. Less than seven hours after Ms. Gonzales first contacted police, Mr. Gonzales arrived at the Castle Rock police station. He opened fire with a semi-automatic handgun he had purchased after taking the girls that day. Police shot Mr. Gonzales dead at the scene and found the three Gonzales girls dead in the cab of the truck.³ Mr. Gonzales had shot each of his daughters in the head.⁴

Ms. Gonzales sued the city of Castle Rock and three police officers individually and on behalf of her daughters for violation of their due process rights under the Fourteenth Amendment.⁵ The U.S. District Court of Colorado granted the city's motion to dismiss on the basis that the connection between the state's actions and the harm to the Gonzales girls was too remote to hold the state responsible.⁶ On appeal, the Tenth Circuit Court of Appeals reversed, finding that the city violated the Fourteenth Amendment's Due Process Clause in failing to protect the children by enforcing the TRO.⁷ The city

3. See Interview by Mike Wallace with Jessica Gonzales, CBS television broadcast (Mar. 20, 2005), *available at* <http://www.cbsnews.com/stories/2005/03/17/60minutes/main681416.shtml> (recounting what happened on the night Mr. Gonzales abducted and killed his daughters). Castle Rock Chief of Police Tony Lane insists that because there was no concrete evidence that Mr. Gonzales would act violently against the girls, the police acted properly in treating the matter as a domestic dispute. *Id.* He maintains that the officers acted reasonably based on the information available to them at the time, and because Ms. Gonzales did not insist that the police go to Mr. Gonzales' known location. *Id.*

4. *Id.*

5. The Due Process Clause requires that no state shall "deprive any person of life, liberty, or property, without due process of law." *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863). Though Ms. Gonzales' claim raised both substantive and procedural due process rights, the U.S. District Court of Colorado dismissed her substantive due process claim. The Tenth Circuit and the Supreme Court affirmed this dismissal. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2810 (2005); *Gonzales*, 366 F.3d at 1098. See generally *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 197-98 (1989) (refusing to uphold substantive due process protection where doing so imposes an affirmative duty on state actors).

6. *Gonzales v. City of Castle Rock*, No. 00-D-1285, 2001 U.S. Dist. LEXIS 26018, at *15 (D. Colo. Jan. 22, 2001). The court acknowledged that its ruling was troubling. However, quoting *DeShaney*, the court justified its decision because

[j]udges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for [the deceased children] and [their] mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the [Defendants], but by [Simon Gonzales].

Id. at *15 (quoting 489 U.S. at 202-03) (alterations in original).

7. *Gonzales*, 366 F.3d at 1118.

appealed and the Supreme Court granted certiorari to decide whether Ms. Gonzales had a valid substantive due process claim.⁸

On June 27, 2005, despite acknowledging the facts as “horrible,” the Supreme Court held that the police did nothing wrong and that Ms. Gonzales was not entitled to the enforcement of the TRO against Mr. Gonzales.⁹ The Court classified TROs as “benefits” that are not constitutionally protected entitlement property interests.¹⁰ The Court explained that if state law required mandatory enforcement of TROs, then an independent source would exist such that Ms. Gonzales would have had an entitlement property interest.¹¹ However, the Court quickly dismissed the possibility that mandatory enforcement was the Colorado Legislature’s intent and provided Ms. Gonzales with no basis for relief.¹²

*Town of Castle Rock v. Gonzales*¹³ marks the latest in a line of Supreme Court decisions limiting the protections of the procedural due process clause. In *DeShaney v. Winnebago*,¹⁴ the Court indicated that states can impose affirmative duties on their agents. In *Gonzales*, the text of the statute and legislative history at issue show that the Colorado Legislature intended to impose an affirmative duty on police officers to enforce TROs.¹⁵ Nonetheless, the Supreme Court still refused to hold the Town of Castle Rock accountable.¹⁶ Rather,

8. *Town of Castle Rock v. Gonzales*, 533 U.S. 955 (2004) (granting the motion for writ of certiorari).

9. *Gonzales*, 125 S. Ct. at 2810.

10. *Id.* at 2803.

11. *Id. But cf.* *Siddle v. City of Cambridge*, 761 F. Supp. 503, 509 (S.D. Ohio 1991) (“This Court believes that [a protective] order creates a property right which incurs a duty on the part of the government”); *Coffman v. Wilson Police Dep’t*, 739 F. Supp. 257, 264 (E.D. Pa. 1990) (“[A] court order may create a property right. If it did not, much of the work of this, or any other court, would be nugatory; civil disputes are referred to courts precisely because the court can issue an order that compels one person to [act or not act].”).

12. *Gonzales*, 125 S. Ct. at 2805. Justices Stevens and Ginsberg also suggested that interpretation of state law should be left to the Colorado Supreme Court. Transcript of Oral Argument at 23-24, 51-52, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-278.pdf. See also Christopher J. Roederer, *Another Case in Lochner’s Legacy, The Court’s Assault on New Property: The Right to the Mandatory Enforcement of a Restraining Order is a “Sham,” “Nullity,” and “Cruel Deception,”* 54 DRAKE L. REV. 321, 338-41 (criticizing the Court’s failure to defer to the circuit court which has local knowledge of law and practice, and which would be more efficient).

13. *Gonzales*, 125 S. Ct. at 2805.

14. See 489 U.S. 189, 202 (1989) (clarifying that a state can create affirmative duties of care and protection on its agents judicially or legislatively). The *DeShaney* Court, however, found no such duty existed to compel the state to protect a child from violence inflicted by his father. *Id.*

15. See *infra* Part II.B (demonstrating the Colorado Legislature’s intent for mandatory TRO enforcement).

16. *Gonzales*, 125 S. Ct. at 2803.

the Court rejected the Tenth Circuit's finding that Colorado law gave Ms. Gonzales a protected property interest in the enforcement of her restraining order.¹⁷ As a result of this decision, the Court severely restricted private citizens' ability to receive relief when their negative rights¹⁸ are infringed upon by state actors.¹⁹

This Comment argues that the Supreme Court's lack of deference to clear legislative intent is best understood through the rights/remedies framework. This framework explains how the Court's refusal to place any burden on state actors caused it to stray from a textual interpretation of the Colorado Code that prescribed mandatory TRO enforcement. This Comment proposes that this shift is part of the Court's expansion into remedies jurisprudence, despite its proper role as an enforcer of rights. Part I begins by explaining the rights/remedies framework. Part II analyzes the line of Supreme Court cases from *Goldberg v. Kelly*²⁰ to *Gonzales*, demonstrating the Court's shift to limiting the protections of the procedural due process clause. Part III considers *Gonzales*' impact on public policy, as the decision diminishes legislative ability to protect citizens while it expands the Supreme Court's role to the application of remedies. This Comment concludes by considering how the Court should have ruled on Ms. Gonzales' claim and the possibilities for postdeprivation remedies for future victims.

17. *Id.* at 2804. The Court asserted that it placed greater weight on the plain language of the statute than on legislative intent or on past Colorado court decisions. However, the plain language of COLO. REV. STAT. § 18-6-805.5 does suggest mandatory enforcement. *See infra* Part II.B.2 (showing the Colorado Legislature's intent for mandatory TRO enforcement through the plain language and legislative history of the statute).

18. *See* Childs v. Collins, 995 F.2d 67, 69 (5th Cir. 1993) (suggesting that a "negative right" is a shield against government intrusion); Arielle Goldhammer, *A Case Against Consensual Crimes: Why the Law Should Stay Out of Pocketbooks, Bedrooms, and Medicine Cabinets*, 41 BRANDEIS L.J. 237, 237 (2002) (defining "negative rights" as the "freedom from, rather than the freedom to do, something").

19. *Cf. Gonzales*, 125 S. Ct. at 2805-06 (recognizing that "well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes"). The Court also asserted that "legislative history, insufficient resources, and sheer physical impossibility" supported non-mandatory interpretation. *Id.* *But cf.* Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1229-32 (2001) (explaining how taking away police discretion through "no drop" policies that require police to arrest batterers may protect victims in the short term, but disempowers them in the long term by removing decision-making power). *See generally* STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 31 (2005) (contesting the understanding that the Constitution prohibits the federal government from protecting citizens' negative liberties).

20. 397 U.S. 254 (1970).

I. THE RIGHTS/REMEDIES FRAMEWORK

The Supreme Court's ruling in *Gonzales* is best understood through the rights/remedies framework. This framework distinguishes between cases in which the Court decides an issue based on a clear constitutional or statutory *right*, and those in which the Court makes a decision based on policy or political concerns arising from *remedial* impacts.²¹ Under the rights/remedies framework, courts bear the responsibility for determining the extent and limit of legal rights, while legislatures address the remedial concerns necessary to protect these rights.²²

The historical basis for the rights/remedies framework begins with *Marbury v. Madison*.²³ In *Marbury*, the Court established that the Constitution gives courts final consideration of the constitutionality of laws.²⁴ More recently, in *City of Boerne v. Flores*,²⁵ the Court reasserted the judiciary's discretion to define what constitutes a right, acknowledging the difference between rights and remedies.²⁶ As the court's role is to define rights, the framework leaves remedial

21. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) (suggesting that "there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues"). Professor Sager uses this distinction to explain the underenforcement of constitutional norms such as the equal protection clause. He argues that in creating three standards of scrutiny, and dismissing most claims of equal protection violations, the Court does not fully provide the protections that the drafters of the Fourteenth Amendment intended. *Id.* at 1215-18.

22. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (emphasizing that the Court's role in interpreting the Constitution is to establish what the law says). See generally U.S. CONST. amend. XIV, § 5 (granting Congress legislative power to enforce the protections of the Fourteenth Amendment).

23. 5 U.S. (1 Cranch) 137, 177 (1803) (explaining that legislative acts do not bind the Court and that the Constitution gives the Supreme Court final consideration of the constitutionality of laws).

24. *Id.* ("It is emphatically the province and duty of the judicial department to say what the law is."). Justice Marshall also maintained that "[t]he question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority." *Id.* at 167. *Contra* Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2707 (2003) (critiquing the widely-held belief that judicial review was established by *Marbury* and instead pointing out that *Marbury* is merely where the Court applied well-established principles).

25. 521 U.S. 507 (1997).

26. *Id.* at 519. In *Flores*, the Court struck down the Religious Freedom Restoration Act because it did not agree with Congress's interpretation of what was constitutionally acceptable legal protection where the Constitution was silent. *Id.*; see also David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 66-67 (1997) (emphasizing how *Flores* is one example of the Court's distinction between remedy and substance).

concerns to the legislatures.²⁷ Remedial concerns include the implementation of judicially-determined constitutional rights and the detection and prevention of constitutional violations.²⁸

In some cases, courts and legislatures may overstep their roles, blurring these distinctions. For example, in *Flores*,²⁹ the Court based its decision on a constitutional right and found that Congress overstepped its remedies role by enacting legislation that changed the rights guaranteed under the Free Exercise Clause of the First Amendment.³⁰ In contrast, the Court's concern with remedial impacts drove its decision in *Colegrove v. Green*.³¹ *Colegrove* involved a challenge to congressional attempts to correct electoral districts for federal elections pursuant to congressional powers under Article I, Section 4 of the Constitution.³² Professor Daryl J. Levinson has suggested that the political controversy surrounding the reapportionment and the lack of a feasible solution caused the Court to "disclaim the existence of a judicially enforceable constitutional right."³³ Thus, concern over the outcome affected the Court's definition of a constitutional right.

Critics maintain that the framework's distinction between rights and remedies is oversimplified because rights are inherently influenced by the nature of the remedies they create.³⁴ Nevertheless,

27. See generally Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 87 (1997) (distinguishing rights as attaching to constitutionally-required affairs from remedies, which attach to states of affairs that are not constitutionally required).

28. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 869 n.47 (1999) (defining "remedies" within this tool of constitutional analysis).

29. 521 U.S. at 508.

30. *Id.* at 519 (striking down the Religious Freedom and Restoration Act); see also Michael W. McConnell, *Institutions and Interpretations: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 171-73 (1997) (asserting that the Court only has the last say in interpreting the Constitution, and its proper role is to defer to Congress).

31. 328 U.S. 549 (1946).

32. *Id.* at 552-53; see also U.S. CONST. art. I, § 4 ("Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.").

