Is abortion constitutional? Let's ask the founders

Is abortion constitutional? The Supreme Court concluded in *Roe v. Wade* (1973) that an expectant mother has a "fundamental right to abortion." According to Supreme Court logic, this right to abortion is protected under the penumbral right of privacy supposedly guaranteed by the Bill of Rights.

To see whether the *Roe* decision is an accurate interpretation of constitutional rights, it is important to understand the intentions of the authors of the Constitution. Did they advocate legal abortion protected by the Constitution?

One of the most authoritative sources for learning law during the founding era was William Blackstone's *Commentaries on the Laws of England*. Blackstone, a distinguished English jurist, was so well-liked by the founding fathers that he was the second most frequently cited thinker in the American political writings of the founding era. American law students studied his work so religiously that Thomas Jefferson wrote to a friend that "Blackstone is to us what the Koran is to the Muslims."

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Blackstone affirmed in his *Commentaries* that an individual's right to life is an "immediate gift of God." This right to life is legally binding "as soon as an infant is able to stir in the mother's womb." Per Blackstone,

> *"For if a woman is quick with child, and by a potion, or otherwise kills it in her womb; or if any one beat her, whereby the child dies in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor."*

Interestingly, Blackstone also explains that fetuses "in the mother's womb" are legally considered "to be born." Thus, the law considered a fetus to be his or her own person, independent of the mother.

From these commentaries, the founding fathers learned that any abortion perpetrated after the stirring of an infant in the mother's womb was a "heinous misdemeanor."

American courts upheld this traditional common law approach in characterizing abortion as a misdemeanor. Founding father James Wilson, a signatory of the Declaration of

Independence and original U.S. Supreme Court justice, taught his law students that,

> *"With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger."*

Similarly, St. George Tucker, a Madison judicial appointee and professor of law at the College of William and Mary, explained in his celebrated legal treatise on American law that it is "a great misprision [misdemeanor]" to "kill a child in its mother's womb."

Laws in American states criminalized abortion from the beginning. For example, Virginia law outlawed the practice of using "potion" to "unlawfully destroy the child within her [womb]." These laws were crafted by many of the same individuals who framed the Constitution.

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It is therefore inconceivable that the framers intended constitutional protections for abortion as a "fundamental right." Indeed, the framers believed the opposite. From their perspective, the unborn child has a fundamental right to life, a right that would be infringed by an abortion that ends his or her life.

A "fundamental right to abortion" does not exist in the Constitution or its amendments. It is the height of intellectual dishonesty to argue that the authors of the Constitution and its amendments intended to protect abortion under some vague and unwritten "right to privacy." That so many courts and judges have for so long upheld a legal doctrine antagonistic to the Constitution reveals the rogue nature of the modern judiciary.

Blaine Conzatti is a columnist and research fellow at the Family Policy Institute of Washington. He can be reached at Blaine@FPIW.org.

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