

What Are and Are Not “Undue Burdens”?

The matters addressed here – namely, “undue burdens” – are, strictly speaking, different from the *exceptions* to the rule of *Roe v. Wade*, although the two can overlap. Such exceptions, for example, include the no federal or state funding cases such as *Harris v. McRae* and *Maher v. Roe*. Since the “undue burdens” test was first set out in *Maher v. Roe* (1977) but not fully and openly embraced until later, the use of that test is functionally akin to but formally different from the exceptions cases.

In light of *Casey* and its progeny, the government can regulate abortions *prior to viability* so long as there is no *undue burden* on access to abortions.¹

The following have been deemed to be *unconstitutional undue burdens*:

- 1.) Spousal consent²
- 2.) Spousal notification
- 3.) Admitting privileges requirement³
- 4.) Surgical center requirement

¹ This list is by no means comprehensive, but will suffice for our purposes.

² See e.g., *Planned Parenthood of Central Missouri v. Danforth* (1976). Although the holding was framed as an exception to *Roe*, in light of the Court’s ruling in *Gonzales*, spousal consent would surely be deemed to constitute an undue burden on a woman’s right to an abortion.

³ See *Whole Woman’s Health v. Hellerstedt* (2016) re: both admitting and surgical center requirements.

The following have been deemed to be constitutionally *permissible burdens*:

- 1.) 24-hour waiting period⁴
- 2.) Partial-birth abortion ban
- 3.) Informed consent requirement⁵
- 4.) Parental notification for a minor to obtain an abortion provided there is a judicial bypass option.
- 5.) Parental consent for a minor to obtain an abortion
- 6.) The absence, in certain circumstances, of an exception to safeguard the health of a mother (e.g., congressional findings disputing any health risks).
- 7.) Certain fetal viability tests.⁶
- 8.) Reporting requirements for abortion providers: requiring the filing of a report that includes, for examples, the name of the doctor, the woman's age, the number of prior pregnancies and abortions, any medical complications from abortion, the weight of fetus, and the woman's marital status.

⁴ Notably, when the Court employed a *strict scrutiny* test in *City of Akron v. Akron Center for Reproductive Health* (1983), it invalidated a similar waiting period.

⁵ Prior to *Casey*, such requirements were struck down. See e.g., *Planned Parenthood of Central Missouri v. Danforth* (1976) and *Thornburgh v. American College of Obstetricians & Gynecologists* (1986).

⁶ See *Webster v. Reproductive Health Services* (1989) in which Justice O'Connor in a concurrence said that "it is clear to me that requiring the performance of examinations and tests useful to determining whether a fetus is viable, when viability is possible, and when it would not be medically imprudent to do so, does not impose an undue burden on a woman's abortion decision."

New Assaults on *Roe*

Beyond case law, there is the political realm. The trend to undercut *Roe* continues as evidenced by congressional attempts to defund Planned Parenthood⁷ and to eliminate all Title X family planning funding.

As to what is happening in the States, the Guttmacher Institute, a New York nonprofit research organization that supports abortion rights, documents the lattice work of abortion laws that codify, regulate, and limit whether, when, and under what circumstances a woman may obtain an abortion.

The following are only a few of the “highlights” synthesizing State restrictions on abortion as of May 1, 2021. For more details, see: <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

- *Physician and Hospital Requirements*: 38 States require an abortion to be performed by a licensed physician. 19 states require an abortion to be performed in a hospital after a specified point in the pregnancy, and 17 states require the involvement of a second physician after a specified point.

⁷ In 2011, Indiana passed a law to do just this. According to a news report, “Planned Parenthood of Indiana would stand to lose about \$1.5 million in funding and the potential closure of nearly half the state’s 28 clinics, while also jeopardizing the care of at least 9,300 Medicaid patients—some of the state’s poorest and neediest.” (May 16, 2011)

- *Gestational Limits*: 43 States prohibit abortions, generally except when necessary to protect the woman's life or health, after a specified point in pregnancy, most often fetal viability.
- *"Partial-Birth" Abortion*: 21 states have laws in effect that prohibit "partial-birth" abortion. 3 of these laws apply only to post-viability abortions.
- *Public Funding*: 16 States use their own funds to pay for all or most medically necessary abortions for Medicaid enrollees in the state. 33 States and the District of Columbia prohibit the use of state funds except in those cases when federal funds are available: where the woman's life is in danger or the pregnancy is the result of rape or incest. In defiance of federal requirements, South Dakota limits funding to cases of life endangerment only.
- *Coverage by Private Insurance*: 12 States restrict coverage of abortion in private insurance plans, most often limiting coverage only to when the woman's life would be endangered if the pregnancy were carried to term. Most States allow the purchase of additional abortion coverage at an additional cost.
- *Refusal*: 45 states allow individual health care providers to refuse to participate in an abortion. 42 states allow institutions to refuse to perform abortions, 16 of which limit refusal to private or religious institutions.

- *State-Mandated Counseling*: 18 States mandate that women be given counseling before an abortion that includes information on at least one of the following: the purported link between abortion and breast cancer (5 States), the ability of a fetus to feel pain (13 States) or long-term mental health consequences for the woman (8 States).
- *Waiting Periods*: 25 States require a woman seeking an abortion to wait a specified period of time, usually 24 hours, between when she receives counseling and the procedure is performed. 12 of these States have laws that effectively require the woman make two separate trips to the clinic to obtain the procedure.
- *Parental Involvement*: 37 States require some type of parental involvement in a minor's decision to have an abortion. 27 States require one or both parents to consent to the procedure, while 10 require that one or both parents be notified.