Legal Scholars

"No one in 1973 anticipated the radical decision—the most radical in American judicial history—by which the U.S. Supreme Court established abortion as a fundamental constitutional right in the United States. …

"No enforcement of an abortion law covering even the last two months of prenatal life was possible. Effectively, the human being in the womb was stripped of the protection of the law at every stage of his or her existence.

"The United States was presented with the most radical abortion law, or rather non-law, in the world. The action was accomplished without justification in any text of the Constitution of the United States and with out any relevant precedent. The action was accomplished, as Justice Byron White noted in dissent, by 'raw judicial power.'"

"*Abortion 1985*", by John T. Noonan, Jr., *Respect Life Program,* 1985, pp 6-11, U.S. Catholic Conference. (professor of law, University of California Law School at Berkeley).

What Legal Scholars say about *Roe v. Wade*

Alexander Bickel
Robert H. Bork
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Fifth Circuit Court of Appeals decision

Alexander Bickel

Professor, Yale Law School

"On January 22, 1973, the Supreme Court … undertook to settle the abortion issue. In place of the various state abortion statutes in controversy and in flux, the Supreme Court prescribed a virtually uniform statute of its own. … [T]here is considerable question why the Court foreclosed state regulation of the places where abortion is to be performed. The state regulates and licenses restaurants and pool halls and Turkish baths and God knows what else in order to protect the public; why may it not similarly regulate and license abortion clinics, or doctors' offices where abortions are to be performed?

"But if the Court's model statute is generally intelligent, what is the justification for its imposition? If this statute, why not one on proper grounds of divorce, or on adoption of children? …

"One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject. It simply asserted the result it reached. This is all the Court could do because moral philosophy, logic, reason, or other materials of law can give no answer. … It is astonishing that only two dissented from the Court's decision. … The dissenters were Justices Byron White and William Rehnquist. The Court's decision was an 'extravagant exercise' of judicial power, said Justice White; it was a legislative rather than a judicial action, suggested Justice Rehnquist. So it was, and if the Court's guess on the probable and desirable direction of progress is wrong, that guess will nevertheless have been imposed on all fifty states."

Bickel, Alexander M., The Morality of Consent. New Haven: Yale, 1975. At 27-29 (footnotes omitted)

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Robert H. Bork

Former U.S. Court of Appeals judge and former U.S. solicitor general

"The Court has used its invented privacy right exclusively to enforce sexual freedoms. The most dramatic instance was the success of the pro-abortion movement in evading democratic processes to lodge its desires in the Constitution, effectively making abortion a convenient birth control technique. The majority opinion in *Roe v. Wade* is a curious performance: In just over fifty-one pages it contains no shred of legal reasoning (or logic of any description), but simply announces that the right of privacy is sufficiently

capacious to encompass a woman's right to an abortion. The opinion laid down new rules more permissive than any state legislature had produced."

Bork, Robert H. Coercing Virtue: The Worldwide Rule of Judges. Washington, D.C.: AEI Press, 2003. at 70-71

"Both *Roe* and [*Planned Parenthood v.*] *Casey* are, in fact, crass violations of the rule of law; they are not rooted in any conceivable interpretation of the Constitution, and have nothing to do with 'constitutional terms.'"

Bork (*supra*), at 71

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Archibald Cox

Former U.S. solicitor general, Watergate special prosecutor and professor at Harvard Law School

"Oddly ... the opinion fails even to consider what I would suppose to be the most compelling interest of the State in prohibiting abortion: the interest in maintaining that respect for the paramount sanctity of human life which has been at the centre of western civilization, not merely by guarding 'life' itself, however defined, but by safeguarding the penumbra, whether at the beginning, through some overwhelming disability of mind or body, or at death."

Cox, Archibald. The Role of the Supreme Court in American Government. New York: Oxford, 1976. at 53

"[T]he Justices read into the generalities of the Due Process Clause of the Fourteenth Amendment a new 'fundamental right' not remotely suggested by the words."

Cox (*supra*), at 54

"The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations. … Neither historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe v. Wade* are part of either natural law or the Constitution."

Cox (*supra*), at 113-114

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Joseph Dellapenna
Professor, Villanova University School of Law

"As even those who applaud the decisions admit, the opinions sustaining these conclusions are confusing, mystifying, and unpersuasive."

Dellapenna, Joseph A. "Nor Piety Nor Wit: The Supreme Court on Abortion." Columbia Human Rights Law Review 6 (1974-75): 379-413, at 379 (footnotes omitted)

"The Court never made clear how this material [about the history of abortion laws] was relevant to its disposition of the case. It simply presented the material and then dropped it."

