The Supreme Court’s Use of the Term “Potential Life”: Verbal Engineering and the Abortion Holocaust

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ARTICLE

THE SUPREME COURT'S USE OF THE TERM "POTENTIAL LIFE": VERBAL ENGINEERING AND THE ABORTION HOLOCAUST

Martin Wishnatsky†

We have made a covenant with death, and with hell are we at agreement . . . for we have made lies our refuge, and under falsehood have we hid ourselves.

—Isaiah 28:15—

INTRODUCTION

One mark of a holocaust is the dehumanization of its victims. The dehumanization of the Jews preceded their destruction in Germany.1 Justification for the mass slaughter of a defined class of people often begins with the use of language that diminishes their humanity.2 The abortion holocaust is no different. Ever present in Supreme Court cases, beginning with Roe v. Wade3 in 1973, is the dehumanizing term "potential life." This Article traces the tenacious use of the concept that the unborn are not actual human beings through every Supreme Court case in which it appears from 1973 to the present.

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"In assessing the State’s interest," wrote Justice Harry Blackmun in Roe v. Wade, "recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone." Thus began a long and continuous use of an essentially fictitious concept in Supreme Court case law. Unwilling to fully embrace the disturbing reality that abortion ends a human life, the Supreme Court invented the concept of “potential life” to describe the child in the womb. The Court employed that term, with some variations, eight times in Roe—seven times in the majority opinion, and once in Justice Stewart’s concurrence.

In the companion case of Doe v. Bolton, the majority used the term once. Justice Douglas, concurring, employed “potential life” twice, both times in a passage from an article by Justice Tom Clark. The article attempted to blur the bright line of conception as the beginning of actual life.

To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm meets egg life may eventually form, but quite often it does not. The law does not deal in speculation. The

4. The Supreme Court’s annual term begins on the first Monday in October and runs through the following June. Thus, Roe v. Wade, decided January 22, 1973, fell in the middle of the 1972 term.

5. Roe, 410 U.S. at 150 (emphasis added).

6. See id. at 154 (employing the term “protecting potential life”); id. at 156 (recognizing “the State’s interests in protecting health and potential life”); id. at 159 (“At some point in time another interest . . . that of potential human life, becomes significantly involved.”); id. at 162 (“The fetus, at most, represents only the potentiality of life.”); id. at 162 (noting that the State “has still another important and legitimate interest in protecting the potentiality of human life”) (emphasis added); id. at 163 (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability.”); id. at 164 (noting the State’s “interest in the potentiality of human life”); id. at 170 (“The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her.”) (Stewart, J., concurring).


8. Id. at 197 (using the phrase “the protection of potential life”).

phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide. . . . This would not be the case if the fetus constituted human life. 10

Finally, Justice Byron White, one of two dissenters in Roe and Doe, twice employed the phrase “life or potential life,”11 which indicates that even those who opposed the invented abortion right at least partially acceded to its dehumanizing terminology.

**OCTOBER TERM 1975**

In Connecticut v. Menillo,12 explaining that states could still outlaw self-induced or non-physician abortions, the Court referred to “the potential life of the fetus.”13 Three days before the bicentennial of the Declaration of Independence, the Court, in Planned Parenthood of Central Missouri v. Danforth,14 deepened the abortion right—outlawing, *inter alia*, spousal consent laws—and quoted Roe’s term “potential human life.”15 Justice White, in a separate opinion, used the term three times. He first used the phrase “life or potential life” that he employed in his Roe dissent.16 Then, however, though opposing constitutional recognition of an abortion right, he nonetheless employed Justice Blackmun’s misleading terminology, referring to “the State’s interest in the potential life of the fetus,”17 and “a mother’s decision to cut off a potential human life by abortion.”18 Thus, the insidious phrase crept into the vocabulary of the dissenters.

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11. *Id.* at 221-22 (White, J., dissenting).
13. *Id.* at 11.
15. *Id.* at 61 (quoting *Roe v. Wade*, 410 U.S. 113, 159 (1973)).
16. *Id.* at 92 (White, J., concurring in part and dissenting in part).
17. *Id.* at 93.
18. *Id.*
OCTOBER TERM 1976

In *Sendak v. Arnold,* Justice White, dissenting, quoted a passage from *Menillo* referring to the State’s “interest in the potential life of the fetus.” In *Carey v. Population Services International,* the Court, extending the dubious constitutional right to contraception to the unmarried, used “potential life” four times: twice quoting directly from *Roe,* then arguing that contraception did not implicate “the interest in protecting potential life,” and finally referring to the State’s interests “in protection of potential life.” Eleven days after *Carey,* the Court concluded the term with a trio of abortion-subsidy cases, sprinkling “potential life” throughout.

