

*Gonzales v. Carhart*¹
An Analysis Supreme Court's Decision
And Future Legislation²

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On April 18, 2007, in a 5 to 4 decision, the United States Supreme Court upheld the federal law proscribing the use of the in-tact D&E procedure to perform an abortion. This procedure involves the doctor killing the fetus/child³ after it has partially emerged from the mother's body. Pro Life advocates lauded the decision as a "Breakthrough ...[a] significant abortion course correction,"⁴ "a major life affirming decision."⁵ Roberta Combs of the Christian Coalition of American is reported as "predicting that 'it is just a matter of time before the infamous *Roe v. Wade* ...will be stuck down by the Court.'"⁶

Pro Choice advocates decried the Court's decision as "a political decision," one that "completely distorts the law and disregards the Constitution,"⁷ and as "reckless" and

¹ Slip Opinion, *Gonzales, Attorney General v. Carhart*, October Term 2006, No. 05-380, issued April 18, 2007, 550 U.S. ____ (2007).

² This paper was originally developed as a Pro Life Presentation on May 19, 2007.

³ The term "fetus" is preferred by Pro-Choice advocates. In contrast the term "child" is preferred by Pro Life advocates. In order not to obfuscate the analysis, I will use both words together when not in a quote.

⁴ National Catholic Register, 4/26/ 2007, by Susan E. Willis, Catholic Online, <http://www.catholic.org>

⁵"Justice Kennedy's Pro-Choice Opinion" by Steven Warshawsky, quoting Planned Parenthood, Yahoo News, http://news.yahoo.com/realclearpolitics/20070426/cm_rep/kustice_k... (hereinafter cited as "Warshawsky").

⁶ *Ibid.*

⁷ NOW's Press Release of April 18, 2007, <http://www.now.org/press/04-07/04-18.html>.

“devastating”.⁸ Justice Ruth Bader Ginsburg, who wrote the dissent, expressed her disdain for the Majority’s decision characterizing it as being “**alarming,**”⁹ based on “**flimsy and transparent justifications**”¹⁰ that reflect “**ancient notions of women’s place in the family and under the Constitution - ideas that have long since been discredited.**”¹¹(Emphasis added.¹²) She predicted that the decision would not be long lived, stating: “ **One wonders how long a line that saves no fetus from destruction will hold in the face of the court’s ‘moral concerns.’** ”¹³ Justice Ginsberg further pointed out by upholding the constitutionality of the statute, the Court requires the fetus/child to be killed in a manner more painful, gruesome and inhumane than the intact D&E procedure and in ways which are also medically less safe for the mother. (Dissent at 14-15.) She also strongly protested that **the Court**

“blurs the line, firmly drawn by *Casey*, between previability and postviability abortions. And for the first time since *Roe* the Court blesses a prohibition with no exception safeguarding a women’s health.” (Dissent at 3.)

Justice Ginsberg is correct when she stated that this is the **first time** since *Roe* that the women’s health interests, as determined by the physician performing the abortion, was not controlling for a previability abortion. She is also correct that the state of viability was not a determinative factor in the Court’s analysis or decision. She further pointed out that the medical

⁸ Warshawsky, *supra*.

⁹ Ginsburg’s Dissent at 3.

¹⁰ Ginsburg’s Dissent at 13.

¹¹ Ginsburg’s Dissent at 18.

¹² Bold or italicized fonts in a quote in this paper indicated “emphasis added.”

¹³ Ginsburg’s Dissent at 19.

evidence both in the record of the cases being reviewed and in the medical community generally did not support the Court's assessment of the alternative abortion procedures but the majority found that the expert opinion was divided and that was sufficient to sustain the legislators' decision to ban the use of the procedure.