Dellapenna (*2*), at 381

"But then, the Court made no effort to explain how a right of abortional privacy grows out of the previous privacy cases, so why should it bother to justify its conclusion that the right is fundamental."

Dellapenna (*supra*), at 383 (footnotes omitted)

"By concluding without explanation that the foetus could be no more than potential life, the Court has come up with what appears to be a politically viable compromise. As in 1896 the Court has gained support by sacrificing invisible people."

Dellapenna (*supra*), at 409 (footnotes omitted)

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Robert A. Destro

Professor, Catholic University of America, Columbus School of Law

"The Court completely omitted any discussion of why the unborn should or should not have rights of their own. The rationale behind this marshalling of interests and the necessity for this approach to the issues were unexplained."

Destro, Robert A. "Abortion and the Constitution: The Need for a Life-Protective Amendment." California Law Review 63 (1975): 1250-1351, at 1254

"Since the Court was apparently unwilling to disclose the constitutional basis of this particular facet of its ultimate resolution of the merits of *Roe v. Wade*, the holding, of necessity, must rest upon a determination that the judicial power of the United States includes the right to restrict the protection of fundamental liberties to those classes the Court deems worthy. This was the only theory upon which the Court's implication of a right to abortion could rest. While the Court undoubtedly has the power to engage in such interpretation, the exercise of that power gives an entirely new significance to the maxim that the 'constitution [sic] is what the judges say it is.'"

Destro (*supra*), at 1260 (footnotes omitted)

"Therefore, it seems strange that the Court professed an inability to find agreement in the community at large as to the point at which life 'begins'; the answer it so earnestly sought to avoid is a matter of common knowledge in scientific circles."

Destro (*supra*), at 1266

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John Hart Ely

Professor, *Yale Law School*

***Roe* is "a very bad decision. … It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."**

Ely, John Hart. "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," Yale Law Journal 82 (1973): 920-49, at 947

"[T]he argument that fetuses lack constitutional rights is simply irrelevant. … Dogs are not 'persons in the whole sense' nor have they constitutional rights, but that does not mean the state cannot prohibit killing them. … Thus even assuming the Court ought generally to get into the business of second-guessing legislative balances, it has picked a strange case with which to begin. … That the life plans of the mother must, not simply may, prevail over the state's desire to protect the fetus simply does not follow from the judgment that the fetus is not a person. Beyond all that, however, the Court has no business getting into that business."

Ely (*supra*), at 926

"What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-a-vis the interest that legislatively prevailed over it. And that, I believe … is a charge that can responsibly be leveled at no other decision of the past twenty years.'"

Ely (*supra*), at 935-936 (footnotes omitted)

"The problem with *Roe* is not so much that it bungles the question it sets itself, but rather that it sets itself a question the Constitution has not made the Court's business."

Ely (*supra*), at 943 (footnotes omitted)

"*Roe* lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine. …"

Ely (*supra*), at 943

"[T]hough the identification of a constitutional connection is only the beginning of analysis, it is a necessary beginning. The point that often gets lost in the commentary, and obviously got lost in *Roe*, is that *before* the Court can get to the "balancing" stage, *before* it can worry about the next case and the case after that (or even about its institutional position) it is under an

obligation to trace its premises to the charter from which it derives its authority. A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."

Ely (*supra*), at 949 (footnotes omitted)

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Professor Richard Epstein

University of Chicago School of Law

"Before Mr. Justice Blackmun was ready to deal with the constitutional issues, he found it necessary to burden his opinion with an exhaustive history of abortion from ancient times until the present day. It is difficult to see what comfort he could draw from his researches, for at no point do they lend support for the ultimate decision to divide pregnancy into three parts, each subject to its own constitutional rules. … Those who wish to check the footnotes in Mr. Justice Blackmun's history of law and practice of abortion are free to do so, but they are warned that neither the mass nor the antiquity of the sources can conceal their essential irrelevance to the constitutional inquiry."

Epstein, Richard A. "Substantive Due Process by Any Other Name: The Abortion Cases," Supreme Court Review (1973): 159-85, at 167 (footnotes omitted)

"In the months that have passed since the decision in *Roe v. Wade*, its troubled logic has added a new dimension to a burning controversy. The diversity of opinions on all aspects of the abortion question might have suggested that the Court should have been careful not to foreclose debate on the issue by judicial decision, and more careful still not to use constitutional means to resolve the question."