In *Beal v. Doe,* the Court decided that states do not have to pay for Medicaid abortions, citing *Roe* for the “important and legitimate interest . . . in protecting the potentiality of human life.” In his dissent, Justice Thurgood Marshall referred to “potential life” three times and “potential human life” once. In *Maher v. Roe,* holding that states that subsidize childbirth do not also have to pay for abortions, the Court referred to “the potential life of the fetus” three times, and it also noted that “the pregnant woman carries a potential human being” and that abortion terminates “a potential human life.” Justice Brennan, dissenting, referred to the “potential life of the fetus” and “the State’s important and legitimate interest

20. *Id.* at 968.
21. *Id.* at 970 (White, J., dissenting) (quoting *Connecticut v. Menillo,* 423 U.S. 9, 11 (1975) (per curiam)).
23. *Id.* at 686, 690 (1977) (using the phrase “protecting potential life”) (quoting *Roe v. Wade,* 410 U.S. 113, 154 (1973)).
24. *Id.* at 690.
25. *Id.* at 694.
27. *Id.* at 445-46 (quoting *Roe,* 410 U.S. at 162).
28. *Id.* at 457, 460-61 (Marshall, J., dissenting).
30. *Id.* at 472, 478.
31. *Id.* at 478.
32. *Id.* at 480.
in potential life.” Completing the trilogy, the Court, in Poelker v. Doe, refused to force the City of St. Louis to subsidize abortions at city-controlled hospitals, quoting Roe on the State’s “important and legitimate interest in potential life.”

**OCTOBER TERM 1978**

In Williams v. Zbaraz, Illinois argued that refusal to stay a lower-court injunction “will result in irreparable injury to the interest of the people of Illinois in protecting potential human life.” Despite speaking the Court’s language, Illinois did not prevail. Justice Stevens, acknowledging the “State’s interest in potential life,” denied the motion.

Next, in Colautti v. Franklin, the Court found a viability-determination provision in the Pennsylvania Abortion Control Act unconstitutional on vagueness grounds. Justice Blackmun, for the majority, referred three times to “the potential life of the fetus.” Discussing viability, Justice White, in dissent, noted the difference between “potential” and “actual.” “Potential ability,” he wrote, “is not actual ability. It is ability existing in possibility, not in actuality.” Justice White referred to Pennsylvania’s viability regulation as “an attempt to protect a period of potential life.”

**OCTOBER TERM 1979**

On the last day of the term, the Court, in Harris v. McRae, rejected challenges to the Hyde Amendment restrictions on Medicaid abortion

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33. Id. at 489-90 (Brennan, J., dissenting).
35. Id. at 524 (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)).
37. Id. at 1313.
38. Id.
40. Id. at 401.
41. Id. at 386 & n.7.
42. Id. at 402 (White, J., dissenting) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1958) (internal punctuation omitted)).
43. Id. at 406.
44. Harris v. McRae, 448 U.S. 297 (1980).
funding and also held that the states were not required to make such payments. After referring to "protecting potential human life" and "protecting the potential life of the fetus," the Court noted the "state interest in protecting potential life" and "protecting potential life after fetal viability." As if that were not enough, Justice Stewart, for the majority, then riffed the phrase six more times in three short paragraphs. He performed this dizzying display of virtuosity within a mere two pages of the United States Reports, the judicial equivalent of a Tommy Emmanuel guitar solo.