Is the Court's decision in *Gonzales v. Carhart* then the beginning of the end of *Roe v. Wade* and its progeny as Pro Life advocates have stated? Does it presage a return to outdated views of women's roles and standing in society as Justice Ginsberg lamented? Or does it constitute, in the words of Alan Keyes, "An abominable affirmation of the Court's unconstitutional decisions in *Roe* and *Casey*."¹⁴

Cathleen Kaveny's analysis of the *Gonzales* decision, "Regulating Abortion - What did the Roberts Court Do" in the May 4th issue of Commonweal, at 6, presented an excellent summary of the significance of the case for Pro-lifers and Pro-Choicers:

- For those who believe that human life begins at conception, that a unique human being exists within the mother's womb at every stage of *in vitro* development, that a "person" within the meaning of the Constitution exists, entitled to the full protection of law during the individual's entire life cycle, beginning at conception, the 1973 *Roe* decision that legal human personhood begins at birth, nothing short of the Court over-ruling *Roe* and all the abortion decisions that followed will be satisfying. The legal status and rights of the child should not be dependent upon its location or stage of physical development. The issue before the Court in *Gonzales* was especially crucial because partial birth abortion is seen as the equivalent of

¹⁴ Gardeners of Evil, <http://www.renewamerica.us/columns/keyes/070428>.

infanticide. The Court in *Gonzales* finally put the child's/fetus' rights first.

- The paramount concern for those who believe that the physical integrity and well being of the mother is the primary and controlling issue, that the personhood of the child/fetus, the child's/fetus' life, the brutality of the methods used to kill the child/fetus are not controlling or determinative factors, but secondary, if not inconsequential, concerns while the child/fetus is within the mother, a physical part of her. If the pregnancy is unwanted, too burdensome in any way, or endangers her well being, she has the absolute right to terminate the pregnancy at any stage prior to birth. The law does not require one person to rescue another especially where risks in doing so are present. The *Gonzales* decision thus represents displacing the primacy of the mother's interests with that of the child/fetus, of undermining her autonomy, her right to protect the integrity of her own body.



In my opinion, to truly understand and appreciate the *Gonzales* decision, you have to understand that despite the context that the Court was determining the constitutionality of a criminal statute proscribing a particular procedure used in second term or later abortions, this is a **birth** decision. As explained more fully below, the ultimate issue before the Court was whether the State could proscribe the killing of a live fetus/child that was being born, that had partially emerged from the mother's body. The Court had made it very clear in *Roe* that its ruling applied **only to the prenatal stage** and that while it linked the "compelling point" of the State's interest in protecting potential human life to viability, it did not alter but accepted that **all Constitutional rights and protections attach at birth**. *Roe, supra*. 410 U.S. at 157-62. The Dissenters disagreed: for them the birth of a living human child is irrelevant if the birth process was

initiated for abortion procedures. They didn't even qualify their position on the basis that there is only a partial emergence!

In upholding the constitutionality of the federal criminal statute, the Court did not overrule or reverse any of its prior abortion decisions.¹⁵ Quite the contrary, the Court relied upon its prior decisions, especially *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) and *Roe v. Wade*, 410 U.S. 113 (1973).¹⁶ It did, however, distinguish its decision from that in *Stenberg v. Carhart*, 530 U.S. 914 (2000), in which the Court struck down as violative of the Constitution Nebraska's law banning the same procedure. The federal statute differed from the Nebraska law principally in two ways: first, unlike the Nebraska law, the federal statute prohibits "knowingly perform[ing] a partial-birth abortion ... that is [not] necessary to save the life of a mother," 18 U.S.C. § 1531(a), and second, the federal statute's very precise definition of the term "partial-birth abortion" which requires either "the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother." (Slip Op. at 17.) As a result, in contrast to the Nebraska statute which the Court had found could proscribe instances of nonintact D&E abortions, the Court in *Gonzales* found that the reach of the federal statute encompassed only intact D&E abortions. (Slip Op. at 21-23.)

¹⁵ Justice Clarence Thomas in his Concurrence, joined by Justice Antonin Scalia, would have overturned *Roe*.