33. Levinson, *supra* note 28, at 882 (explaining that the Court in *Colegrove* allowed Congress to correct state malapportionment because of its justiciability concerns, rather than constitutional concerns).

34. See, e.g., *id.* at 884 (asserting that courts must consider rights and remedies concurrently because rights "may be shaped by the nature of the remed[ies] that will follow if the right[s are] violated"). Levinson also argues that the threat of undesirable remedial consequences forces courts to consider remedies alongside rights, and that the definition of some rights necessarily incorporates remedies. *Id.* at 885. Using the example of prison conditions, Levinson emphasizes the following:

The substantiation of the constitutional right to decent prison conditions through the transformation of remedies into rights seems almost inevitable in a setting where the constitutional right cannot be articulated in more specific terms than "cruel and unusual," and the only way to get a sense of

the rights/remedies framework is a helpful tool for understanding judicial outcomes. In particular, the framework offers one explanation for the Supreme Court's decision in *Gonzales*.

A. Support for Applying the Rights/Remedies Framework

Proponents for judicial application of the rights/remedies framework assert that it properly balances the practical requirements for naming and protecting rights with the constitutional roles of the judiciary and legislature.³⁵ The judiciary's insulation from public opinion allows it to focus on determining what rights the Constitution and statutes guarantee.³⁶ While this insulation from shifting public opinion is the judiciary's strength, it also makes courts less capable of reflecting what the public wants.³⁷ Thus, legislatures are best situated to enact remedies and allow public opinion to properly influence how states protect rights.³⁸ Moreover, the framework properly accounts for the Constitution's prohibition on legislatures changing or expanding the rights.³⁹

which prison conditions are constitutionally forbidden is to see what kinds of concrete changes are required by remedial orders.

Id. at 880.

35. See McConnell, *supra* note 30, at 163-65 (discussing the Supreme Court's emphasis in *City of Boerne v. Flores* on the legislature's proper "remedial" role in constitutional law).

36. *E.g.*, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962) (defending the judicial branch as necessary to democracy even though it sometimes overturns the will of the majority as expressed by the actions of elected officials).

37. *E.g.*, Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 52 (1979) (contending that insulation of the judiciary equips it to "actualize" rights into remedies). Fiss argues that "[A judge] must be impartial, distant, and detached from the contestants, thereby increasing the likelihood that his decision will not be an expression of the self-interest (or preferences) of the contestants, which is the antithesis of the right or just decision." *Id.* at 14; see also Lawrence Friedman, *Public Opinion and Strict Scrutiny Equal Protection Review: Higher Education Affirmative Action and the Future of the Equal Protection Framework*, 24 B.C. THIRD WORLD L.J. 267, 278-79 (2004) (arguing that the courts should never consider public opinion in making decisions on equal protection matters, due in part to the difficulty of accurately gauging public opinion).

38. See Fiss, *supra* note 37, at 51 ("The rightful place of the courts in our political system turns on the existence of public values and on the promise of those institutions—because they are independent and because they must engage in a special dialogue—to articulate and elaborate the true meaning of those values"). But see *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (dismissing the argument that the Court can confine its analysis to the mere words of the Constitution, but must take into account the "gloss which life has written upon them").

39. See *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (indicating that the Court would strike down the Religious Freedom Restoration Act if it changed the Constitution). The Court rejected the argument that it upheld past congressional legislation that expanded constitutional rights. *Id.* at 527-28. Rather, it asserted that Congress can only interpret the Constitution. *Id.* at 528.

B. Assessing the Rights/Remedies Framework

Critics of the rights/remedies framework argue that it oversimplifies the complicated manner in which courts properly consider both rights and remedies.⁴⁰ Levinson argues that “constitutional rights are inevitably shaped by, and incorporate, remedial concerns.”⁴¹ Therefore, it is unreasonable for courts to consider rights in isolation, and it is impractical to assume that this is what they actually do. Similarly, Professor Owen Fiss argues that courts are not exclusively focused on recognizing rights when they make decisions.⁴² Rather, they also attempt to enforce remedies addressing specific events.⁴³ Therefore, Fiss asserts that the judiciary’s purpose is to shape remedies because of its ongoing relationship with the institutions in place to grant remedies.⁴⁴ As such, critics conclude that courts should consider the factual circumstances surrounding their analysis of rights.⁴⁵

Despite these claims, the rights/remedies framework remains a useful tool for understanding *Gonzales*. It provides an explanation for why Justice Scalia, who advocates strongly that textualism is the proper method for interpreting statutes and constitutions,⁴⁶ argued

40. *E.g.*, Levinson, *supra* note 28, at 873 (“remedying complex social pathologies takes obvious precedence over enunciating interpretations of constitutional values”). Levinson, however, does argue that the rights/remedies distinction might be more properly applied over longer periods of time to understand the Court’s desire to institute concrete change in public institutions. *Id.* at 874.

41. *Id.* at 873. Levinson asserts that “[r]ights are often shaped by the nature of the remedy that will follow if the right is violated.” *Id.* at 874. He also describes remedies as “a routine matter of making politically influenced policy judgments about the means of achieving the constitutionally anointed ends.” *Id.* at 865.

42. Fiss, *supra* note 37, at 27.

43. *Id.*

44. *Id.* at 28. These “institutions,” such as schools, prisons, police departments, and housing authorities, include both individuals and agencies. *Id.* at 29-30.

45. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678, 686 (1978) (conceding that the Court had to evaluate holistically the existence of Eighth Amendment violations in state prisons).

46. *See* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 22-23 (Amy Gutmann ed., 1997) (describing textualism as the belief that “[t]he text is the law, and it is the text that must be observed”); *see also* *Smith v. United States*, 508 U.S. 223, 241-46 (Scalia, J., dissenting) (charging that the majority too broadly construed the term “use” to achieve a desired outcome and preferring a more restricted definition based on statutory language); Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 Ky. L.J. 527, 527 (1997-98) (attributing the revival of the textualist approach to Justice Scalia). Justice Scalia asserts that applying anything but the ordinary meaning of a word would “frustrate the purpose of the statute,” and that “[s]tretching language in order to write a more effective statute than Congress devised is not an exercise [the Court] should indulge in.” *Smith*, 508 U.S. at 247 n.4; *cf.* BREYER, *supra* note 19, at 127 (contending that the textualist or originalist methods are not more likely to produce clear, workable legal rules than an approach that takes into consideration the intent of the legislature).

against strict textual interpretation of section 18-6-805.5(3) of the Colorado Code⁴⁷ in the majority opinion of *Gonzales*.⁴⁸ The Court's over-concern with the remedial impact of its decision explains its dismissal of both the statute's plain language and the Colorado Legislature's intent for mandatory TRO enforcement.⁴⁹

II. THE IMPACT OF THE RIGHTS/REMEDIES FRAMEWORK ON PROCEDURAL DUE PROCESS PROTECTION

The Supreme Court's analysis of property entitlement interests in *Gonzales* demonstrates its emphasis on remedies at the expense of protecting rights.⁵⁰ The Court has defined property interests as "individual entitlement[s] grounded in state law, which cannot be removed except 'for cause.'"⁵¹ Further, the Court requires an "independent source" for finding entitlement property interests.⁵² The Court's dismissal of the Tenth Circuit's determination that the Colorado Legislature did intend mandatory TRO enforcement demonstrates its move away from a textual interpretation of rights to a broader interpretation based on the impact of remedies.⁵³ Because of this shift, the Court found that Ms. Gonzales had no property interest in the TRO's enforcement and did not even consider the

47. COLO. REV. STAT. § 18-6-805.5(3) (1994).

48. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2804-09 (2005).

49. This judicial dismissal of legislative intent, especially absent any constitutional violation, can be considered an abuse of judicial power. Justice Breyer encourages public criticism and outcry to check such abuses. BREYER, *supra* note 19, at 127.

50. The Court did not consider whether the Constitution provides a basis for requiring TRO enforcement because *DeShaney v. Winnebago* established that the Constitution does not convert fundamental rights into affirmative duties by state actors. 489 U.S. 189, 197-98 (1989); *see also* *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (acknowledging that competent adults have a liberty interest in refusing medical treatment, but holding that this interest does not translate into an affirmative duty for the states to legally sanction physician-assisted suicide).

51. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (citing *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972)). The Court goes on to explain that property interests are not limited to tangible objects. Rather, "the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Id.*

52. *See infra* Part II.A (presenting the history of the Supreme Court's evolving analysis for recognizing and protecting property interests).

53. In the early 1990s, many states, in addition to Colorado, passed statutes raising standards for police response to domestic violence. Therefore, the *Gonzales* decision reaches beyond Colorado and has implications throughout the United States. *See, e.g.*, MO. REV. STAT. § 455.080(3) (1992) (allowing law enforcement agencies to establish specially-trained "domestic crisis teams" to respond to domestic violence situations); N.J. REV. STAT. § 2C:25-20 (1992) (creating "domestic crisis teams" and special training for officers responding to cases of domestic violence, elder abuse, and neglect).

procedural requirements that mandatory TRO enforcement would create.

A. The Supreme Court's Evolving Analysis for Protecting Property Interests

In *Goldberg v. Kelly*,⁵⁴ the Court expanded on the idea of property as an “entitlement” and expressly rejected the argument that property is a mere “gratuity.”⁵⁵ In doing so, it found that welfare benefits are a matter of “statutory entitlement for persons qualified to receive them.”⁵⁶ Thus, the Court’s recognition of new property interests in *Goldberg* opened the door for plaintiffs to sue the state for infringement on those interests.⁵⁷ Nonetheless, because of its concern with remedies, the Court has been increasingly reluctant to recognize new property interests. A string of cases decided by the Supreme Court in the ten years following *Goldberg* confirms this trend.⁵⁸

The Court both affirmed and narrowed the *Goldberg* “entitlement” test in *Board of Regents v. Roth*.⁵⁹ By refusing to recognize a property interest in continued employment, the Court narrowly limited entitlement property interests to those “created and . . . defined by existing rules or understandings that stem from an *independent source*

54. 397 U.S. 254 (1970).

55. *Id.* at 263 n.8. The Court maintained that considering property as an entitlement is “realistic” given that traditional common-law concepts of property no longer fully account for actual wealth. *Id.*

56. *Id.* at 262.

57. See generally Michael Mattis, *Protection Orders: A Procedural Pacifier or a Vigorously Enforced Protection Tool? A Discussion of The Tenth Circuit's Decision in Gonzales v. Castle Rock*, 82 DENV. U. L. REV. 519, 527 (2005) (citing Breden Marshall Douthett, *The Death of Constitutional Duty: The Court Reacts to the Expansion of Section 1983 Liability in DeShaney v. Winnebago County Dep't of Soc. Serv.*, 52 OHIO ST. L.J. 643, 651-52 (1991) (characterizing the Court's decision in *Goldberg* as starting an “entitlement revolution”)).

58. See *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 784 (1980) (denying that nursing home residents have a right to a hearing before the state revokes funding for a nursing home facility and emphasizing the need to distinguish between direct and indirect effects of governmental action to provide the legislature with the ability to enact laws with merely tangential adverse effects); *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 4104, 4130 (1978) (rejecting the argument that appellants were deprived of a “property interest” in the airspace above their building in light of the impact a decision to recognize a right in one's future ability to exploit a property interest would have on takings jurisprudence); see also *Matthews v. Eldridge*, 424 U.S. 319, 343 (1976) (holding that no evidentiary hearing is required when terminating social security disability benefits where sufficient protection is provided by other procedures). The Court also expresses that procedural due process theory does not absolutely guarantee citizens protection from deprivation of life, liberty, or property. *Id.* at 334-35. Rather, procedural due process involves balancing the affected private interests with the risk of erroneous deprivation through procedures used, the value of alternative safeguards, and the government's interests. *Id.*

59. 408 U.S. 564, 564 (1972).

such as state law.”⁶⁰ This independent source requirement limits the relief available to private citizens because it renders the Constitution alone insufficient to create a property interest.⁶¹ Nevertheless, the Court has found independent sources to grant property interests when the entitlement becomes essential to the pursuit of livelihood⁶² and where the private citizen depends on the benefit.⁶³ The Court has also found an independent source where a state statute included mandatory language for the provision of a service.⁶⁴ Thus, even where a service is not constitutionally guaranteed, the Court protects it as a property interest when a state legislature guarantees its provision.⁶⁵

In *Gonzales*, the Court acknowledged that if the Colorado Legislature created a mandatory obligation for the police to enforce restraining orders, Ms. Gonzales would prevail.⁶⁶ Yet, despite clear evidence of the Colorado Legislature’s intent for mandatory TRO enforcement, the Court asserted that there is no mandatory

60. *Id.* at 577 (emphasis added). The Court further explained that one does not have a property interest merely because of an “abstract need or desire for it.” *Id.*

61. *Id.*; *accord* *DeShaney v. Winnebago*, 489 U.S. 189, 202 (1989) (expounding that courts and legislatures can impose affirmative duties on state actors when they wish to do so).