Justice White, equal to the occasion, came back with five mentions in four paragraphs—not as awesome, but still notable. Eschewing variety, he rapped out four straight mentions of "the governmental interest in potential life," concluding with "its legitimate interest in a potential life." Like Justice Stewart, Justice White kept it all within a mere two pages of the Reports—an impressive accomplishment for someone who believed that Roe was wrongly decided. Next up, Justice Brennan offered only one solitary mention of "the State's interest in protecting the potential life of the fetus." The next candidate was Justice Marshall—always willing to swing a bat for abortion. He spread four mentions over seven pages, a far more relaxed pace than either Justice Stewart or Justice White. Derisively referring to the Hyde Amendment as "purportedly designed to safeguard 'the legitimate governmental objective of protecting potential life,'" he repeated the phrase a second time, segued into "the asserted state interest in protecting

45. The Hyde Amendment, with narrow exceptions, such as life of the mother, rape and incest, or severe physical health damage, prohibited Medicaid reimbursement for abortion using federal funds. Id. at 302-03.
46. Id. at 311.
47. Id. at 313.
48. Id. at 316.
49. See id. at 324 (noting the "legitimate interest in protecting the potential life of the fetus"); id. (noting the "important and legitimate interest in protecting the potentiality of human life") (quoting Roe v. Wade, 410 U.S. 113, 162 (1973)); id. at 324-25 (noting "the legitimate state interest in protecting potential life by encouraging childbirth") (citations omitted); id. at 325 (noting "the legitimate governmental objective of protecting potential life"); id. (noting "the legitimate congressional interest in protecting potential life"); id. ("[N]o other procedure involves the purposeful termination of a potential life.").
50. Id. at 327-28 (White, J., concurring).
51. Id. at 329 (Brennan, J., dissenting).
52. Id. at 340 (Marshall, J., dissenting).
53. Id. at 341.
potential life,”^54 and closed with a repeat of the opening phrase.\(^55\) But, lo, the \textit{Harris} symphony was not over. Justice Stevens, the final soloist, added a dissenting passage garnished with five invocations of “potential life” within three pages.\(^56\) All told, the Justices used “potential life” twenty-five times in \textit{Harris}.

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\textbf{OCTOBER TERM 1980}
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In \textit{H.L. v. Matheson},^57 the Court held that the plaintiff inadequately pleaded a challenge to the Utah parental notification statute for minors. The majority quoted Harris on “the legitimate governmental objective of protecting potential life.”^58 Justice Marshall, in dissent, mentioned the State’s interest in protecting “the potential life of the fetus.”^59

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\textbf{OCTOBER TERM 1982}
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On the last day of the term, the Court resolved two cases challenging state abortion regulations. In the first, \textit{City of Akron v. Akron Center for Reproductive Health},^60 Justice Powell quoted \textit{Roe} on the “important and legitimate interest in protecting the potentiality of human life” and added a comment on “protecting the potential life of the unborn child.”^61 He also dropped “potential human life” twice in a footnote.\(^62\) In dissent, Justice O’Connor criticized the trimester approach as “completely unworkable,” and argued that the State’s interest “in protecting the potentiality of human life” extended throughout pregnancy.\(^63\) To make her point, she used the phrase “potential life,” or an equivalent, six times in one paragraph, vividly illustrating how this unscientific mantra had come to dominate the Court’s discourse.

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54. \textit{Id.} at 344.
55. \textit{Id.} at 346.
56. \textit{Id.} at 350-52 (Stevens, J., dissenting).
58. \textit{Id.} at 413.
61. \textit{Id.} at 428 (quoting \textit{Roe v. Wade}, 410 U.S. 113, 162 (1973)).
62. \textit{Id.} at 420 n.1.
63. \textit{Id.} at 454, 459 (O’Connor, J., dissenting).
\end{flushright}
The state interest in potential human life is likewise extant throughout pregnancy. In Roe, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the potential for human life. . . . The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.64

Adopting the Court's agnosticism on when human life begins,65 Justice O'Connor and all the other Justices, whether for abortion or against, employed the same "potential life" refrain over and over, refusing to acknowledge the obvious: life begins at conception. In addition to the previous mentions, Justice O'Connor used "potential life" or variations of the phrase six more times.66 In total, the Justices used "potential life" or an equivalent seventeen times in Akron, demonstrating its centrality as the Court's dominant meme for life in the womb.

In Planned Parenthood Association v. Ashcroft,67 decided the same day as Akron, the majority used the phrase "potentiality of human life" once.68 Justice Blackmun, in partial dissent, used the same phrase one time, and "potential life" twice.69

OCTOBER TERM 1985

Thornburgh v. American College of Obstetricians and Gynecologists,70 a 5-4 opinion, was the high water mark of the Court's abortion absolutism.

