



## Fetal Viability and Judge Amy Coney Barrett

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The Supreme Court [nomination](#) of Judge Amy Coney Barrett has prompted greater scrutiny of her judicial opinions, academic writing, and statements to discern how she might decide future cases if she were confirmed to the High Court. With cases involving the Affordable Care Act, the First Amendment, and civil rights on the Court’s docket in its current term, Judge Barrett’s views on these subjects are being carefully reviewed. Commentators are also examining Judge Barrett’s [background](#) and writing to try to gauge her views on the Court’s seminal 1973 abortion decision, *Roe v. Wade*. Although the Supreme Court’s docket does not include any cases involving abortion at the moment, the Court is considering whether to review *Dobbs v. Jackson Women’s Health Organization*. *Dobbs* implicates one of *Roe*’s “essential holdings”: that a state may not completely prohibit abortion before fetal viability, a point in fetal development when a fetus is able to live outside of the mother’s womb with or without artificial assistance. Judge Barrett joined a dissenting opinion in a 2018 case involving an Indiana law that would have restricted abortions based on fetal characteristics such as sex or a Down syndrome diagnosis. While joining a judicial opinion authored by another judge does not necessarily reflect full agreement with the underlying opinion, it may grant some insight into Judge Barrett’s views. This Sidebar examines that 2018 dissent and discusses *Dobbs* as it awaits further consideration by the Court.

Since *Roe*, the Supreme Court has recognized viability as the earliest point at which a state’s interest in fetal life may allow for an outright prohibition on the performance of an abortion. The *Roe* Court indicated that viability “is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.” In its 1992 decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court “reaffirm[ed]” this aspect of *Roe*, holding that a woman has a “right ... to choose to have an abortion before viability and to obtain it without undue interference from the State.” A plurality of the *Casey* Court also adopted the undue burden standard that is used to evaluate abortion regulations, such as parental notification requirements, that may restrict but not prohibit the performance of pre-viability abortions.

During her tenure with the U.S. Court of Appeals for the Seventh Circuit, Judge Barrett has not authored any opinions on abortion. However, in two abortion cases, *Planned Parenthood of Indiana and Kentucky v. Box* and *Planned Parenthood of Indiana and Kentucky v. Commissioner of the Indiana State Department of Health (Commissioner)*, Judge Barrett joined dissenting opinions authored by two of the court’s other judges. Although the *Box* dissent [focused](#) on a procedural matter, the *Commissioner* dissent did comment on the constitutionality of an abortion regulation at issue in the case. In *Commissioner*, a federal district court in Indiana permanently enjoined three Indiana regulations: (1) restrictions on

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abortions sought because of a fetus's sex, race, color, national origin, ancestry, or Down syndrome diagnosis; (2) informed consent requirements related to such restrictions; and (3) requirements concerning the disposal of aborted fetuses. After a panel of the Seventh Circuit affirmed the district court's injunction, Indiana requested en banc or full-court review, but only with regard to the fetal disposition requirements. The Seventh Circuit subsequently denied the state's request to rehear the case.

Judge Barrett joined a dissenting [opinion](#) that supported en banc review of the district court's decision. Although the state requested review for only the court's holding on the fetal disposition requirements, the opinion nevertheless addressed Indiana's abortion restrictions based on a fetus's characteristics, describing them as a "eugenics statute." The dissenting opinion criticized the panel's determination that the restrictions were unconstitutional in light of *Casey* because they prohibited certain abortions prior to fetal viability.

Specifically, the dissent questioned whether *Casey* should be interpreted to invalidate a type of abortion regulation that was not before the Court in that case: "[u]sing abortion to promote eugenic goals," which the dissent described as "morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered." The dissent seemed skeptical that *Casey* should restrict a state from prohibiting abortions based on fetal characteristics, even if these abortions were to occur before fetal viability: "Does the Constitution supply a right to evade regulation by choosing a child's genetic makeup after conception, aborting any fetus whose genes show a likelihood that the child will be short, or nearsighted, or intellectually average, or lack perfect pitch—or be the 'wrong' sex or race?"

A state's authority to prohibit abortions prior to fetal viability is directly at issue in *Dobbs v. Jackson Women's Health Organization*. In *Dobbs*, the U.S. Court of Appeals for the Fifth Circuit affirmed a permanent injunction against enforcement of Mississippi's [Gestational Age Act](#). The act prohibits abortions, with limited exceptions, once a fetus reaches a gestational age of 15 weeks. Citing the state's failure to show that fetal viability could occur as early as 15 weeks, the Fifth Circuit maintained that the act is "a ban on certain pre-viability abortions, which *Casey* does not tolerate."

In its [petition](#) for Supreme Court review, Mississippi argues that the Court should revisit the viability standard, contending that it is inflexible and does not accommodate a greater understanding of prenatal life. For example, according to the state, medical and scientific advances show that a fetus can detect and respond to pain once it has reached a gestational age of 10-12 weeks. In light of such findings, Mississippi maintains that it should be allowed to prohibit "inhumane procedures." The state also argues that the viability standard does not adequately address its interest in protecting potential human life throughout a fetus's development.

Notably, the U.S. Courts of Appeals for the Eighth and Ninth Circuits have invalidated other state [laws](#) that would have prohibited abortions once a fetus reaches a gestational age younger than 24 weeks. In their decisions, the two appellate courts cited the *Casey* Court's determination that a state may not prohibit a woman from having an abortion before a fetus attains viability. In *McCormack v. Herzog*, for example, the Ninth Circuit struck down Idaho's Pain-Capable Unborn Child Protection Act, which prohibited abortions once a fetus reached a gestational age of 20 weeks. Examining the Idaho law, the Ninth Circuit observed:

[T]he broader effect of the statute is a categorical ban on all actions between twenty weeks gestational age and viability. This is directly contrary to the Court's central holding in *Casey* that a woman has the right to "choose to have an abortion before viability and to obtain it without undue interference from the State."

While it may be possible to distinguish Mississippi's Gestational Age Act from the Indiana abortion restrictions that the Seventh Circuit considered, *Dobbs* and the dissenting opinion in *Commissioner* would seem to raise similar questions about the viability standard and prohibitions on pre-viability abortions. If the Court agrees to review *Dobbs*, it could potentially consider revisions to the viability standard that

might allow at least some prohibitions on the procedure. *Dobbs* is arguably different from other recent abortion cases that have involved the undue burden standard used to evaluate abortion regulations. Since the Court's most recent abortion decision, *June Medical Services v. Russo*, was decided in May 2020, many have [focused](#) on how the undue burden standard will be applied in the future. A Supreme Court decision to review *Dobbs* would likely redirect attention to the viability standard and the possibility of prohibiting abortions prior to fetal viability.

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