62. *See* *Bell v. Burson*, 402 U.S. 535, 539 (1971) (recognizing an entitlement to driver’s licenses because once issued, citizens depend on them for their livelihood).

63. *See* *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (establishing that “rules or mutually explicit understandings” meet the requirements for a property interest even where there is no “explicit contractual provision”).

64. *See* *Goss v. Lopez*, 419 U.S. 565, 586 (1975) (recognizing an entitlement to public education where the state statute included mandatory language for the state to provide public education).

65. *E.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11 (1978) (allowing the government to terminate services once offered only “for cause”); *In re Jessup*, 379 N.Y.S.2d 626, 632 (Fam. Ct. 1975) (citing to *Goss* and finding a property interest in education once the state has started providing it); *cf.* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (rejecting the argument that there is a fundamental right to education); Brooke Wilkins, Comment, *Should Public Education be a Federal Fundamental Right?*, 2005 BYU EDUC. & L.J. 261, 288-89 (2005) (arguing for the Supreme Court to recognize a fundamental right to education in light of its reasoning in *Lawrence v. Texas*, 539 U.S. 558 (2003) that certain rights are a critical part of the individual). *Goss*, heard just two years after *Rodriguez*, did not overturn *Rodriguez* as the Court again asserted that there is no right to education. Rather, the Court distinguished the cases by asserting that once the state begins providing a service, it cannot arbitrarily stop the service. *Goss*, 419 U.S. at 586.

66. *See* 125 S. Ct. 2796, 2804 (2005) (clarifying that the main issue at bar is determining “whether Colorado law gave respondent a right to police enforcement of the restraining order”). The majority cites its prior opinion in *Memphis Light*, 436 U.S. at 9, requiring an “independent source” for a legitimate claim of entitlement as the basis for focusing the opinion on the legislature’s intent. *Gonzales*, 125 S. Ct. at 2803-04; *accord* *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 463 (1989) (articulating that mandatory language is necessary to create a liberty interest).

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obligation attached to section 18-6-805.5(3).⁶⁷ Therefore, no “independent source” and no protected property interest existed to provide Ms. Gonzales with relief. Though *Gonzales* does not expressly overturn the independent source requirement, the Court’s dismissal of the statute’s plain language and legislative intent renders it extremely difficult for legislatures to create a protected property interest in the future.⁶⁸

The Supreme Court rejected the Tenth Circuit’s conclusion that section 18-6-805.5(3) requires mandatory TRO enforcement, dismissing the statute’s plain language and legislative history.⁶⁹ The Court reached this conclusion despite precedent dictating that it should defer to the lower court’s interpretation of state laws because the lower court is better equipped to understand the laws of its own jurisdiction.⁷⁰ The Supreme Court asserted, “we think deference inappropriate here,”⁷¹ and instead chose an interpretation in favor of police discretion.⁷² The Court’s concern with remedies explains why

67. See *infra* Part II.D (applying the rights/remedies framework to explain the *Gonzales* decision).

68. Cf. *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1551-53 (1993) (recounting how legislatures enacted more mandatory arrest legislation to protect the victims of domestic violence the year before the Colorado Legislature enacted section 18-6-805.5). This article also predicts that the states will face litigation regarding failure to protect victims, foreshadowing *Gonzales*. *Id.* at 1557-60.

69. See *Gonzales*, 125 S. Ct. at 2805 (“We do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*.”). The majority fails to address what the result would be if the Court were to find mandatory intent. Instead, the majority argues that any amount of police discretion necessarily negates mandatory enforcement. This, however, is contrary to the common police understanding that they are required to provide assistance to victims, batterers, and children, especially to “ensure the safety of children.” NBPA Amicus Brief, *supra* note 1, at 9 (citing the INT’L ASS’N OF CHIEFS OF POLICE, MODEL POLICY (rev. 1997) (App. B 9a)). Thus, police understand that though they have discretion to decide what situations are serious and require action, this does not negate their duty to respond when there are clear violations of restraining orders. The NBPA Amicus Brief also notes that police officers understand their protective role in domestic violence cases and that “reasonable means” would certainly include responding to Ms. Gonzales’ repeated phone calls. *Id.*

70. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 n.9 (1985) (reiterating that the Supreme Court should “defer to lower courts on state-law issues unless there is ‘plain error’”); *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 205 (1956) (arguing that since the federal district judge was a member of the jurisdiction’s bar, higher courts should show deference to his interpretation of that jurisdiction’s law).

71. *Gonzales*, 125 S. Ct. at 2804.

72. Compare *id.* at 2806, with *Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999) (“It is possible to read the mandatory language of the ordinance and conclude that it affords police *no* discretion, since it speaks with the mandatory ‘shall.’”).

it so easily overlooked the Colorado Legislature's intent to provide for mandatory enforcement.⁷³

B. The Colorado Legislature Intended Mandatory TRO Enforcement

The Colorado Legislature's intentions when enacting section 18-6-805.5(3) are best determined through analyzing the statute's plain language and legislative history. The plain language and legislative history of section 18-6-805.5(3) of the Colorado Code demonstrate the legislature's intent for mandatory TRO enforcement.⁷⁴ The use of the term "shall" in section 18-6-805.5(3), as well as the judiciary's understanding of the term, signal this intent.⁷⁵ Furthermore, the legislative history surrounding House Bill 1253 that became section 18-6-805.5(3) of the Colorado Code also points to mandatory intent.⁷⁶ Even if the plain meaning of the word "shall" leaves the police some discretion, it does not negate a mandatory enforcement requirement.⁷⁷ Therefore, the Supreme Court should have recognized Ms. Gonzales' entitlement property interest.

1. The plain meaning of "shall" signals mandatory intent

Section 18-6-803.5(3) of the Colorado Code states:

- (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 office has information amounting to probable cause that:

73. See *infra* Part II.D (offering the rights/remedies framework as a tool for analyzing the Supreme Court's decision in *Gonzales*). In addition, in his dissenting opinion, Justice Stevens, joined by Justice Ginsburg, looked to the New Jersey Superior Court and the Washington Court of Appeals that both found it permissible to limit police discretion. *Gonzales*, 125 S. Ct. at 2813-25 (Stevens, J., dissenting). See also Roederer, *supra* note 19, at 341-55 (surveying Oregon, Tennessee, New Jersey, and Washington statutes and state court determinations mandating mandatory enforcement of protective orders). Roederer also provides a survey of state legislation regarding police discretion to enforce protective orders. *Id.* at 365.

74. See generally G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 264-82 (2005) (tracing the development of mandatory enforcement statutes).

75. See *infra* Part II.B.1 (providing examples of how the Colorado Legislature, the Colorado Supreme Court, and the U.S. Supreme Court have interpreted and used the term "shall").

76. See *infra* Part II.B.2 (describing the legislative history of section 18-6-805.5(3)).

77. See *infra* Part II.B.3 (drawing upon the Supreme Court's past analysis to demonstrate how property interests can exist even if police retain some discretion).

- (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.⁷⁸

The Colorado Legislature uses “shall” more than twenty times in section 18-6-803.5. The plain wording of the statute and the common understanding of the word “shall” indicate that the legislature intended the statute to be mandatory.⁷⁹ For example, in *People v. Guenther*,⁸⁰ the Colorado Supreme Court plainly asserted that “[t]he word ‘shall,’ when used in a statute, involves a ‘mandatory connotation’ and hence is the *antithesis of discretion or choice*.”⁸¹ The Colorado Supreme Court went on to declare that when the term “shall” is used, only one interpretation is possible: mandatory application.⁸² The court also noted that “[i]t must be presumed that the legislature has knowledge of the legal import of the words it uses . . . and that it intends each part of a statute to be given effect.”⁸³ Thus, the Colorado Supreme Court clearly believes that the plain meaning of “shall” requires mandatory enforcement.⁸⁴ Since the United States Supreme Court has long recognized that it has “no authority to construe the language of a state statute more narrowly than the

78. COLO. REV. STAT. § 18-6-803.5(3) (2005). The statutory language of this provision has not changed since it was amended and approved by the Colorado Legislature on June 3, 1994.

79. See Kerns Amicus Brief, *supra* note 1, at 8-9. Kerns rejects the notion that the legislature intended any discretion, explaining that “the statute is plainly worded and both the English language and the context indicate that ‘shall’ is intended to be a mandate.” *Id.* at 8. Kerns concludes, on this first point, that “[t]here is no logical reading of the statute that authorizes peace officers to do *nothing*.” *Id.* at 9.

80. 740 P.2d 971 (Colo. 1982).

81. *Id.* at 975 (emphasis added) (finding that the legislative intent of section 18-1-704.5(3) was to provide mandatory immunity for persons who use force when defending their home); *accord* *Swift v. Smith*, 201 P.2d 609, 614 (Colo. 1949) (noting that the word “shall” carries a presumptive interpretation of mandatory compliance); *People v. Dist. Court, Second Judicial Dist.*, 713 P.2d 918, 922 (Colo. 1986) (explaining that while the term “may” is permissive, the terms “shall” and “require” are mandatory).

82. *Guenther*, 740 P.2d at 976.

83. *Id.* (citation omitted).

84. *Id.* (stressing that since the legislature is “deliberate” and “calculated” when drafting statutes, courts should defer to the “plain meaning of the words”); *accord* *Smith v. United States*, 508 U.S. 223, 228 (1993) (“When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.”). The *Smith* Court, however, also explained that “[l]anguage . . . cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it.” *Id.* at 229. But see BLACK’S LAW DICTIONARY 1407 (8th ed. 2004) (defining “shall” as “[h]as a duty to; more broadly, is required to . . . the mandatory sense that drafters typically intend and that courts typically uphold,” but also providing for alternative definitions of “should,” “may,” “will,” or “is entitled to”).

construction given by that State's highest court,"⁸⁵ the Colorado Supreme Court's interpretation of the term "shall" should have prevailed.⁸⁶

Moreover, the Supreme Court itself found mandatory intent from the word "shall" in *Kentucky Department of Corrections v. Thompson*.⁸⁷ In *Kentucky Department of Corrections*, inmates challenged the Kentucky prison system's attempt to curtail their visitation rights on due process grounds.⁸⁸ After examining the language of the relevant statutes and regulations, the Court concluded that since the visitation regulations provided that "[a] visitor may be denied a visit at any time," use of the term "may" negated mandatory action.⁸⁹ However, the Court went on to explain that the language of a subsequent consent decree, which stated that "defendants shall continue their open visiting policy," required mandatory action on behalf of the correctional authority.⁹⁰ Even where the state has some discretion, the Court found a constitutionally protected interest if there is "explicitly mandatory language."⁹¹ The Court broke with this line of statutory interpretation in *Gonzales*, dismissing Ms. Gonzales' claim to an entitlement despite mandatory statutory language demanding otherwise.

85. *Chicago v. Morales*, 527 U.S. 41, 61 (1999).

86. *See Vitek v. Jones*, 445 U.S. 480, 488-89 (1980) (reaffirming that due process protections are required once a state grants a liberty interest); *Bishop v. Wood*, 426 U.S. 341, 344 (1976) ("[T]he sufficiency of the claim of entitlement must be decided by reference to state law."). *But see Morales*, 527 U.S. at 62 n.32 (arguing that it "flies in the face of common sense" to interpret a statute as prohibiting any police discretion based solely on the fact that the statute "speaks with the mandatory 'shall'").

87. 490 U.S. 454 (1989). *Accord Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (clarifying that a statute's use of the term "shall" is "more than directory words of caution," and is instead "the language of command").

88. *See id.* at 457-58 (discussing the repeated denial of certain visitors which spawned the inmates' decision to organize a class action lawsuit).