64. Id. at 460-61.
65. Id. at 461 (quoting Roe, 410 U.S. at 159) (refusing to "resolve the difficult question of when life begins").
66. Id. at 453 n.1, 461 & n.8, 466, 474.
68. Id. at 482.
69. Id. at 499-500 (Blackmun, J., concurring in part and dissenting in part).
With the addition of Justices Sandra Day O'Connor (1983), Antonin Scalia (1986), and Anthony Kennedy (1988), the Court—with the original Roe dissenters, Justices Rehnquist and White—would in the future have a majority willing to grant the states more scope for regulation, though not abolition, of abortion. The Thornburgh majority used the term “potential life” once.71 Chief Justice Burger, dissenting, quoted Roe on “protecting the potentiality of human life”72 and twice referred to “potential life.”73 Justice White, in a powerful dissent, intimated that the Court’s use of “potential life” was a deliberate misnomer. He discussed “the State’s countervailing interest in protecting fetal life (or, as the Court would have it, ‘potential human life,’) . . .”74 Justice White did use “potential human life” in a footnote,75 but, more tellingly—dropping the word “potential”—employed the term “fetal life” four times in a single paragraph in the same footnote.76 Justice O’Connor, also dissenting, used “potential human life” twice.77

OCTOBER TERM 1988

In Webster v. Reproductive Health Services,78 the Court almost overturned Roe, but Chief Justice Rehnquist could not hold a majority together to drop the threshold for scrutinizing state regulations from the “compelling interest” test to a more relaxed “rational basis” test.79 Justice O’Connor simply refused to go along.80 Nonetheless, Webster opened the door to expanded state regulation. The opinion also set a new record for use of “potential life” and its variants: twelve times in Chief Justice Rehnquist’s main opinion,81 seven times in Justice O’Connor’s partial concurrence,82

71. Id. at 759.
72. Id. at 784 (Burger, C.J., dissenting) (quoting Roe v. Wade, 410 U.S. 113, 162 (1973)).
73. Id. at 783 n.*, 784.
74. Id. at 794 (White, J., dissenting) (citation omitted).
75. Id. at 795 n.4.
76. Id.
77. Id. at 828, 831 (O’Connor, J., dissenting).
79. For an account of the internal politics of Webster, see Bernard Schwartz, The Unpublished Opinions of the Rehnquist Court 260-338 (1996).
80. Id. at 336-38.
81. Webster, 492 U.S. at 515-16 & n.14, 519-21.
82. Id. at 528, 530-31 (O’Connor, J., concurring in part and concurring in the judgment).
eighteen times by Justice Blackmun, and another seven by Justice Stevens, including five on a single page—for a grand total of forty-four. Though the Court was moving toward greater accommodation of state regulation, the "potential life" mantra still ruled.

Justice Stevens disagreed with the majority's position that the state's interest in "potential life" begins at conception, not viability. Because the "freshly fertilized egg" cannot experience "physical pain or mental anguish," he argued, "a State has no greater secular interest in protecting the potential life of an embryo that is still 'seed' than in protecting the potential life of a sperm or an unfertilized ovum." To Justice Stevens, the early human being is a mere "seed," unworthy of legal protection, and no different from a sperm or an unfertilized egg. In another unusual phrase, he stated that "the Constitution allows the use of contraceptive procedures to prevent potential life from developing into full personhood." Thus, in his mind, "potential life" is another name for non-personhood.

OCTOBER TERM 1991

In the two years following Webster, Justices Brennan and Marshall, two unwavering abortion stalwarts, retired. President George H. W. Bush

83. Id. at 541, 544, 545 n.6, 546, 547 n.7, 549, 552-54, 555 & n.10, 556 (Blackmun, J., concurring in part and dissenting in part).
84. Id. at 562, 569 (Stevens, J., concurring in part and dissenting in part).
85. Id. at 569.
86. "It is hard not to be dumbfounded at a statement . . . giving support to the idea that there is no essential difference between a sperm and an embryo—a position that is ludicrous on scientific grounds." Christopher Wolfe, Public Morality and the Modern Supreme Court, 45 AM. J. JURIS. 65, 77 n.41 (2000).
87. Webster, 492 U.S. at 569 (Stevens, J., concurring in part and dissenting in part).
88. The withdrawal of legal protection from a class of human beings is the definition of a holocaust. "In essence, the 'legal nonperson' designation serves as a device for defining the victims out of the human race and beyond the protection of the law where they can be . . . annihilated with impunity." BRENAN, supra note 1, at 95. "Even the Nazis started their extermination of Jews by first depriving them of all legal status . . . ." HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296 (Harcourt Books 1973) (1951).
nominated David Souter and Clarence Thomas to replace them.90 Expectations were high that Roe would fall.91 In Planned Parenthood of Southeastern Pennsylvania v. Casey,92 Justice Thomas was faithful to life, but Justices O'Connor, Kennedy, and Souter—all Republican nominees—banded together to preserve Roe. In Casey, the Court used the term “potential life” or its equivalent forty-nine times, more than in any other case before or since. The plurality itself, whose cohesion guaranteed Roe’s continuing vitality, used “potential life” and its variations twenty-three times in its seventy-page opinion,93 including five times on a single page.94