¹⁶ Out of respect for the Constitution, the Court is not to decide any constitutional issue unnecessary to resolving the specific question before it and that when it does address a constitutional issue, it is to decide that constitutional issue on the narrowest grounds possible and in light of prior precedents. The reason for this is that too broad a ruling may foreclose a result that is right in a future case and the overturning of prior precedents should be avoided and only rarely done.

The Court also held that under *Casey* and other of its precedents the federal statute was enacted for constitutionally valid purposes. (Slip Op. at 26-30.) “*** The Act expresses respect for the dignity of human life.” (Slip Op. at 27.) This was the first time in 34 years that the state’s interest in preserving the life of the child, which the Court has always recognized as a legitimate interest, was the prevailing factor.¹⁷ The Court also noted that the statute also protects “*** the integrity and ethics of the medical profession’ [and] ‘for maintaining high standards of professional conduct’ in the practice of medicine.” (Slip Op. at 27, quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) and *Barsky v. Board of Regents of Univ. of N.Y.*, 347 U.S. 702, 731 (1997). Congress found that

“ ‘Partial-birth abortion...confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end life.’ Congressional Findings (14)(j), *ibid* [in notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV)].” (Slip Op. at 27.)

The Court further pointed out that

“the State, from the inception of pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey*’s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.” (Slip Op. at 27-28.)

¹⁷ See also the April 18, 2007 Statement of His Eminence Justin Cardinal Rigali, Archbishop of Philadelphia and Chairman of the Committee for Pro Life Activities of the United States Conference of Catholic Bishops:
<http://www.archdiocese-phl.org/rigali/cardstat/SC-PBA.pdf>.

The crucial question then was whether the federal law imposed a substantial obstacle to the woman's constitutionally protected right to terminate her pregnancy prior to viability:

“Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional ‘if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’ *Casey*, 505 U.S., at 878 (plurality opinion). **The abortions affected by the Act’s regulations take place both previability and postviability; so the quoted language and the undue burden analysis it relies upon are applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions.** The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.” (Slip Op. at 26.)

The Court recognized that

“the prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it ‘subjected women to significant health risks.’ ” (Slip Op. at 31, quoting *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328 (2006), and citing *Casey, supra*, at 879.)

In light of divided medical opinion and the availability of medically safe alternative procedures, the Court concluded the federal prohibition did not subject women to significant health risks. (Slip Op. at 33-34.) In so concluding, the Court made it clear that what the physician thought was the best and safest procedure was no longer controlling:

“Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.” (Slip Op. at 33.)

By departing from prior cases in which the physician's decision of what was in the best interests of the woman's health in the abortion of **a previsible fetus/child** was the controlling or

determinative factor and a factor that had to be taken into account in the abortion of a **postviable fetus/child**, *Gonzales* seems to have disregarded the Court’s long standing rule as set forth in *Casey* as to what a State may and may not do:

“It must be stated at the outset and with clarity that *Roe*’s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interest are not strong enough to a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is the confirmation of the State’s power to restrict abortions after fetal viability if the law contains exceptions for pregnancies which endanger the women’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.”

Planned Parenthood of Southeastern Pa. v. Casey, supra, 505 U.S. at 846. *See Roe v. Wade, supra*, 410 U.S. at 164 for the statement of the trimester analysis.

Is Justice Ginsberg’s criticism of the Majority’s decision thus correct? In my view, no, it is not correct. Though not explicitly stated, the key to understanding the decision is that the fetus/child had begun to emerge from the mother’s body alive, at which point, whether viable or not, the full force and effect of the United States Constitution, with all its protections and individual rights, applied to the emerging fetus/child, subject to only one limitation: the need to save the Mother’s life. Birth, even if induced by force or drug, was taking place, and thus Congress was well within its right to prohibit use of a procedure which intentionally killed the living fetus/child as it was being born.¹⁸ As Justice Anthony M. Kennedy noted, “**The Act**

¹⁸ The federal Partial-Birth Abortion Act’s definition of the term “partial-birth abortion” , 18 U.S.C. §1531(b)(1), clearly states that it applies to an abortion “in which the person performing the abortion – (A) deliberately and intentionally vaginally delivers a living fetus ***

proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process.” (Slip Op. at 26.) *It does not apply to or “restrict an abortion procedure which involves the delivery of expired fetus.”* (Slip. Op. at 17.) That is why the question of whether the fetus/child is viable or not is irrelevant. Constitutional protections apply at birth whether the fetus/child lives one second or longer after birth.