89. *Id.* at 457 n.2.

90. *Id.* at 463 (quoting *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983)). Other jurisdictions also interpret "shall" as requiring mandatory intent. *See, e.g., In re Bailey*, 771 S.W.2d 779, 781 (1989) (asserting that interpreting "shall" to mean anything but mandatory intent when used in a statute would be absurd); *Louisville & Nashville R.R. Co. v. Hammer*, 236 S.W.2d 971, 973 (1951) (pronouncing that the general rule of law is for "shall" to be construed as mandatory and not merely directory when used in a statute or constitution).

91. *E.g., Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983) (concluding that even though the state may not have intended to create a protected interest, one is created when the state uses language that is "unmistakably mandatory [in] character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed").

2. *The legislative history of section 18-6-803.5(3) signals mandatory intent*

The legislative history of section 18-6-803.5(3) reveals that the Colorado Legislature intended the statute to be mandatory. In Peggy Kerns' Amicus Brief on behalf of Ms. Gonzales, she explains that "[t]his is a case about a state legislature's policy choice to create an entitlement to mandatory police enforcement of protection orders for victims of domestic violence."⁹² Kerns is the former Colorado State Representative who sponsored the bill that became section 18-6-803.5(3),⁹³ and her brief draws upon her first-hand knowledge to explain the legislature's intent to require vigorous enforcement of protection orders.⁹⁴ Kerns points out that the legislature granted an exemption of liability to officers enforcing TROs because it preferred to risk an erroneous arrest rather than risk harm to women and children based on an officer's decision to forego an arrest.⁹⁵

The Colorado Legislature placed "paramount importance" on both the "issuance and *enforcement* of protection orders."⁹⁶ By increasing accessibility to protection orders, the legislature sought to "promote safety, reduce violence, and prevent serious harm and death."⁹⁷ The legislation also recognized that the cost of domestic violence outweighs the burden of mandatory enforcement.⁹⁸ Kerns points to the eight million days of work that domestic violence victims miss

92. Kerns Amicus Brief, *supra* note 1, at 2.

93. *Id.* at 1.

94. *See id.* at 3 ("Specifically tailored to resolve the problem of inconsistent police response to protection order calls, the statute reflects a policy choice that the reduction of family violence through consistent enforcement of protection orders is a high priority to the people of Colorado.")

95. *See* COLO. REV. STAT. § 18-6-803.5(5) ("A peace officer arresting a person for violating a protection order or otherwise enforcing a protection order *shall not be held criminally or civilly liable* for such arrest or enforcement unless the peace officer acts in bad faith and with malice or does not act in compliance with rules adopted by the Colorado supreme court.") (emphasis added).

96. COLO. REV. STAT. § 13-14-102(1) (emphasis added).

97. *Id.*

98. *Id.*; *see* Kerns Amicus Brief, *supra* note 1, at 12-14 (underscoring that policy concerns about the cost of domestic violence support the legislative intent for the statute to be mandatory); *accord* National Center for Injury Prevention and Control, Center for Disease Control, *Intimate Partner Violence: Fact Sheet* (2005), <http://www.cdc.gov/ncipc/factsheets/ipvfacts.htm> (last visited July 20, 2006) (citing a 2003 CDC study that explains that victims of severe intimate partner violence "lose nearly 8 million days of paid work, the equivalent of more than 32,000 full-time jobs—and almost 5.6 million days of household productivity each year"); Joseph S. Volpe, Ph.D., B.C.E.T.S., The American Academy of Experts in Traumatic Stress, *Effects of Domestic Violence on Children and Adolescents: An Overview* (1996), <http://www.aets.org/arts/art8.htm> (last visited July 20, 2006) (explaining that without treatment, children who witness and experience domestic violence are "at significant risk for delinquency, substance abuse, school drop-out, and difficulties in their own relationships," which creates concerns about the future economic and social productivity of children who are impacted by domestic violence).

each year, costing employers more than three billion dollars annually.⁹⁹ In addition, the more than 1,400,000 visits to emergency rooms each year, along with the millions of dollars spent on shelters for women and children fleeing domestic violence, represent additional social costs of domestic violence.¹⁰⁰ Kerns concludes that the legislature enacted section 18-6-803.5(3) in order to curb these costs, and that ignoring the legislature's intent to make enforcement mandatory would defeat this purpose.¹⁰¹

Furthermore, a comparison of section 18-6-803.5(3) with other legislation enacted during the 1994 term supports a finding of mandatory intent.¹⁰² In addition to requiring TRO enforcement, the Colorado Legislature changed standardized TRO forms to create more efficient procedures for obtaining a TRO.¹⁰³ The Legislature also amended section 14-4-102 of the Colorado Code to eliminate the requirement that protected parties show the protection order to the officer who is enforcing it.¹⁰⁴ This facilitates efficient enforcement as police can more easily respond to reports of TRO violations.

During the 1994 term, the Colorado Legislature passed House Bill 94-1090 to create a statewide central registry for restraining orders.¹⁰⁵ The registry assists police in their enforcement of TROs by facilitating easier access to restraining orders and faster response times to

99. Kerns Amicus Brief, *supra* note 1, at 13.

100. *Id.* (noting that approximately fifty percent of homeless women and children are fleeing domestic violence situations); *cf.* United States v. Morrison, 529 U.S. 598, 631-34 (2000) (Souter, J., dissenting) (recounting the extensive domestic violence statistics cited by Congress in support of the Violence Against Women Act). *But cf. id.* at 626 (rejecting the argument that gender-motivated crimes of violence constitute sufficient economic activity to justify congressional exercise of Commerce Clause powers).

101. Kerns Amicus Brief, *supra* note 1, at 14. In total, domestic violence costs the United States more than \$8.3 billion per year. *Id.*

102. H.B. 94-1090, 54th Gen. Assem., Reg. Sess. (Colo. 1994), available at http://www.state.co.us/gov_dir/leg_dir/olls/sl1994/sl.323.htm (last visited July 20, 2006); see also Melody Fuller & Janet Stansberry, *1994 Legislature Strengthens Domestic Violence Protection Orders*, 23 COLO. LAW. 2327 (1994) (providing an overview of the 1994 Colorado state legislation). Fuller and Stansberry argue that analysis of the 1994 legislation as a whole leads to the conclusion that the legislation was designed to "strengthen both civil and criminal restraining order laws and procedures for victims of domestic violence." *Id.*

103. *Id.* at 2327. See generally COLORADO GENERAL ASSEMBLY, 1994 DIGEST OF BILLS (54th Gen. Assem., 2d Sess.), available at http://www.state.co.us/gov_dir/leg_dir/olls/digest1994/CRIMINALLAWANDPROCEDURE.htm (last visited July 20, 2006) (listing the criminal law and procedure amendments approved by the 54th General Assembly of Colorado in 1994).

104. H.B. 94-1090, 54th Gen. Assem., Reg. Sess. (Colo. 1994), available at http://www.state.co.us/gov_dir/leg_dir/olls/sl1994/sl.323.htm (last visited July 20, 2006).

105. *Id.*

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reports of TRO violations.¹⁰⁶ Also, the Legislature increased the punishment for protection order violations from Class Three violations to Class Two misdemeanors, and charged repeat offenders with Class One misdemeanors.¹⁰⁷ The increased punishments for TRO violations demonstrate the Legislature's desire to deter violations. This, along with the Legislature's attempt to create more efficient procedures, supports the interpretation that section 18-6-803.5(3) requires TRO enforcement rather than leaving enforcement optional.

Finally, the Colorado state government itself advises victims that police are required to respond when they have probable cause to believe that a TRO has been violated. A brochure published by the Colorado Judicial Branch *after* the deaths of the Gonzales girls states that "[i]f the police have a 'probable cause' to believe that the defendant has violated the restraining order, they are *required* to arrest the defendant and take the defendant to jail."¹⁰⁸ Thus, Colorado does not allow the police to decide whether or not to respond to a report of a restraining order violation.¹⁰⁹ The language

106. House Bill 94-1090 is codified in Section 18-6-803.7(2)(a) of the Colorado Code. Section 18-6-803.7(2)(a) provides that

"[t]here is hereby created in the bureau a computerized central registry of protection orders which shall be accessible to any state law enforcement agency or to any local law enforcement agency having a terminal which communicates with the bureau. The central registry computers shall communicate with computers operated by the state judicial department."

See generally Fuller & Stansberry, *supra* note 102, at 2329 (noting that this repeal specifically addressed officers' hesitation to enforce restraining orders when the protected party fails to show a copy of the protection order).

107. COLO. REV. STAT. § 18-6-803.5(2)(a). Class One misdemeanors carry a sentence of six to eighteen months in jail and/or a five hundred dollar to five thousand dollar fine. Class Two misdemeanors require three months to one year of jail time and/or a two hundred fifty dollar to one thousand dollar fine. Class Three misdemeanors are punishable by six months in jail and/or a fifty dollar to seven hundred and fifty dollar fine. COLO. REV. STAT. § 18-1.3-501; see also COLO. REV. STAT. § 18-1.3-401 (setting forth the punishments for Class One through Five felonies).

108. COLORADO JUDICIAL BRANCH, ANSWERS TO YOUR QUESTIONS ABOUT COUNTY COURT RESTRAINING ORDERS 5 (June 2002) (emphasis added), *available at* <http://www.courts.state.co.us/exec/pubed/brochures/restraining.pdf> (last visited July 20, 2006). Cf. KENNETH CULP DAVIS, POLICE DISCRETION 94-95 (1975) (proposing that even in light of full enforcement statutes and ordinances, police non-enforcement is legal and necessary). However, Davis concedes that where legislatures demonstrate specific intent for full enforcement, the general acceptance for police non-enforcement of full enforcement statutes is diminished. *Id.* at 95.

109. Cf. Christopher J. Roederer, *The Constitutionally Inspired Approaches to Police Accountability for Violence Against Women in the U.S. and South Africa: Conservation Versus Transformation*, 13 TULSA J. COMP. & INT'L L. 91, 109 (2005) (explaining that all judicially recognized entitlements involve some level of discretion in implementation). See generally Kevin Walsh, *The Mandatory Arrest Law: Police Reaction*, 16 PACE L. REV. 97, 101-03 (1995) (explaining why many states are moving towards mandatory arrest statutes for domestic violence situations).

of section 18-6-803.5(3) evinces a legislative determination that the immediate danger to victims' safety justifies mandatory police action.¹¹⁰

3. Even if police discretion remains, property interests can still exist

Even if section 18-6-803.5(3) of the Colorado Code affords police some discretion, this does not automatically negate the existence of a property interest. In *Olim v. Wakinekona*,¹¹¹ the Supreme Court found a property interest where police discretion was severely limited but not entirely removed.¹¹² As it may be practically impossible to remove all discretion from police, discretion alone should not defeat the existence of mandatory enforcement.¹¹³ Since courts have found property interests even where statutes clearly leave room for discretion,¹¹⁴ it is unreasonable to interpret section 18-6-803.5(3) as not mandating TRO enforcement simply because it may afford police some discretion.

C. Ms. Gonzales' Clear Expectation of the TRO's Enforcement Supports Finding a Protected Property Interest

In *Barry v. Barchi*,¹¹⁵ the Supreme Court recognized a property interest even though it was unclear if the legislature intended to create an independent source of entitlement.¹¹⁶ In *Barchi*, the Court showed great deference to a New York state law that stated, "a license

110. See NEW JERSEY DIVISION OF CRIMINAL JUSTICE, GUIDELINES ON POLICE RESPONSE PROCEDURES IN DOMESTIC VIOLENCE CASES 11-12 (rev. Nov. 1994), available at <http://www.state.nj.us/lps/dcj/aguide/dvpolsrsp.htm> (granting police discretion as to whether or not to file charges, but requiring police to advise the victim that she may sign and complete a criminal or civil complaint herself).

111. 461 U.S. 238 (1983).

112. See *id.* at 249 (distinguishing situations where official discretion is guided by "objective and defined criteria" from situations in which officials may deny relief based on "any constitutionally permissible reason or for no reason at all" (quoting Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 466-67 (1981))).