Upholding Roe, while granting states more scope for regulation, the plurality recognized that “potential life” is not the exclusive term for a child in the womb; it also employed the term “life of the unborn” five times without the modifier “potential.”95 Some deem these procedures, said the plurality, “nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, [with consequences] for the life or potential life that is aborted.”96 The plurality, continuing to read the unborn out of the human race, at least recognized that, to some, the unborn child is a life, not merely a potential life. Another time the plurality mentioned “life or potential life of the unborn”97 maintaining the equivocation, and in another place referred similarly to “protecting fetal life or potential life.”98 Speaking of contraception, they used the unusual phrase “postconception potential life.”99 The correct use of “potential life” is to describe a


91. “With Thomas on board, a perceived sixth conservative vote, many inside and outside the court feared that [overruling Roe] was inevitable.” Ján Crawford Greenburg, Supreme Conflict 137 (2007).


93. Id. at 852, 859, 870-73, 875-79, 882, 886, 898.

94. Id. at 876.

95. Id. at 869, 873, 877, 883, 885. Justice Scalia noted the inconsistency between speaking of the unborn in more humane terms while still forbidding any state to prohibit their destruction. Id. at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).

96. Id. at 852 (majority opinion).

97. Id. at 870.

98. Id. at 876.

99. Id. at 859.
spermatozoa or an oocyte. Both are alive, yet neither is a human life. The phrase “postconception potential life” is an oxymoron. Anything postconception is actual life, not potential. But in the Supreme Court killing fields, truth is also a casualty.

Justice Stevens used “potential life” or the equivalent nine times and added a couple of ghoulish touches of his own. “[M]any find third-trimester abortions,” he said, “when the fetus is approaching personhood particularly offensive.” For Justice Stevens, legal recognition of life begins at birth, not before. He also found that “the State’s interest in potential human life” could encompass population growth—“believing society would benefit from the services of additional productive citizens”—or that the State might benefit from allowing people to be born to find “the occasional Mozart or Curie.” Does not the child in the womb have a personal interest in being born, regardless of his utility to the “State”? Under the Roe regime, life is no longer a gift from God, an unalienable right. Instead, the “State” decides who shall live and who shall die, depending on the “interests” of the moment, as weighed by the Supreme Court.

Justice Blackmun, not a laggard in pro-abortion fervor, weighed in with eight uses of “potential life.” Justice Rehnquist, though taking the side of

100. See Martin H. Johnson & Barry J. Everitt, Essential Reproduction 283 (6th ed. 2007) (referring to the “fertilizable life” of the oocyte); Dr. J.C. Willke, Conception Physiology, Life Issues Institute, http://www.lifeissues.org/abortifacients/conceptphys.html (last visited Feb. 17, 2012) (“People often use the phrase ‘potential life.’ Well, here we have potential life. It is millions of eager sperm seeking one ovum.”).

101. “[T]here is no such thing as a fetus’s ‘potential life.’ Any fetus in the womb either is actually alive or was actually alive and is now dead. If an obstetrician ever told a woman that her unborn child was ‘potentially alive,’ she’d be looking for a new obstetrician.” Catherine W. Short, Essay Responding to Nadine Strossen’s Reproducing Women’s Rights: All Over Again: Recycling Wrongs: All Over Again, 32 Vt. L. Rev. 633, 634 (2008); see also Hamilton v. Scott, No. 1100192, 2012 WL 517459, at *14 & n.18 (Ala. Feb. 17, 2012) (“[A] new and unique human being is formed at the moment of conception, when two cells incapable of independent life, merge to form a single, individual human entity.”).