That the fetus/child has begun to emerge from the mother’s body is the significant, determinative factor is further emphasized by Justice Kennedy in commenting upon the rare case in which the prohibited procedure must be used for legitimate medical reasons. Justice Kennedy noted that the pre-viable fetus can be killed by an injection before delivery is induced:

“If the intact D & E procedure is truly necessary in some circumstances, it appears likely that an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure.” (Slip Op. at 34-35.)

It is thus the fetus/child’s emerging from the woman’s body alive that is the determinative factor that allows the state to prohibit and criminally proscribe a procedure which interferes with the birth process in such a way as to deliberately, or knowingly and intentionally, terminate the life of the living fetus/child without the required justification to save the mother’s life. For the majority, the case was not about abortion but the killing of a child being born.

For the Dissenters, the birth process is a constitutionally irrelevant factor. What is controlling is what the physician determines is the procedure that is in the best interests of the woman:

“According to expert testimony *** the safety advantages of intact D&E are marked for women with certain medical conditions

and (B) performs the overt act, other than completion of delivery, that kills the partially delivered fetus ***.”

***. Further *** intact D&E is significantly safer for women with certain pregnancy-related conditions *** and for women carrying fetuses with certain abnormalities ***.

“Intact D&E *** provides safety benefits over D&E by dismemberment for several reasons: *First*, intact D&E minimizes the number of times a physician must insert an instrument through the cervix and uterus, and thereby reduces the risk of trauma to, and perforation of the cervix and uterus – the most serious complication associated with nonintact D&E. *** *Second*, **removing the fetus intact, instead of dismembering it *in utero***, decreases the likelihood that fetal tissue will be retained in the uterus, a condition that can cause infection, hemorrhage, and infertility. *** *Third*, intact D&E diminishes the chances of exposing the patient’s tissues to sharp body fragments sometimes resulting from dismemberment of the fetus. *** *Fourth*, intact D&E takes less operating time than D&E by dismemberment, and thus may reduce bleeding, the risk of infection, and complications relating to anesthesia. ***” (Citations and references omitted.) Dissent at 10-11.

The logical conclusion of this reasoning is that the fetus/child may be delivered intact, or removed from the woman intact, before the fetus/child is intentionally killed. The delivery of a fetus, however, is the birth of a child, a human being. The Constitution is fully applicable at that point and the Court has never deviated from that. That for the dissenters the birth of the child is a constitutionally irrelevant factor in the abortion process is startling and that is the shocking deviation from precedent. That for the majority it is the relevant, determinative factor, means that a clear and bright line that may not be crossed has thus been drawn which, in the undersigned’s opinion, should stand the test of time. Notwithstanding, is this the major Pro Life breakthrough as some have claimed?

As the Court recognized “the Act does not proscribe D&E.” (Slip Op. at 34.) In its description of the non-intact D&E procedure the gruesome, brutal, inhumane methods used to kill the living fetus/child in the womb by repeatedly cutting and ripping parts of the body apart,

cutting into the skull and sucking out the brain out, crushing the skull, to terminate the pregnancy, may still be utilized with impunity, free of any substantial burden or impediment.¹⁹ The Court also recognized its decision was not inconsistent with its prior decision in *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 77-79 (1976), in which it invalidated the ban on saline amniocentesis, because that method was at the time the predominant method for terminating a second trimester pregnancy whereas the intact D&E procedure is rarely used. (Slip Op. at 35.) This suggests that a prohibition on non-intact D&E would likely be found to violate the Constitution absent a medically acceptable alternative.