113. See DAVIS, *supra* note 108, at 144-45 (concluding that while it is necessary to limit the discretion of police, it is impossible to eliminate absolutely all discretion); cf. Papachristou v. Jacksonville, 405 U.S. 156, 161 (1972) (invalidating a vagrancy law because it afforded police unlimited discretion in enforcement).

114. See, e.g., Meador v. Cabinet for Human Res., 902 F.2d 474, 476-77 (6th Cir. 1990), cert. denied, 498 U.S. 867 (1990) (upholding a Kentucky law creating an entitlement for protective services for children in state custody); Siddle v. Cambridge, 761 F. Supp. 503, 509 (S.D. Ohio 1991) (setting forth the principle that police are required to act reasonably, and that they violate citizens' rights when they shirk their duty to protect); Coffman v. Wilson Police Dep't, 739 F. Supp. 257, 263-66 (E.D. Pa. 1990) (acknowledging that while police work requires "a great deal of discretion," the plaintiff has a property interest in a reasonable police response).

115. 443 U.S. 55 (1979).

116. *Id.* at 65 n.11; accord Logan v. Zimmerman, 455 U.S. 422, 431 (1982) (finding a property interest where the claimant had "more than an abstract desire or interest in redressing his grievance").

may not be revoked or suspended at the discretion of the racing authorities” absent proof of “certain contingencies.”¹¹⁷ The Court held that the New York State Racing and Wagering Board erred in suspending the appellee horse trainer’s license because the appellee’s “clear expectation of continued enjoyment of a license” constituted a protected property interest.¹¹⁸

In contrast, despite Ms. Gonzales’ clear expectation of continued TRO enforcement, the Court refused to find that she had a property interest.¹¹⁹ In fact, given that the weight of the evidence supports interpreting section 18-6-803.5(3) as creating mandatory TRO enforcement,¹²⁰ Justice Stevens argued in his dissent that Ms. Gonzales’ relationship with Castle Rock police was the “functional equivalent” of a private contract.¹²¹ The majority of the Court, however, failed to distinguish Ms. Gonzales’ expectation from the expectation in *Barchi*. The Court simply set aside *Barchi*’s clear expectation standard without explanation.

Ms. Gonzales repeatedly expressed a clear belief that she expected the police to enforce the TRO.¹²² Her belief was well-founded because it reflects not only her reasonable understanding of TRO enforcement, but also the common police understanding about the appropriate response to TRO violations.¹²³ In an amicus brief filed in

117. 443 U.S. at 64 n.11.

118. *Id.* (emphasis added).

119. See Interview by Mike Wallace with Jessica Gonzales, *supra* note 3 (demonstrating that Ms. Gonzales expected the TRO to protect her daughters).

120. See *supra* Part II.B (expounding on how the plain meaning of the term “shall” and the legislative history of section 18-6-803.5 leads to the conclusion that the Colorado Code requires mandatory TRO enforcement).

121. See *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2823 (2005) (Stevens, J., dissenting) (noting that if Gonzales “had contracted with a private security firm to provide her and her daughters with protection from her husband, it would be apparent that she possessed a property interest in such a contract,” and arguing that the state of Colorado undertook a similar obligation by providing her with a TRO).

122. See ACLU Women’s Rights Project, *Castle Rock v. Gonzales: Making the Court’s Protection Real*, WOMEN’S RIGHTS, March 17, 2005, available at <http://www.aclu.org/womensrights/gen/13212res20050317.html> (last visited July 20, 2006) (expressing Ms. Gonzales’ belief that the police would arrest Mr. Gonzales if he violated the TRO). In this interview, conducted shortly before the Supreme Court heard her case, Ms. Gonzales stated that if the Supreme Court ruled that there was no mandatory enforcement of TROs, the issuance of a TRO would be “meaningless.” *Id.*; cf. *DeShaney v. Winnebago*, 489 U.S. 189, 209 (1989) (Brennan, J., dissenting) (maintaining that a private citizen “would doubtless feel that her job was done as soon as she had reported her suspicions of child abuse to [the Department of Social Services]”). See generally Mary Kate Kearney, *DeShaney’s Legacy in Foster Care and Public School Settings*, 41 WASHBURN L.J. 275, 296-97 (2002) (underscoring that when the state “effectively confined” a child to a life-threatening situation, it had “functional custody” over the child sufficient to create a special relationship requiring state protection).

123. See NBPA Amicus Brief, *supra* note 1, at 12 (demonstrating how police officers understand their duty to enforce TROs).

support of Ms. Gonzales, the National Black Police Association (NBPA) and other law enforcement agencies maintained that current police practices exceed what sections 14-10-108(2)(b)-(c) and 18-6-803.5(3) require.¹²⁴ The NBPA Amicus Brief cites the International Association of Chiefs of Police (IACP) Model Policy, which requires police to ensure the safety of children.¹²⁵ Thus, even if police have the option to determine whether or not to make an arrest, they do not have discretion about whether or not to protect children.¹²⁶ Absence of discretion supports interpreting section 18-6-803.5(3) as mandating TRO enforcement.¹²⁷ Therefore, since Mr. Gonzales abducted the girls and their well-being was uncertain, the police should have responded to Ms. Gonzales' repeated pleas for help.

D. The Rights/Remedies Framework Explains Gonzales

The Court's failure to recognize Ms. Gonzales' property interest marks a shift in the Court's analysis of procedural due process. The Court's concern with remedies, specifically the practical impact of limiting police discretion, explains this shift. The Court pointed to the "practical necessity for discretion" as evidence that the Colorado Legislature did not intend for the statute to be mandatory.¹²⁸ Further, even though a "presumption of deference [is] given [to] the views of a federal court as to the law of a State within its jurisdiction,"¹²⁹ the Court chose to ignore this presumption because of its remedial concerns.¹³⁰ As discussed above, however, this finding of discretionary intent is not supported by the legislative history surrounding the

124. *Id.* at 9.

125. *Id.* (citing Int'l Ass'n of Chiefs of Police (IACP), Model Policy (rev. 1997)).

126. *But see* DAVIS, *supra* note 108, at 90-93 (arguing that although police officers would never acknowledge that they selectively enforce criminal statutes, in reality, police officers have this discretion). Davis asserts that this leads to the enforcement of the most sensible system. *See id.* at 93 (discussing the nonenforcement of many minor legal violations and concluding that "[a]lmost all legislators are fully aware that the system would not be sensible if every criminal statute were enforced according to its letter").

127. *See id.* at 95 (arguing that when a legislature makes its intention for full enforcement clear in a statute, "its general acquiescence in nonenforcement and its appropriation of less than enough for full enforcement may be overridden by the more specific intent").

128. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2806 (2005); *cf.* SCALIA, *supra* note 46, at 16-17 (asserting that "the intent of the legislature" is best discerned from the text of the law as opposed to the legislative history which involves a "great degree of confusion"). *See generally* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479-82 (1987) (providing an overview of different methods of statutory interpretation).

129. *Gonzales*, 125 S. Ct. at 2804 (quoting *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998)) (first alteration in original).

130. *See id.* at 2810 (emphasizing the Court's "continuing reluctance to treat the Fourteenth Amendment as 'a font of tort law'" (quotation omitted)).

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enactment of section 18-6-803.5(3).¹³¹ Perhaps more significantly, the Court dismissed the plain language of the statute, pointing to the “deep-rooted nature of law-enforcement discretion” to dismiss “seemingly mandatory legislative commands.”¹³² The Court’s departure from reliance on the text of the statute is in sharp contrast with the Court’s past approach.¹³³ Finally, the Court explained that the Colorado Legislature’s use of the term “shall” was not enough to indicate mandatory enforcement; instead, the Court explained that the Legislature had to use “some stronger indication” than mandatory language to indicate mandatory intent.¹³⁴ On what would qualify as “some stronger indication,” however, the Court is silent.¹³⁵

The Court argued that even if the Colorado Legislature intended to make enforcement mandatory, this would not guarantee Ms. Gonzales “enforcement of the mandate.”¹³⁶ The Court emphasized that “legislative history, insufficient resources, and sheer physical impossibility” may require courts to reject literal interpretation of statutes.¹³⁷ Thus, the Court values the well-established tradition of police discretion over the mandatory language within the statute.¹³⁸

131. See *supra* Part II.B.2 (discussing the legislative history of section 18-6-803.5, and concluding that the legislature intended to require mandatory TRO enforcement).

132. *Gonzales*, 125 S. Ct. at 2805-06; see also *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 654, 655 (1995) (looking to the structure and purpose of the Act in question after considering its text); cf. Larry J. Pittman, *The Federal Aviation Act: The Supreme Court’s Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 855-56 (2002) (arguing that if a federal court does not defer to the state court’s decision to allow arbitration, the impermissible outcome of different forums leading to different outcomes will result). See generally Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 64 (1994) (arguing that the text of a statute should carry much greater weight than legislative history and intent).

133. Compare *Gonzales*, 125 S. Ct. at 2805-06 (writing for the majority, Justice Scalia maintains that to rely solely on the plain text would violate common sense), with SCALIA, *supra* note 46, at 22 (asserting that the text of the statute is law and failure to follow it leads to an outcome that is inherently wrong).

134. *Gonzales*, 125 S. Ct. at 2806.

135. Before *Gonzales*, the term “shall” was sufficient to indicate mandatory intent. Thus, there is no guidance about what would meet this new standard for demonstrating mandatory intent. Professor Christopher J. Roederer criticizes the Court’s assertion that the Colorado Legislature should use stronger language because “it is hard to imagine clearer language that is not silly (e.g. ‘really shall’, ‘must use all means regardless of how reasonable’).” Roederer, *supra* note 109, at 109. See generally Martin H. Redish, *Article III and the Judiciary Act of 1799: Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1640 (1990) (stressing that there is no logical way to interpret “shall” as not mandatory).

136. *Gonzales*, 125 S. Ct. at 2808.

137. *Id.* at 2806 (quoting 1 ABA STANDARDS FOR CRIMINAL JUSTICE 1-405, comments 1-124 to 1-125 (2d ed. 1980)).

138. See *id.* (discussing the deep-rooted nature of police discretion). The Court also suggests that mandatory intent only attaches when a public end is affected. *Id.* at

By limiting recognition of mandatory intent to criminal matters affecting a public end, the Supreme Court has severely limited the relief available for private concerns.

Leading up to *Gonzales*, the Court increasingly used remedies language in its decisions. In *DeShaney v. Winnebago*,¹³⁹ the Court refused to impose *affirmative duties* on state actors.¹⁴⁰ The Court asserted that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”¹⁴¹ Rather, “the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”¹⁴² The Court stressed its concern over the impact that placing affirmative duties would have on state actors, representing a remedial, rather than a rights-based consideration.¹⁴³ Similarly, the *Gonzales* Court’s discussion of police discretion, and hesitation in taking away such discretion, demonstrates its concern with imposing affirmative duties on state actors.¹⁴⁴

2808 (“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’” (quoting 4. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769)) (alteration in original)); *see also* *Gonzales v. Town of Castle Rock*, 366 F.3d 1093, 1105 (10th Cir. 2004) (“While an officer must obviously exercise some judgment in determining the existence of probable cause, the validity and accuracy of that decision is reviewed under objectively ascertainable standards and judged by what a reasonably well-trained officer would know.”); *United States v. Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999) (maintaining that courts should determine the reasonableness of police response based on how the circumstances would have appeared to a prudent, cautious, and well-trained police officer).

139. 489 U.S. 189 (1989).

140. *Id.* at 197-98; *see also* Mattis, *supra* note 57, at 530-31 (asserting that the Tenth Circuit dismissed Ms. Gonzales’ substantive due process claim because of *DeShaney*); Peter Edelman, *Another Casualty of Judicial Callousness*, LEGAL TIMES, Mar. 20, 1999, at 18 (describing *DeShaney* as “outrageous” and lamenting the arbitrary distinction between the case at bar and what would constitute being in state “custody”).

141. *DeShaney*, 489 U.S. at 195.

142. *Id.* at 196.

143. *Id.*

144. *See* *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2806 (2005) (“They clearly do not mean that a police officer may not lawfully decline to make an arrest. As to third parties in these states, the full-enforcement statutes simply have no effect, and their significance is further diminished.” (quoting 1 ABA STANDARDS FOR CRIMINAL JUSTICE 1-405, comments 1-124 to 1-125 (2d ed. 1980))). *Gonzales* was heard solely on procedural due process grounds because the precedent from *DeShaney* caused the Tenth Circuit to quickly dismiss the substantive due process claim. The Tenth Circuit opinion explains that the Supreme Court had already established that “the Constitution itself does not require a state to protect its citizens from third party harm.” *Gonzales v. Town of Castle Rock*, 366 F.3d 1093, 1099 (10th Cir. 2004).