102. Casey, 505 U.S. at 914, 915 & n.3, 916, 918 (Stevens, J., concurring in part and dissenting in part).

103. Id. at 915 (emphasis added).

104. Id.

105. “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these, are Life . . . .” The Declaration of Independence para. 2 (U.S. 1776).

106. Casey, 505 U.S. at 929-30, 932-34 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
life, nonetheless used “potential life” five times. Justice Scalia used “potentiality of human life” twice, “potential human life” once, and “potentially human” once, but only to refute these concepts. Breaking free of the shackles of “potentiality,” he boldly used the term “unborn human life.” Attacking the Court's pretense of “reasoned judgment,” he directly challenged the legitimacy of the term “potential life.”

But “reasoned judgment” does not begin by begging the question, as Roe and subsequent cases unquestionably did by assuming that what the State is protecting is the mere “potentiality of human life.” The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child is a human life. Thus, whatever answer Roe came up with after conducting its “balancing” is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human.

Justice Scalia, unfortunately, did not take the argument further: “There is of course no way to determine that as a legal matter,” he stated, “it is in fact a value judgment.” He punctured the Court's pretense, but only to say that recognition of human life is a political question for the legislature. Having demonstrated that the term “potential life” is a device to devalue life, he was unwilling to take the further step of asserting that all human life inherently qualifies for legal protection.

107. Id. at 946, 949, 952, 974 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
108. Id. at 982, 992 (Scalia, J., concurring in the judgment in part and dissenting in part).
109. Id. at 989.
110. Id. at 982 (citations omitted).
111. Id.
112. In Webster, the author submitted an amicus brief arguing that the Fourteenth Amendment, by its very nature, cannot authorize a holocaust. See Brief of Martin Wishnatsky, Amicus Curiae, reprinted in 5 Roy M. Mersky & Gary R. Hartman, A DOCUMENTARY HISTORY OF THE LEGAL ASPECTS OF ABORTION IN THE UNITED STATES: WEBSTER V. REPRODUCTIVE HEALTH SERVICES 189-97 (1990) (arguing for "a presumption of personhood in any question touching the Fourteenth Amendment, because the purpose of that amendment is to extend personhood to those previously considered non-persons").
OCTOBER TERM 1992

In Bray v. Alexandria Women’s Health Clinic,113 Justice Stevens assumed that pro-lifers who risk arrest to rescue babies from abortion express “the legitimate and nondiscriminatory goal of saving potential life.”114 Very noble, I suppose, to go to jail for “potential life.”

OCTOBER TERM 1996

In Washington v. Glucksberg,115 an assisted suicide case that asked the Court to bootstrap Roe’s reasoning into end-of-life decisions, Justice Souter drew an analogy to the “strength of [the] State’s interest in potential life.”116 “Like the decision to commit suicide,” he wrote, “the decision to abort potential life can be made irresponsibly and under the influence of others, and yet the Court has held in the abortion cases that physicians are fit assistants.”117 Are senior citizens also mere “potential life”?

OCTOBER TERM 1999

In Hill v. Colorado,118 a challenge to restrictions on sidewalk counselors who wished to speak with women arriving for abortion appointments, Justice Kennedy, in dissent, quoted from Casey the phrase “the life or potential life that is aborted.”119

In Stenberg v. Carhart,120 after citing Casey on the “potentiality of human life,”121 the Court, acknowledging in muted tones the horror of partial-birth abortion, still called the half-born child “potential human life.” “Considering the fact,” wrote Justice Breyer, “that those procedures seek to terminate a potential human life, our discussion may seem clinically cold or callous to some, perhaps horrifying to others.”122 Taking a deep breath before endorsing abortion in the birth canal, the Court even admitted that

114. Id. at 323 (Stevens, J., dissenting).
116. Id. at 772 (Souter, J., concurring in the judgment) (citing Casey, 505 U.S. at 869).
117. Id. at 778.
119. Id. at 791 (Kennedy, J., dissenting) (quoting Casey, 505 U.S. at 852).
121. Id. at 921 (citing Casey, 505 U.S. at 879).
122. Id. at 923.
for millions "life begins at conception and consequently that an abortion is akin to causing the death of an innocent child[.]" Endorsing conversion of the maternity ward into death row, the majority referred yet another three times to the doomed full-term child as merely "the potentiality of human life." Seven Justices wrote separately in Stenberg, three in concurrence and four in dissent.