Epstein (*supra*), at 168 (footnotes omitted)

"The importance of the question—Does an unborn child count as a person?—moreover, is demonstrated anew when we examine the reasons that Mr. Justice Blackmun gave for why abortions should, at least in some circumstances, be

allowed as a matter of constitutional law. The Justice made his case in what are no doubt familiar terms:

… . [quoting passage in *Roe* which lists potential burdens of pregnancy and child rearing on mothers]

"These rationales may have their intuitive appeal. But as a matter of theory they have the unhappy distinction of being either insufficient or unnecessary. If the unborn is not a person, and an abortion is, to use the phrase of Mr. Justice Stewart, only a simple 'surgical procedure,' it is difficult to see why either the woman who requests it or the doctor who performs it owes anyone an explanation for their decision. There is no harm to any person, no need for state intervention. The decision to end pregnancy is but an exercise of personal preference which needs no justification, because *prima facie* it suggests no wrong. Remove a hangnail, terminate a pregnancy, it is all the same thing. In both cases, the woman need only want a service, and perhaps have the means to pay for it. Third persons may object to the removal of hangnails, as they do the performance of abortions, but their views are entitled to no more protection in the one case than in the other.

"The case assumes a different complexion if we decide that the unborn child is, or should be treated as, a person. At this point, we can no longer speak of the exercise of natural liberties but must find some justification for the deliberate killing of a human being. Clearly, had the child been born, the mother would not be allowed to kill it at birth for the reason that a child might cause her mental distress and tax her with the burden of care. Nor could she kill her sick mother for a similar reason. These purported justifications for killing are, in a word, brutal. If the unborn child is indeed a person, then the logic of Mr. Justice Blackmun's position collapses."

Epstein (*supra*), at 176-77 (footnotes omitted)

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Patricia King

Professor, *Georgetown University Law Center*

“The Court offered no justification for this conclusion [that viability has constitutional significance], perhaps because any justification would have exposed the thinness of its claim that it was taking no position on when life begins.”

King, Patricia A. “The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn.” Michigan Law Review 77 (1979): 1647-87, at 1656

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Edward Lazarus

Legal commentator and former clerk to Justice Harry Blackmun, author of Roe v. Wade

“As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible. I say this as someone utterly committed to the right to choose, as someone who believes such a right has grounding elsewhere in the Constitution instead of where *Roe* placed it, and as someone who loved *Roe*’s author like a grandfather.

McConnell should not be rejected simply because he is brave enough to say that the emperor has no clothes. Indeed, McConnell’s criticism of *Roe* should be taken as a sign of [] integrity. …

Lazarus, Edward. “The Lingering Problems with Roe v. Wade, and Why the Recent Senate Hearings on Michael McConnell’s Nomination Only Underlined Them” 3 Oct. 2002. Find Law’s Legal Commentary. Find Law. 7 Apr. 2004 <http://writ.findlaw.com/lazarus/20021003.html>

“What, exactly, is the problem with Roe? The problem, I believe, is that it has little connection to the Constitutional right it purportedly interpreted. A constitutional right to privacy broad enough to include abortion has no meaningful foundation in constitutional text, history, or precedent – at least, it does not if those sources are fairly described and reasonably faithfully followed.”

Lazarus (*supra*)

“The proof of *Roe*’s failings comes not from the writings of those unsympathetic to women’s rights, but from the decision itself and the friends

who have tried to sustain it. Justice Blackmun's opinion provides essentially no reasoning in support of its holding. And in the almost 30 years since *Roe*'s announcement, no one has produced a convincing defense of *Roe* on its own terms."

Lazarus (*supra*)

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Richard E. Morgan

Professor of Constitutional and International Law and Government, Bowdoin College

"Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court's attempt to justify its conclusions … suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function. … Even some who approve *Roe*'s form of judicial review concede that the opinion itself is inscrutable."

Morgan, Richard Gregory. "*Roe v. Wade* and the Lesson of the Pre-*Roe* Case Law." Michigan Law Review 77 (1979): 1724-48, at 1724 (footnotes omitted)

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John T. Noonan, Jr.

Professor, University of California Law School at Berkeley; later, a Federal Appelate Judge

"Political pragmatism, not constitutional principle, appeared to be the *raison d'être* of *The Abortion Cases*.

"Critics did exist who condemned *The Abortion Cases* by asserting that the Court could not add to the written Constitution. Critics did exist who were as outraged by what the Court had done to the unborn as by what it had done to the Constitution. Bickel, Cox, Ely, Epstein, and Wellington, however, were five critics who were neither fundamentalists in constitutional theory nor champions of the cause of the unborn. They accepted constitutional development by judicial interpretation as necessary. … They showed no

special commitment to the anti-abortion side. In their cool professional judgment, *The Abortion Cases* were indefensible because they had a basis neither in the Constitution nor in any principled interpretation of the Constitution."