The Court ended its decision stating that the outcome in an actual “as-applied” case could be different than in the current case which challenged the constitutionality of the federal statute on its face:

“The Act is open to a proper as-applied challenge in a discrete case. *** No as-applied challenge need be brought if the prohibition in the Act threatens a woman’s life because the Act already contains a life exception. 18 U.S.C. §1531(a)(2000 ed. Supp. IV).” (Slip Op. at 38.)

Thus the as-applied case would be from the conviction of a physician who used the banned procedure as the method preferred for reasons of the woman’s non-life threatening health risks.²⁰ In light of the Court’s 1971 decision upholding the constitutionality of the District of Columbia’s criminal abortion statute against a physician in *United States v. Vuitch*, 402 U.S. 62, and the Court’s positive reference to it in *Roe*, 410 U.S. at 158, a physician’s intentional “termination of

¹⁹ The Court’s disgust with this procedure is evident and the details make it quite clear that a living human being is being killed.

²⁰ The Court in *Roe* (410 U.S. at 126-27) held that the physician lacked standing to sue because his case was not ripe for review. He had not performed the abortion nor been convicted of violating the Texas statute.

life entitled to Fourteenth Amendment Protection” (*ibid*) would not likely be approved if it wasn’t necessary to save the mother’s life.²¹

So what is the significance of *Gonzales* and what will the future bring? Will the “abortion war” be rekindled? The opposing camps have certainly been reinvigorated and recharged to advance the conflicting interests of “Life versus choice. Personhood versus bodily health and integrity. Women versus unborn children?” (Kaveny, *supra.*) David Broder, N.Y. Times, and others see this as the opportune time for the enactment of definitive controlling federal legislation defining and restricting when abortion is available. Many countries limit it to the first trimester and allow later term abortions only where necessary to save the mother’s life. Any such law, would, of course, be a compromise that satisfies neither side, but is seen as acceptable to an overwhelming majority of Americans. Short of such a law or constitutional amendment, what can be done? What directions should pro life efforts be directed towards?

The majority in *Gonzales* shows the way to change the current state of abortion law once it is understood that the woman’s right to terminate her pregnancy does not incorporate the right to kill her *in-vitro* child. The Court in *Roe* clearly stated (410 U.S. at 153):

“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions on state actions, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not **to**

²¹ Some commentators see Justice Kennedy as being open to changing his ruling in an “as applied” case. While that is not precluded, I don’t see it likely if it can not be established beyond question that no other medical procedure could have been used to protect the mother from the most serious injury to her health. Even in such a case, the issue then would be what injury to the mother justifies the killing of another and innocent human being, including where induced delivery and caesarean section are available options. Indeed, under the Dissenters’ view, induced delivery is the safest method for the woman for terminating a second trimester pregnancy.

terminate her pregnancy.*)** (Emphasis added.)

The Court in *Roe* rejected the argument the woman’s right to terminate her pregnancy was absolute:

“*** [A]ppellant and some *amici* argue that the woman’s right is absolute and that she is entitled **to terminate her pregnancy** at whatever time, in whatever way, and for whatever reason she alone chooses. **With this we do not agree.***)** (*Ibid*; emphasis added.)

* * * *

“***In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one’s body as one pleases bears a close relationship to the right of privacy previously articulated in the court’s decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jaconson v. Massachuettas*, 197 U.S. 11 (1905)(vaccination); *Buck v. Bell*, 274 U.S. 200 (1927)(sterilization).” (*Id.* at 154.)