Justice Kennedy chose language of true respect, reciting the only mention in the United States Reports of "human life and its potential." "The political processes of the State," he wrote, "are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential." Following this wonderful sentence, he twice, quoting Casey, reverted back to "potential life." Abortion ends, wrote Justice Thomas, "depending on one's view, human life or potential human life." Is biological reality a matter of opinion? He also noted from Casey that the State's "legitimate," "profound," and "substantial interest in potential life," using the term seven more times before ending with a quotation of the Casey plurality's phrase "life or potential life of the unborn." Partial-birth abortion, he also said, "dehumanizes the fetus and trivializes human life." All told, the Stenberg Justices used "potential life" or a comparable term nineteen times. Justice Kennedy charted new territory with his description: "human life and its potential," intimating that the unborn are not "potential life," but "life with potential."

123. Id. at 920.
124. Id. at 930.
125. Id. at 946-47 (Stevens, J., concurring); id. at 947-51 (O'Connor, J., concurring); id. at 951-52 (Ginsburg, J., concurring).
126. Id. at 952 (Rehnquist, J., dissenting); id. at 953-56 (Scalia, J., dissenting); id. at 956-79 (Kennedy, J., dissenting); id. at 980-1020 (Thomas, J., dissenting).
127. Id. at 957 (Kennedy, J., dissenting) (emphasis added).
128. Id. at 961 (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 876 (1992)).
129. Id. at 980 (Thomas, J., dissenting).
130. Id. at 981, 1005-06.
131. Id. at 1011 (quoting Casey, 505 U.S. at 870).
132. Id. at 1006.
133. See Charles I. Lugosi, Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence, 4 GEO. J.L. & PUB. POL'y 361, 430 (2006) (stating that Justice Blackmun "was wrong when he stated that a live human being was merely 'potential life,' rather than a life with potential"); see also 122 CONG. REC. 20,410 (1976) ("Once conception has occurred, a new and unique genetic
OCTOBER TERM 2006

Gonzales v. Carhart,134 the Court’s most recent major abortion case, addressed partial-birth abortion, this time upholding a state ban. Justice Kennedy’s majority opinion, quoting Casey, twice mentioned “the State’s interest in potential life.”135 Justice Ginsburg, in dissent, mentioned it once.136 But more significant than fewer mentions of “potential life” was Justice Kennedy’s adoption of new terminology to describe life in the womb. Instead of “potential life,” he used the phrase “the life of the fetus that may become a child.”137 Is this an improvement? The infant in the womb is still subject to a dehumanizing medical term—considered less than a child. Yet somehow the departure from “potential life” with its heavy freight of association with abortion-on-demand seems a step in the right direction. But Justice Kennedy went further, noting that the State has a legitimate purpose “to promote respect for life, including life of the unborn.”138 He spoke of the “stage of the unborn child’s development,”139 and, quoting Casey, “profound respect for the life of the unborn.”140 He twice referred to “fetal life”141 and also quoted a nurse’s description of the puncturing of a child’s skull that used the term “baby” eight times.142

From “potential life,” the Court has progressed to “unborn life,” which is a significant step. Later, Justice Kennedy referred to “the fast-developing brain of [an] unborn child, a child assuming the human form.”143 A child halfway out of the womb has certainly long since assumed “the human form.” The Court’s acknowledgement of the humanity of the unborn child is a labored form of intellectual birth, a “rough beast” slouching towards
Bethlehem to be born. Justice Ginsburg, in dissent, complained about the majority’s new nomenclature. “A fetus is described as an ‘unborn child,’” she objected, “and as a ‘baby.’” She has reason for concern. Once the “potential life” misnomer is discarded, the Court’s abortion jurisprudence may go with it.

CONCLUSION

From Roe v. Wade to the present, the Supreme Court Justices have used “potential life” terminology 216 times. By decades, the distribution is as follows:

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The Court’s willingness to accept some legislative limits on the practice of abortion goes hand in hand with adoption of terminology recognizing the humanity of the unborn child. Perhaps by baby steps, as Gonzales v. Carhart indicates, the Court will eventually abandon its holocaust past and the dehumanizing and scientifically untenable terminology of “potential life.”

146. See Appendix A for a year-by-year breakdown.
APPENDIX A

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