Noonan, John T., Jr. A Private Choice: Abortion in America in the Seventies. New York: The Free Press, 1976, at 31-32 (currently distributed by Life Cycle Books, Toronto, Ont.)

"The balance of expert opinion viewed the [abortion] liberty [found in *Roe* and *Doe*] as a disaster. As the critics successfully evoked Holmes, Brandeis, and Frankfurter, the weight of their judgment was overwhelming.
The judgment was remarkably harsh: without principle, a failure; a refusal of the Court's own discipline, a transgression of all limits, something that will not do; naked political preference, comprehensive legislation, invisible standards; … an advertising agent's view of doctors, Pickwickian, beyond the outer limit of legitimate authority; none of its business, a bad decision. ...

"Scholarly authority judged the liberty to lack constitutional basis. … If the liberty did not have a foundation in the Constitution or in constitutional principle, its basis had to lie in politics."

Noonan, A Private Choice (*supra*), at 32

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Michael Stokes Paulsen

Professor, *University of Minnesota Law School*

"The result in *Roe v. Wade* was, to put the matter simply and directly, not warranted by any plausible argument from constitutional text, structure, or history. I begin with the obvious: *Roe* is utterly indefensible as a matter of constitutional text. … In fact, I know of no serious scholar, judge, or lawyer who attempts to defend *Roe*'s analysis on textual or historical grounds. A first-year law student who argued for such a position would likely get a 'C-' in any good Constitutional Law course, and that's only because of grade inflation."

Paulsen, Michael Stokes. "The Worst Constitutional Decision of All Time." Notre Dame Law Review 78 (2003): 995-1043, at 1007

"*Roe* is pure judicial lawmaking. It is not merely an unjustified stretching of the language of the text; its result is wholly outside the range of plausible readings of the text. Indeed, it is not unfair to say that the Court's decision is not even constitutional interpretation at all. The Court just plain made up an abortion regulation über-statute, not even working very hard to disguise the fact. The result, with the elaborate three-stage trimester division, even looks like a statute. The result is pure judicial ukase. It is anti-democratic and fundamentally anti-constitutional to a degree rivaled by very few, if any, important constitutional decisions in our nation's history. As a matter of constitutional interpretation, *Roe* is an embarrassment—perhaps the worst work-product the Court has ever produced."

Paulsen (*supra*), at 1007-1008

"To be sure, *Roe* has its defenders in terms of the Court's result; many law professors and activists like legal abortion on demand—unfettered private 'choice'. But I cannot recall ever seeing a serious scholarly defense of *Roe*'s legal reasoning, on its own terms, by a distinguished legal academic (or even by an undistinguished one)."

Paulsen (*supra*), at 1008

"The substantive due process reasoning of *Roe* most nearly resembles, of any historical precedent, the substantive due process reasoning of *Dred Scott v. Sandford*, *Roe*'s doctrinal great-grandfather. *Dred Scott*, of course, is on everyone's all-time hit list of most atrocious constitutional decisions of the Supreme Court. And for good reason: in *Dred Scott*, the Court misconstrued the Constitution egregiously and, to all appearances, willfully, producing a bizarre, monstrously unjust, and politically destructive outcome. The case surely must be regarded as the principal rival to *Roe* and *Casey* for worst constitutional decision of all time."

Paulsen (*supra*), at 1011

"*Roe* and *Dred Scott* share another crucial feature of judicial atrocity other than atrocious reasoning: their results inflicted great harm on innocent lives. More than simply doing violence to the Constitution, *Roe* and *Dred Scott* authorized private violence against others, under color of the Court's interpretation of the Constitution."

Paulsen (*supra*), at 1014

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Richard A. Posner
Federal Appellate Judge, Professor, University of Chicago Law School

Roe **raises "the question whether we have a written constitution, with the limitations thereby implied on the creation of new constitutional rights, or whether the Constitution is no more than a grant of discretion to the Supreme Court to mold public policy in accordance with the Justices' own personal and shifting preferences."**

Posner, Richard A. "The Uncertain Protection of Privacy by the Supreme Court." Supreme Court Review (1979): 173-216, at 199 (footnotes omitted)

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Laurence Tribe
Professor, *Harvard Law School*

"One of the most curious things about *Roe* is that behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."