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Allowing police discretion as to whether or not to enforce criminal statutes negates mandatory enforcement.¹⁴⁵ By emphasizing the “tradition of police discretion,” the *Gonzales* Court avoided placing an affirmative duty on state officials to enforce TROs.¹⁴⁶ Rather than looking to the plain language of the statute or drawing upon the legislative history for its interpretation, the majority focused on the impact its decision would have on police.¹⁴⁷ As a result, the *Gonzales* ruling reflects a policy decision by the Court to bar relief to a plaintiff whose constitutionally guaranteed rights were violated, in order to shield state actors from liability.

III. GONZALES’ IMPACT AND RECOMMENDATIONS FOR MOVING FORWARD

The Supreme Court’s ruling in *Gonzales* has significant implications. The Supreme Court’s shifting jurisprudence impairs legislatures’ ability to enact effective legislation.¹⁴⁸ It also restricts the protection that 42 U.S.C. § 1983 provides to private citizens when state laws fail to protect them.¹⁴⁹ In addition, *Gonzales* has grave public policy implications for victims of domestic violence.¹⁵⁰

Therefore, this Comment concludes that the Supreme Court should have granted Ms. Gonzales postdeprivation relief. Courts

145. See DAVIS, *supra* note 108, at 90-92 (commenting that police non-enforcement of criminal statutes and ordinances changes the law as intended by legislators). Davis asserts that while police non-enforcement allows police to change the law, something that police are uncomfortable about doing openly, this is necessary to strike the right balance between the law and reality. *Id.* at 93. In the reverse, Davis’ reasoning indicates that allowing police officers discretion in applying mandatory enforcement statutes, changes the law and impermissibly allows police to frustrate the legislature’s intent. *Id.*

146. *Gonzales*, 125 S. Ct. at 2805-06. See generally Brief for the United States as Amicus Curiae Supporting Petitioner, *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278) at 10 (expressing concerns about the policy implications of “unwarranted liability” imposed on state actors).

147. *Gonzales*, 125 S. Ct. at 2806; cf. Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2416-18 (2003) (highlighting the potential for arbitrary application of laws when police are given discretion).

148. Compare MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 174 (1999) (discussing the effect of shifting Supreme Court jurisprudence while arguing that judicial review allows political leaders to abrogate difficult decisions to the judiciary), with Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?*, 98 MICH. L. REV. 1416, 1421 (2000) (arguing that Tushnet’s analysis greatly overstates the problems associated with judicial review).

149. See Mattis, *supra* note 57, at 525 (describing the potential for procedural due process remedies for victims of state inaction prior to *Gonzales*).

150. See generally G. Kristian Miccio, *Exiled From the Province of Care: Domestic Violence, Duty, and Conceptions of State Accountability*, 37 RUTGERS L.J. 111 (2005) (arguing that public policy considerations require state accountability for non-intervention in the face of mandatory arrest statutes).

should hold police and other state actors responsible for not following procedures and uphold the relief provided by state legislation. Even if Colorado's statute opened up municipalities to too much liability, it is the responsibility of the Legislature to amend the statute. The Supreme Court overreached its rights-determining role in ignoring the intent of the Colorado Legislature.

A. Gonzales Reduces Legislatures' Ability to Protect Citizens

The *Gonzales* decision takes away the core function of state and local legislatures to accomplish what they deem necessary to protect their citizens, even where there is no violation of the Constitution. The Supreme Court, pursuant to its judicial review powers, can overturn unconstitutional state legislation.¹⁵¹ However, many experts question the Court's overreaching application of this power. Justice Breyer cautions the Court from overreaching, noting that "within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance."¹⁵² Justice Breyer also criticizes the Court's increased willingness to overturn state legislation, even where there is clear legislative intent.¹⁵³

While the Court did not expressly invalidate section 18-6-805.5(3) of the Colorado Code, *Gonzales* eliminated the Legislature's intent for mandatory enforcement. As police are not required to enforce TROs, many fear that the orders are now useless.¹⁵⁴ Accordingly,

151. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (providing the historical basis for judicial review). See generally Charles F. Hobson, Commentary, *The Origins of Judicial Review: A Historian's Explanation*, 56 WASH. & LEE L. REV. 811, 815 (1999) (tracing the origins of judicial review back before the Marshall Court to the disarray of state legislative enactments in the post-revolutionary period and Madison's response in the Federalist papers); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 788-89 (1999) (contending that the Supreme Court did not cite *Marbury* as the origin of judicial review until the late nineteenth century).

152. *United States v. Morrison*, 529 U.S. 598, 660 (2000) (Breyer, J., dissenting) (arguing that practical realities justified the enactment of the civil remedy section of the Violence Against Women Act and the majority erred by striking that section down); see also *id.* at 647 (Souter, J., dissenting) (criticizing the majority's "rejection of the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests").

153. See BREYER, *supra* note 19, at 109-11 (arguing that judges should be constrained by the constitutional objective of active democratic participation and contending that conservative justices vote to strike down state statutes more frequently than liberal judges).

154. See, e.g., Roederer, *supra* note 109, at 118 (concluding that *Gonzales* allows police officers to arbitrarily ignore their duty to enforce TROs at the expense of the most vulnerable members of society); Maria Gonzales & Tamara Koehler, *Challenge May Alter Domestic Violence Strategies*, VENTURA COUNTY STAR, Mar. 27, 2005, at 1 (interviewing Sandra Saucedo from the Coalition to End Family Violence in Oxnard,

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Justice Stevens' dissenting opinion in *Gonzales* emphasizes how the majority overstepped its role in deciding a state-law issue and strayed from the "tradition of judicial restraint."¹⁵⁵

As the rights/remedies framework explains, legislatures are best situated to consider the impact of their legislation, and courts are better situated to consider whether such legislation violates a right.¹⁵⁶ Some scholars warn that serious consequences arise when courts overstep their rights-determining role.¹⁵⁷ Courts enter the realm of deciding public policy, rather than properly interpreting and applying the law.¹⁵⁸ If the judiciary continues in this direction, it can interpret what is mandatory as "not mandatory" at will, without any checks from the other branches of government.¹⁵⁹ This is inappropriate because it allows courts too much power and takes away from the proper role of legislatures to balance public opinion with the protection of rights.¹⁶⁰ This will leave many, like Ms. Gonzales, with no relief.¹⁶¹

CA, who asserts that protective orders are often the only thing protecting a victim of domestic violence from further abuse).

155. 125 S. Ct. 2796, 2814 (2005) (Stevens, J., dissenting).

156. See McConnell, *supra* note 30, at 170-71 (suggesting that although the judiciary holds exclusive authority to interpret the extent of constitutionally protected rights, Congress must also interpret the Constitution to enact legislation that does not curtail judicially-determined rights). See generally Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 824 (1986) (arguing that when Congress follows its proper role of enacting legislation, this necessarily creates a dialogue with the Court regarding fundamental rights).

157. See *id.* at 881 (expressing concern about the impact of the Court's remedial intrusiveness on federalism, and about the expansion of judicial "policymaking"). But see, e.g., J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 12 (1968) (maintaining that the Court is best suited to preserve community values). See generally Judge Rosemary Barkett, *The Tyranny of Labels*, 38 SUFFOLK U. L. REV. 749, 756-57 (2005) (pointing out the ambiguous definition of "judicial activism" which is a catch-all phrase for "bad" judging).

158. See Levinson, *supra* note 28, at 865 ("Developing remedies is a routine matter of making politically influenced policy judgments about the means of achieving the constitutionally anointed ends."):

159. See *id.* at 914 (emphasizing that the ideal role for the Court is to "tak[e] advantage of [its] insulation from majoritarian pressure to engage in principled constitutional interpretation").

160. See *supra* Part I (expounding on the proper role of the courts and legislature within the understanding of the rights/remedies framework).

161. See, e.g., M. Ratcliff, *Court Contender Takes Judicial-Activism Prize*, VENTURA COUNTY STAR, Sept. 25, 2005, at 10 (using Judge Janice Rogers Brown as an example of a recently confirmed conservative judge who is "an unrestrained judicial activist" for "legally unsupportable" assaults on precedent and clear legislative intent). But see Saikrishna Prakash, *Are the Judicial Safeguards of Federalism the Ultimate Form of Conservative Judicial Activism?*, 73 U. COLO. L. REV. 1363, 1366 (2002) (asserting that because the Constitution implicitly provides for judicial review, criticisms of judicial activism are unfounded).

Finally, even if the Supreme Court had held the Town of Castle Rock liable, it is the legislature's role to determine whether there is an unacceptable level of liability for state actors. If this is the case, the Legislature should amend section 18-6-805.5(3) to create more discretion or shield police from liability.¹⁶² Moreover, it is beyond the Court's function to address its concern about exposing state actors to too much liability. *Gonzales* demonstrates the Court's unwillingness to trust legislatures to control the impact of their own legislation.

B. Gonzales Restricts the Purpose of 42 U.S.C. § 1983

The Supreme Court's analysis in *Gonzales* also has important implications for other 42 U.S.C. § 1983 claims. Cases asking the Supreme Court to find a property entitlement interest are brought under § 1983 because it allows citizens to sue state actors for deprivation of a protected right.¹⁶³ Section 1983 opens the door for liability where a state actor "subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."¹⁶⁴ In denying Ms. Gonzales relief, the Supreme Court severely limited the ability of § 1983 to protect private citizens.

Though the Supreme Court rarely considered § 1983 during the first fifty years after Congress enacted it,¹⁶⁵ this changed as the Court extended the Bill of Rights to the states and recognized more rights

162. See *Norton v. Taxing Dist. of Brownsville*, 129 U.S. 479, 489 (1889) (asserting that municipalities are bound by statutes until the legislature amends them to expand their powers); see also Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 168-70 (2002) (positing that amendments are necessary to expand the reaches of VAWA's protection of battered immigrant women and children).

163. Section 1983 defines "state actors" as either state employees, or municipalities themselves. See *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) (stating that § 1983 allows for a cause of action against municipal and local governments, among others). Accordingly, Ms. Gonzales sued both the Town of Castle Rock and three officers of the Castle Rock police department in the U.S. District Court of Colorado. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2802 n.3 (2005). The individual officers were granted qualified immunity, and the district court dismissed the action against the town for failure to state a claim based on either substantive or procedural due process grounds because Ms. Gonzales did not establish municipal liability. *Id.*

164. 42 U.S.C. § 1983 (2000).

165. See A SECTION 1983 CIVIL RIGHTS ANTHOLOGY 3 (Sheldon H. Nahmod ed., 1993) (explaining that § 1983 was used rarely before *Monroe v. Pape*, 365 U.S. 167 (1961)). See generally Eric H. Zagrans, "Under Color of" What Law: A Reconstructed Model of Section 1983 Liability, 71 VA. L. REV. 499, 540-60 (1985) (offering a thorough overview of § 1983's legislative history).

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for individuals.¹⁶⁶ Immediately following this incorporation, the Court began considering § 1983 claims against state and local officials for constitutional violations.¹⁶⁷ Subsequently, however, the Court's concern with remedies impacted its willingness to apply § 1983.¹⁶⁸ In *Martinez v. California*,¹⁶⁹ the Court indicated that states may not be required to hear § 1983 cases involving state sovereign immunity arising from state laws.¹⁷⁰ The Court argued that allowing judicial review over parole board decisions would impede parole officers in their decision-making.¹⁷¹ Thus, remedial concerns drove the Court's decision.¹⁷²

166. *E.g.*, *United States v. Harris*, 106 U.S. 629, 643 (1882) (stressing that despite Congress's intent that § 1983 provide citizens relief when treated unconstitutionally by state actors, § 1983 did not extend to protection against unconstitutional acts by private actors).