The Court has never deviated from this: the woman has a limited constitutionally protected right to terminate her pregnancy subject to the state’s interest in protecting her health, regulating medical profession, and protecting the life of the *in vitro* child. The importance of this last interest becomes controlling at the point of viability, as *Casey* (505 U.S. at 846) made clear.²² It was assumed, however, that the decision to terminate a pregnancy necessarily required that the fetus/child be killed in the process, that the right to terminate a pregnancy included the right to terminate the life of the fetus/child. *Gonzales* is to the contrary. Neither the federal statute banning intact D&E nor the *Gonzales* decision bans inducing delivery as a means to terminate a pregnancy. What is banned is the killing of the fetus/child during the birth process. Then, quite unintentionally, Justice Ginsberg sets forth the very strong and convincing medical reasons why terminating a second trimester pregnancy by inducing delivery is the safest method

²² See quote on page 7, *supra*.

and best for the woman. (Dissent p. 3, quoted on page 10, *supra*.) Justice Ginsberg, however, would have allowed the physician to then terminate the life of the fetus/child. Notwithstanding, the reasons she presented for terminating a second trimester or later stage pregnancy by inducing delivery would clearly support a legislative requirement that this method be used unless it would result in death or serious injury to the woman's health. These exceptions would be quite rare, if ever applicable.

Gonzales, in light of the Dissenters' recognition that inducing delivery is for the woman the safest method for terminating a pregnancy, is thus a significant decision. For the first time, the Court applied "birth law" to a child in the process of being born, when the child has started to exit the mother's body: Where the physician must make a choice to save one life or another, the mother's life may be the one saved. Where the life of the mother is not in jeopardy, the physician may not kill the child. It is that simple!

The Court's presentation in gruesome detail what occurs in non-intact D&E abortions expresses the majority's revulsion of the procedure and its legal analysis seems to be a plea for States to regulate and limit the circumstances in which this horrific dismemberment of the child/fetus can be utilized. However, *Gonzales*' reliance on *Roe* and *Casey* suggests that as of the present, *Roe/ Casey* and its other line of abortion decisions will not be overturned if it is asked to rule on the constitutionality of a law banning all abortions except those necessary to save the mother's life, or, one in which there is also an exception for pregnancies that resulted from rape or incest.

Notwithstanding, *Gonzales* does indicate that the five Justices will allow greater state regulation and restrictions that balance the mother's health concerns with preserving the

fetus'/child's life. Prior to viability, what health concerns, conditions of the mother justify the use of such brutal, inhumane, cruel, and excruciatingly painful procedures to kill the potentially viable or actually viable fetus/child?²³ For example, the law might state that (a) prior to the 4th month, if a woman wishes to terminate her pregnancy she can do so for any reason but it must be done in a manner that preserves the life of the child, if possible, as viability is achieved during this gestational period and (b) from 4th month of gestation, a woman may elect to terminate her pregnancy only where the pregnancy and/or delivery of the fetus/child will likely result in either her death or serious and permanent injury to her physical or mental health and that in such a case the pregnancy must be terminated in such a way as to preserve the life of the fetus/child if possible, by, for example inducing delivery for the reasons give by Justice Ginsberg. The statute can then give examples of such serious health risks or leave it to a regulatory authority to do so.

The decision also suggests that these five (5) Justices will uphold the constitutionality of a ban on all post viability abortions not necessary to save the mother's life.

Conclusion

The pro life lobby should now work for the enactment of laws that do this including for all second trimester abortions since viability will be dependent on numerous factors, including scientific advancements. The *Gonzales* decision, when the Majority and Dissenters' Opinions are taken into account, is significant and does indicate that the deference to the Pro Choice point

²³ When a second trimester abortion is being performed, the physician does not know if the fetus is viable or not. What is known is that the fetus is alive. Whether the fetus is able to survive outside the mother's womb, with available medical support, is not determined with absolute certainty and so, unless methods are taken to preserve the fetus's/child's life, the question whether the fetus/child is viable is an academic one. My preference then is use the phrase "potentially viable or actually viable" as a more accurate statement of the reality when a second trimester pregnancy is being terminated.

of view that the Court has exhibited in the past is not without limit. More importantly, *Gonzales* shows that inducing delivery is the safest method for the woman to terminate her pregnancy and that procedure will preserve the life of viable children. The woman's right to terminate a pregnancy is separate and distinct from the child-in-the womb's right to life and now is the time for that distinction to be recognized and enacted into law.