Tribe, Laurence H. "Foreword: Toward a Model of Roles in the Due Process of Life and Law," Harvard Law Review 87 (1973): 1-53, at 7

"[T]he Court never explains why comparative mortality figures should provide the only constitutionally relevant measure of permissible state regulation of a particular procedure in the interest of health, or why states should not be allowed to forbid altogether, even in early pregnancy, any category of abortions demonstrably more dangerous than childbirth to a woman's life or health.

"The Court says even less to justify its critical conclusion that the state's interest in potential life does not become 'compelling' until viability. One reads the Court's explanation several times before becoming convinced that nothing has been inadvertently omitted. …

Clearly, this [explanation] mistakes 'a definition for a syllogism,' and offers no reason at all for what the Court held."

Tribe (*supra*), at 4

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Lynn D. Wardle

Professor, *Brigham Young University Law School*

"The decision in *Roe* evoked tremendous controversy. The opinion of the Court was criticized by scholars for the inaccuracy of the 'facts' on which it was based, for the inadequacy of its consideration of vital constitutional concerns, for its resurrection of substantive due process, for its absence of any 'principled' analysis, and for its attempt to judicially mandate an absolute solution to a complex political controversy. Among the most severe critics of *Roe* were avowed supporters of liberal abortion laws; even the most influential article written in defense of the *Roe* decision expressly disavowed the Court's opinion and offered a different rationale to justify the result."

Wardle, Lynn D. The Abortion Privacy Doctrine: A Compendium and Critique of Federal Court Abortion Cases. Buffalo: William S. Hein, 1980. At xii (citations omitted)

"*Roe v. Wade* [is] a fiction strained beyond credulity—factually erroneous, logically indefensible and constitutionally unjustifiable—that needs to be clearly and completely reconsidered."

Wardle (*supra*), at xiv, fn 22

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Benjamin Wittes

Legal affairs editor, The Washington Post

"Since its inception *Roe* has had a deep legitimacy problem, stemming from its weakness as a legal opinion. Conservatives who fulminate that the Court made up the right to abortion, which appears explicitly nowhere in the

Constitution, are being simplistic—but they're not entirely wrong. In the years since the decision an enormous body of academic literature has tried to put the right to an abortion on firmer legal ground. But thousands of pages of scholarship notwithstanding, the right to abortion remains constitutionally shaky; abortion policy is a question that the Constitution—even broadly construed—cannot convincingly be read to resolve.

"Consequently, a pro-lifer who complains that she never got her democratic say before abortion was legalized nationwide has a powerful grievance. And there's nothing quite like denying people a say in policy to energize their commitment to a position."

Wittes, Benjamin. "Letting Go of Roe." Atlantic Monthly (Jan-Feb 2005): 48-53, at 48

"[If Roe were overturned] certain state legislatures would impose restrictions that would be impermissible under the Supreme Court's current doctrine … [b]ut the right to abortion would most likely enjoy a measure of security it does not now have. Legislative compromises tend to be durable, since they bring a sense of resolution to divisive issues by balancing competing interests; mustering a working majority to upset them can be far more difficult than rallying discontent against the edicts of unelected judges."

Wittes (*supra*), at 52

"The right to abortion remains a highly debatable proposition, both jurisprudentially and morally. The mere fact that liberals have to devote so much political energy to pretending that the right exists beyond democratic debate proves that it doesn't."

Wittes (*supra*), at 53

"A liberal fear of democratic dialogue may make sense regarding social issues on which the majority is conservative. But it is a special kind of pathology that would rather demand a loyalty oath to a weak and unstable Court decision on a proposition that already commands majority support. The insistence on judicial protection from a political fight that liberals have every reason to expect to win advertises pointedly how little they still believe in their ability to persuade."

Wittes (*supra*), at 53

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Fifth U.S. Circuit Court of Appeals, opinion in *Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir. 1986):

"It is no secret that the Supreme Court's abortion jurisprudence has been subjected to exceptionally severe and sustained criticism. Quite apart from the highly visible political controversies revolving around the morality of abortion, the major judicial decisions in this area have been vigorously attacked--from within the Court as well as by a broad range of distinguished constitutional scholars --for the manner in which they interpret the Constitution."

Margaret S. v. Edwards, at 995 (citations omitted)

"[O]ur references to the debate over the abortion decisions are not gratuitous, but are meant to help explain why we think it proper to decide this case as we have. While we are unquestionably bound to obey the Supreme Court, we are not obliged to give expansive readings to a jurisprudence that the whole judicial world knows is swirling in uncertainty."

Ibid., at 996, n. 3

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