167. *See Hernandez v. Denton*, 861 F.2d 1421, 1428 (9th Cir. 1988) (Aldisert, J., concurring), *vacated*, 493 U.S. 801 (1989) (recognizing that since *Monroe v. Pape*, 365 U.S. 167 (1961), § 1983 "has been successfully utilized to correct tens of thousands of civil rights violations . . . [it] has been a major force in protecting the individual from countless abuses by the city, county, and state"). *See generally* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 27-28 (1985) (addressing critics of § 1983 and arguing that it continues to be necessary to protect federal rights); 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, *SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES* 13 (2d ed. 1991) (highlighting how many scholars "see the expanded use of section 1983 as a healthy development").

168. *See generally* Megan Grill, Comment, *Walking the Line: The Rehnquist Court's Reverence For Federalism and Official Discretion in DeShaney and Castle Rock*, 10 LEWIS & CLARK L. REV. 487, 496-98 (2006) (highlighting *Paul v. Davis*, 424 U.S. 693 (1976), as evidence of the Supreme Court's fear of being overwhelmed by § 1983 claims); David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. 1983 and the Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2186 (2005) (noting that the Court has struggled since § 1983 was passed to decide when municipalities are liable for the acts of their employees and officials); Laura Oren, *Safari Into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1139, 1189-90 (2005) (differentiating between ordinary tort claims and state-created danger cases). The factors courts consider in state-created danger cases are:

(1) Did state officials exercise authority or power; (2) in such a way that they put someone in a worse position than they would otherwise have occupied; (3) risking and causing a significant harm; (4) with a degree of culpability (which might be deliberate indifference) amounting to conscience-shocking behavior in the factual context?

Id. (emphasis omitted).

169. 444 U.S. 277 (1980).

170. *Id.* at 280-83. The Court concluded that the state and the parole board could not have predicted any special danger to the decedent when releasing the decedent's killer. *Id.* at 285. Thus, the state's actions were, under the circumstances, too remote from the harm. *Id.*; *cf.* *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989) (distinguishing between remote state action and deliberate indifference to an individual's safety).

171. *Martinez*, 444 U.S. at 282-83.

172. *Compare Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002) (suggesting that § 1983 is not applicable to Spending Clause statutes due to insufficient means for enforcement), *with* Sasha Samberg-Champion, Note, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1839-40

In *Monroe v. Pape*,¹⁷³ the Court extended § 1983 liability to situations where an individual acts according to his state capacity, even if the action was not authorized by state law.¹⁷⁴ The Court asserted that state actors are liable when: (1) the defendant acts “under color of” state law, and (2) the defendant’s action deprives the plaintiff of some right, privilege, or immunity secured by the Constitution or federal statute.¹⁷⁵ The Court specified that though *Monroe* was an instance in which police and city officials acted to deprive citizens of their rights, the same analysis applies to situations in which the state fails to act to protect citizens.¹⁷⁶ In *Blessing v. Freestone*,¹⁷⁷ the Court clarified that § 1983 applies when (1) legislative intent provides the plaintiff with the benefit, (2) the asserted right is not “vague and amorphous,” and (3) the claim concerns a right arising from a binding obligation on the states.¹⁷⁸ Ms. Gonzales’ claim satisfied all three of these requirements. The Colorado Legislature intended to create a property interest in TRO enforcement, the right was not vague or amorphous, and the right was meant to be binding.¹⁷⁹ The Court’s ruling, therefore, undermines the intent of § 1983 to make state actors personally liable for their official actions.¹⁸⁰

C. *The Public Policy Implications of Gonzales*

Gonzales also creates considerable concern because of its public policy implications.¹⁸¹ Domestic violence is the number one cause of

(2003) (arguing that the Supreme Court’s rejection of § 1983 as a mechanism to enforce Spending Clause provisions should not restrict other means of enforcing the Spending Clause).

173. 365 U.S. 167 (1961).

174. *Id.*

175. *Id.* at 179-80, 184, 211.

176. *Id.* at 258 n.87; see also Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 662 (1997) (recognizing that *Monroe* began an increase in § 1983 claims).

177. 520 U.S. 329 (1997).

178. *Id.* at 340-41.

179. See *supra* Part III.A (analyzing *Gonzales*’ impact on legislatures’ ability to protect citizens).

180. See 42 U.S.C. § 1983 (2000) (holding individuals liable for their actions committed in an official capacity); see also *Howlett v. Rose*, 496 U.S. 356, 380 (1990) (rejecting the proposition that a state court could refuse to hear a § 1983 claim on the grounds of state sovereign immunity by asserting that “[a] State may not . . . relieve congestion in its courts by declaring a whole category of federal claims to be frivolous”). See generally Breadan Marshall Douthett, *The Death of Constitutional Duty The Court Reacts to the Expansion of Section 1983 Liability in DeShaney v. Winnebago County Department of Social Services*, 52 OHIO ST. L.J. 643, 650 (1991) (lamenting how *DeShaney* “calls into question the legitimacy and logic of a nation governed by a bureaucracy which has no constitutional duties towards its citizens unless they are in captivity”).

181. See, e.g., *Gonzales Ruling a “Serious Blow” to Victims of Violence Who Need Police Protection*, FAMILY VIOLENCE PREVENTION FUND NEWS FLASH (National Center on

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injury to women, and police protection is critical to protecting battered women and children.¹⁸² Experts believe that women are hesitant to seek police protection and will do so only if they believe that the police in fact will protect them.¹⁸³ Moreover, women of color, like Ms. Gonzales, are the least likely group to seek police intervention because of a cultural distrust of police.¹⁸⁴ Thus, the *Gonzales* decision expands an already large barrier preventing abused women from seeking police protection from their batterers.¹⁸⁵ Domestic violence advocates, who have spent years convincing abused women to come forward for protection, can no longer guarantee that the state has a duty to protect women from their abusers.¹⁸⁶

Domestic and Sexual Violence, Austin, TX), June 27, 2005, *available at* <http://www.ncdsv.org/images/GonzalesRulingSeriousBlow.pdf> (lamenting the *Gonzales* ruling as a “serious blow to victims of domestic violence who count on local police to protect them and their children”).

182. See THE NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, THE CENTER FOR DISEASE CONTROL, INTIMATE PARTNER VIOLENCE: FACT SHEET, <http://www.cdc.gov/ncipc/factsheets/ipvfacts.htm> (last visited July 20, 2006) (reporting that there were nearly 5.3 million instances of Intimate Partner Violence against women, and 3.2 million instances against men in 2000); Callie Marie Rennison, *Intimate Partner Violence, 1993-2001*, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, Feb. 2003, <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf> (stating that despite a downward trend in instances of intimate partner violence, there were still an alarming 691,710 instances of intimate partner violence in 2001, with eighty-five percent of those instances being against women).

183. See Chiu, *supra* note 19, at 1227-29 (noting the hesitancy of battered women to involve police in their domestic disputes); see also Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 4 (1999) (linking the lack of law enforcement response to reports of domestic violence to a deep ambivalence about the issue).

184. See *id.* at 1250 (“There is also a more generalized community ethic against public intervention, the product of a desire to create a private world free from the diverse assaults on the public lives of racially subordinated people. The home is not simply a man’s castle in the patriarchal sense, but may also function as a safe haven from the indignities of life in a racist society. However, but for this ‘safe haven’ in many cases, women of color victimized by violence might otherwise seek help”) (quoting Kimberle Crenshaw, *Mapping the Margins: InterSectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991)); see also Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL’Y 245, 271-81 (2000) (demonstrating the numerous barriers for battered immigrant women to leave abusive relationships).

185. See Kathleen K. Curtis, Comment, *The Supreme Court’s Attack on Domestic Violence Legislation—Discretion, Entitlement, and Due Process In Town of Castle Rock v. Gonzales*, 32 WM. MITCHELL L. REV. 1181, 1207-14 (2006) (focusing on *Gonzales*’ impact on domestic violence statutes).

186. See *Kneipp v. Teddler*, 95 F.3d 1199, 1209 (3d Cir. 1996) (concluding that intervention by city officials increased the risk of danger to the victim by their reassurances, and subsequent failure, to ensure her safety); accord Proclamation No. 7601, 3 C.F.R. § 142 (2002), *available at* http://edocket.access.gpo.gov/cfr_2003/3CFR7601.htm (declaring that “[m]any abusers become more dangerous after court-enforced separation from their victims and often use visitation or exchange of children as an opportunity to inflict abuse” in the proclamation of National Domestic Violence Awareness Month).

Moreover, by deciding that police need not enforce protection orders, the Court endangers other vulnerable members of society who depend on restraining orders. Victims are now more likely to seek private methods of protection because they cannot rely on the state to protect them.¹⁸⁷ Thus, the poor who cannot afford private security will be left especially vulnerable.¹⁸⁸ Additionally, senior citizens, who are the “truly forgotten victims of domestic violence,” will be affected disproportionately by discretionary enforcement of restraining orders.¹⁸⁹

As the Supreme Court has removed what is often a domestic violence victim’s last hope for protection, the state’s overall burden for protecting citizens will increase. *DeShaney* suggests that state responsibility exists only in cases of physical custody.¹⁹⁰ Therefore, victims may seek custodial situations for protection even where a less extreme solution may be available.¹⁹¹ In addition, citizens may be more likely to seek private actions through tort remedies against

187. See generally Robert L. Barrow, Note, *Women with Attitude: Self Protection, Policy, and the Law*, 21 T. JEFFERSON L. REV. 59, 63 (1999) (maintaining that as women are often targets of criminal violence, and since the state has no duty to protect an individual citizen, self-protection and right to carry laws are necessary for greater public safety).

188. See National Network Amicus Brief, *supra* note 1, at 28-29 (recounting a 2002 Department of Justice study that showed that domestic violence victims did not believe protective orders were effective because they were not enforced).

189. See AARP Amicus Brief, *supra* note 1, at 4:

[Elder Abuse is defined as] at least one of the following acts or omissions: (1) an intentional act or attempt to inflict physical harm by anyone, or psychological harm by a caretaker; (2) non-consensual sexual contact; (3) failure by a caretaker to provide for satisfying a persons’ basic life needs; i.e. food, care, housing, medical attention, or other necessities; and, (4) illegal or inappropriate use or taking of an individual’s assets or properties.

190. See 489 U.S. 189, 197-98 (1989) (suggesting that state actors will be held responsible where a “special relationship,” generally involving physical custody, exists). Compare *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 510-11 (3d Cir. 1985) (finding a state duty to protect where the state was aware of a “special danger,” even though the state did not have actual physical custody of the victim), with *Jensen v. Conrad*, 747 F.2d 185, 194-95 (4th Cir. 1984) (dismissing victims’ claims upon finding that no federal case clearly established an affirmative state duty to protect battered children, and upon finding that the social service officials acted in good faith thus warranting immunity). See generally Stephen Faberman, Note, *The Lessons of DeShaney: Special Relationships, Schools & The Fifth Circuit*, 35 B.C. L. REV. 97, 136-37 (1993) (suggesting that the impracticability of requiring “special relationships” to protect children in a school setting requires a less rigid, fact-specific standard).

191. See Peter Edelman, *Another Casualty of Judicial Callousness*, LEGAL TIMES, Mar. 20, 1999, at 18 (describing the *DeShaney* opinion as “outrageous” and lamenting the arbitrary distinction between the facts of *DeShaney* and what would constitute state “custody”). See generally Oren, *supra* note 168, at 1190 (concluding that the Supreme Court has made it unnecessarily difficult for victims to establish state-created dangers).

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government actors.¹⁹² Overall, the *Gonzales* decision leaves the most vulnerable citizens at greater risk and encourages them to carry out acts that trained police officers are better suited to perform.

D. A Postdeprivation Remedy for Ms. Gonzales

Ms. Gonzales and other advocates wanted the Supreme Court to hold Castle Rock police accountable for not following the procedures required by Section 18-6-805.5(3) of the Colorado Code.¹⁹³ In *Gonzales*, there was substantial evidence that would lead a reasonable police officer to believe Mr. Gonzales violated the TRO.¹⁹⁴ The police officers had affirmative knowledge that Mr. Gonzales had the girls, knowledge of his location, and Ms. Gonzales' called them repeatedly over six hours.¹⁹⁵ Moreover, the Colorado court granted the TRO initially because it believed that Mr. Gonzales posed an imminent danger to Ms. Gonzales and her daughters.¹⁹⁶ Therefore, the police officers' unwillingness to take any action fell short of the standard response of a reasonably well-trained officer.¹⁹⁷

The Fourteenth Amendment, which forbids deprivation of property without "due process of law," would have granted Ms. Gonzales a cause of action had the Court properly recognized Ms. Gonzales' property interest in the TRO's enforcement.¹⁹⁸ In *Goss v.*

192. See Curtis, *supra* note 185, at 1213 (suggesting that state legislatures could grant victims of governmental negligence relief). Unlike Colorado that immunizes the government from common law tort liability, Minnesota leaves the government open to full common law tort liability. *Id.* Also, Curtis suggests that the Supreme Court should develop a statutory remedy to protect citizens when police fail to enforce restraining orders. *Id.*

193. See, e.g., Press Release, American Civil Liberties Union, ACLU Urges Supreme Court to Hold Police Accountable for Enforcing Restraining Orders (Mar. 21, 2005), available at <http://www.aclu.org/court/court.cfm?ID=17778&c=286> (announcing that the ACLU coordinated nine Amicus Briefs in support of Ms. Gonzales that were signed by a total of 113 organizations, two former federal judges, and a former Colorado state representative).

194. See *supra* note 3 and accompanying text (presenting the facts of Ms. Gonzales' claim); cf. *Stacey v. Emory*, 97 U.S. 642, 645 (1878) (explaining that facts and circumstances are judged from the perspective of a "man of prudence and caution" to ascertain if an offense has been committed); *Carroll v. United States*, 267 U.S. 132, 162 (1925) (looking for "reasonably trustworthy information" to justify police action of search and seizure).

195. See *supra* note 3 and accompanying text (describing the officers' inaction despite the repeated requests for help from Ms. Gonzales in the face of clear danger).

196. See COLO. REV. STAT. § 13-14-102(4)(a) (1999) ("A temporary civil protection order may be issued if the issuing judge or magistrate finds that an *imminent danger* exists to the person or persons seeking protection under the civil protection order") (emphasis added).

197. Cf. *Carroll*, 267 U.S. at 161-62 (noting that an officer's good faith efforts must be based on an objectively reasonable understanding of the facts).

198. U.S. CONST. amend. XIV, § 1.

Lopez,¹⁹⁹ the Court clarified that sufficient procedural due process for property deprivation occurs when the state affords a citizen “some kind of notice” and “some kind of hearing.”²⁰⁰ “Some kind of notice” and “some kind of hearing” does not place the burden on police to protect every victim.²⁰¹ Rather, notice is satisfied where the police sufficiently follow standard procedures for responding to a TRO violation.²⁰² Therefore, as soon as Ms. Gonzales confirmed Mr. Gonzales’ violation of the TRO, the police should have located him and taken him into custody.²⁰³ Later, they could have applied discretion as to whether to file a motion of contempt against Mr. Gonzales.²⁰⁴ As such, the Court failed to protect Ms. Gonzales’ procedural due process rights.

Since Colorado police failed to follow proper TRO enforcement procedures,²⁰⁵ the Court should have granted Ms. Gonzales postdeprivation relief. In *Parratt v. Taylor*,²⁰⁶ the Court recognized that postdeprivation relief could be required of states in instances of due process violations.²⁰⁷ Though the Court has not given a clear or

199. 419 U.S. 565 (1975) (emphasis added).

200. See *id.* at 579 (qualifying that the Court would consider “appropriate accommodation of the competing interests involved”); accord *Bell v. Burson*, 402 U.S. 535, 542 (1971) (asserting that procedure is satisfied when there is “notice and opportunity for hearing appropriate to the nature of the case”) (citations omitted). Only in rare circumstances is no hearing required to satisfy the requirements of due process. See, e.g., *Cent. Union Trust Co. v. Garvan*, 254 U.S. 554, 566 (1921) (time of war); *Adams v. Milwaukee*, 228 U.S. 572, 584 (1913) (protection of public health).

201. See *Goss*, 419 U.S. at 579-82 (holding that, although most students subject to suspension are entitled to a hearing, special cases might justify the removal of students without traditional procedures); cf. *Arnett v. Kennedy*, 416 U.S. 134, 179 (1974) (White, J., concurring in part and dissenting in part) (“While these cases indicate that the particular interests involved might not have demanded a hearing immediately, they also reaffirm the principle that property may not be taken without a hearing at some time.”).

202. See, e.g., NEW JERSEY DIVISION OF CRIMINAL JUSTICE, GUIDELINES ON POLICE RESPONSE PROCEDURES IN DOMESTIC VIOLENCE CASES 11-12 (1994), <http://www.state.nj.us/lps/dcj/agguide/3dvpols.pdf> (requiring police to arrest the suspect, sign a criminal contempt charge concerning the incident, communicate with a judge or bail unit to set bail for the contempt charge, and if the defendant is unable to post bail, arrange for the defendant’s incarceration).

203. See COLORADO JUDICIAL BRANCH, ANSWERS TO YOUR QUESTIONS ABOUT COUNTY COURT RESTRAINING ORDERS 5 (June 2002), <http://www.courts.state.co.us/exec/pubed/brochures/restraining.pdf> (advising victims to call the police if the defendant violates any part of the restraining order, as the police are required to arrest the defendant if they have probable cause to believe the restraining order was violated).

204. *Id.* (providing that if police choose not to file a motion for contempt, the victim may do so).

205. See *supra* note 200 (stating that arrests are mandatory for violations of restraining orders).

206. 451 U.S. 527 (1981).

207. See *id.* at 538-39, 543 (1981) (articulating that a prisoner defendant would not receive relief because the state’s tort system provided sufficient remedies). The Court, however, did not specify what the postdeprivation remedy would be in that

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consistent formulation of what constitutes sufficient postdeprivation relief, it has deferred to established state procedures.²⁰⁸ Thus, given Colorado state law, the Castle Rock police department should have sanctioned the individual officers named by Ms. Gonzales, and the state should have granted Ms. Gonzales compensation for her loss.

Given the Supreme Court's decision in *Gonzales*, states seeking to provide greater protections for victims of domestic violence should not focus exclusively on enacting mandatory enforcement statutes.²⁰⁹ Rather, they should promote greater cooperation between law enforcement and domestic violence social service providers.²¹⁰ Collaborative efforts will hold police accountable through public pressure and awareness. Over time, strong collaboration will help domestic violence victims and advocates learn to trust that police will do the right thing, which will then encourage victims to seek help.²¹¹ As police are trained by domestic violence advocates to better identify well-founded fears and legitimate complaints, the overall effectiveness

case because it held that the defendant failed to state a valid claim against the state for losing the \$23.50 hobby kit he had ordered. *Id.* at 543-44; *see also* Phillips v. Comm'r of Internal Revenue, 283 U.S. 589, 596-97 (1931) ("Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of liability is adequate."). *But cf.* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 100-01 (1984) (criticizing the majority opinion in *Parratt* for applying a due process analysis).

208. *See Parratt*, 451 U.S. at 537-38 (listing examples of when the Court has upheld remedies granted by states); *see also* Frederick S. Schwartz, *The Postdeprivation Remedy Doctrine of Parratt v. Taylor and Its Application to Cases of Land Use Regulation*, 21 GA. L. REV. 601, 616-17 (1987) (discussing the complexities of determining when postdeprivation remedies should be granted, and how they are determined); *cf.* Patricia C. Cecil, Note, *Section 1983 and State Postdeprivation Remedy for Liberty Loss: Wilson v. Beebe*, 770 F.2d 578 (6th Cir. 1985), 55 U. CIN. L. REV. 257, 269 (1986) (summarizing the need for separate postdeprivation analysis for liberty and property claims because while property "can be returned or . . . compensated for monetarily," liberty cannot).

209. *Cf.* Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1730 (2004) (contending that mandatory statutes are necessary for promoting the long-term safety of battered women). Sack maintains, in an article written before *Gonzales*, that mandatory policies will reduce batterers' ability to manipulate the justice system, create an ongoing collaboration among diverse community groups, and increase understanding about domestic violence throughout the community. *Id.* at 1731.

210. *See id.* at 1675 (chronicling how necessity forced a partnership between battered women's advocates and law enforcement professionals); *cf.* Vera Institute of Justice and Community Oriented Policing Services, U.S. Department of Justice, *Building Strong Police-Immigrant Community Relations: Lessons from a New York City Project* (Aug. 2005), available at <http://www.cops.usdoj.gov/mime/open.pdf?Item=1576> (recognizing a project to strengthen relations between police and immigrants in New York City to provide safer communities).

211. *Cf.* Sack, *supra* note 209, at 1675-76 (lamenting the strained relationship between law enforcement and domestic violence advocates due to differing priorities).

of police departments and the safety of women and children will improve.

In addition, states should bolster funding to address domestic violence. Many women stay in abusive relationships because they fear they will have no financial support if they leave.²¹² Therefore, states should increase financial assistance for domestic violence survivors.²¹³ This creates incentives for women to seek police involvement, even though the state cannot require police to respond to TRO violations.

Finally, victims' advocates must increase publicity about police failure to enforce restraining orders.²¹⁴ Increased publicity will put pressure on police to respond effectively to reports of TRO violations, even if the law does not require them to do so. As police respond, they will rebuild trust with the community, and women will find the confidence to leave violent situations knowing that the police will protect them.

CONCLUSION

In *Gonzales*, the Supreme Court's departure from its traditional analysis recognizing and protecting entitlement property interests left Ms. Gonzales with no relief. The rights/remedies framework provides a tool for understanding this departure. Specifically, the Court overstepped its proper role of determining the extent and limit of legal rights to addressing the remedial concerns arising from the protection of rights.²¹⁵ Thus, the Court showed that it is willing to shield states from liability, even when this requires ignoring a

212. See Peter Margolis, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection and Voice*, 63 GEO. WASH. L. REV. 1071, 1076 (1995) (emphasizing that lack of financial resources, affordable housing, and welfare benefits may cause women to stay with an abusive partner); Mary Becker, *Social Responsibility for Lawyers: Access to Justice for Battered Women*, 12 WASH. U. J.L. & POL'Y 63, 83 (2003) (highlighting the lack of options available for women escaping domestic violence situations).

213. See, e.g., Sack, *supra* note 209, at 1734 (recommending that states increase funding for legal assistance to domestic violence victims to encourage women to leave abusive situations); Becker, *supra* note 212, at 88 (suggesting increased resources for shelters, drug-treatment programs, education, and childcare as important for fighting domestic violence).

214. See BREYER, *supra* note 19, at 127 (noting the influence of public criticism on the judiciary). See generally OFFICE ON VIOLENCE AGAINST WOMEN AND MINNESOTA CENTER AGAINST VIOLENCE & ABUSE AT THE UNIVERSITY OF MINNESOTA, VIOLENCE AGAINST WOMEN ONLINE RESOURCES, ASSESSING JUSTICE SYSTEM RESPONSE TO VIOLENCE AGAINST WOMEN: A TOOL FOR LAW ENFORCEMENT, PROSECUTION AND THE COURTS TO USE IN DEVELOPING EFFECTIVE RESPONSES (Feb. 1998), <http://www.vaw.umn.edu/documents/promise/pplaw/pplaw.html> (summarizing a wide range of options for responding to violence against women).

215. See *supra* note 27 and accompanying text (demonstrating how the Supreme Court's consideration of remedies is beyond its constitutionally prescribed role).

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statute's plain language and clear legislative history. The Court's concern with the remedial impact of its decision explains why it failed to recognize Ms. Gonzales' property entitlement interest in TRO enforcement.

Gonzales represents the Supreme Court expanding its judicial review powers and exhibiting less and less restraint in overturning both state and federal legislation. This trend creates significant concerns as it reduces the ability of legislatures to protect their citizens and renders 42 U.S.C. § 1983 ineffective in holding state actors personally accountable for violating a private citizen's rights.²¹⁶ Further, *Gonzales* leaves battered women, children, the poor, and the elderly at risk with no assurance of police protection. Communities and advocates must now exert stronger pressure on judges to prevent courts from overstepping their judicial review powers. Communities and advocates must also increase accountability for police through non-legislative means and encourage increased funding for support services to battered women. This will help victims of domestic violence who rely on protection orders feel empowered to leave violent situations and regain confidence that police will protect them.

216. See *supra* Part III.B (highlighting the impact of *Gonzales* on § 1983 litigation).