AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power and Constitutional Authority/Constitutional Litigation

**June Medical Services, L.L.C. v. Russo, 140 S.Ct. 2103** (2020) (standing).

*June Medical Services operated an abortion clinic in Shreveport, Louisiana. In June 2014, the Louisiana state legislation passed a law that required the doctors at abortion clinics to have admitting privileges and a local hospital or have an arrangement with another doctor who had those privileges. This law was almost identical to a Texas law that was declared unconstitutional in* Whole Woman’s Health v. Hellerstedt *(2016). Claiming that the Louisiana law violated the right an abortion protected by the due process clause of the Fourteenth Amendment , June Medical Services filed a lawsuit against the Secretary of the Louisiana Department of Health and Hospitals, who in 2020 was Stephen Russo. A lower federal court agreed that the law was unconstitutional, but that decision was reversed by the Court of Appeals for the Fifth Circuit. June Medical Services appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5-4 vote declared the Louisiana abortion restriction unconstitutional and that June Medical had standing to bring the lawsuit on behalf of women seeking abortions. Justice Stephen Breyer’s plurality opinion asserted that Louisiana had waived the issue and that, in any event, abortion providers had standing to assert the right of women seeking abortions. Why is Breyer confident that abortion providers can be trusted to assert the rights of women seeking abortions? Why do the dissents disagree? Who has the better of the argument? Could you identify a better plaintiff in this case or, given that no one is pregnant for the duration of the constitutional litigation necessary to resolve issues in federal court, abortion issues are likely to defy traditional standing rules? Which of your rights would you trust your doctor or medical plan to assert? Which do you believe you would be better off asserting on your behalf?*

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9) announced the judgment of the Court and delivered an opinion, in which Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9), Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9) join.

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The State's argument [on standing] rests on the rule that a party cannot ordinarily “ ‘rest his claim to relief on the legal rights or interests of third parties.’ ” It does not involve the Constitution's “case-or-controversy requirement.”  And so, we have explained, it can be forfeited or waived.

. . . . [T]the State's memorandum opposing the plaintiffs’ TRO request urged the District Court to proceed swiftly to the merits of the plaintiffs’ undue-burden claim. It argued that there was “no question that the physicians had standing to contest” . . . The State's unmistakable concession of standing as part of its effort to obtain a quick decision from the District Court on the merits of the plaintiffs’ undue-burden claims bars our consideration of it here. . . .

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[T]he rule the State invokes is hardly absolute. We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations. And we have generally permitted plaintiffs to assert third-party rights in cases where the “ ‘enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties’ rights.’ ”  In such cases, we have explained, “the obvious claimant” and “the least awkward challenger” is the party upon whom the challenged statute imposes “legal duties and disabilities.”

The case before us lies at the intersection of these two lines of precedent. The plaintiffs are abortion providers challenging a law that regulates their conduct. The “threatened imposition of governmental sanctions” for noncompliance eliminates any risk that their claims are abstract or hypothetical.  That threat also assures us that the plaintiffs have every incentive to “resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.”  And, as the parties who must actually go through the process of applying for and maintaining admitting privileges, they are far better positioned than their patients to address the burdens of compliance. . . .

Our dissenting colleagues suggest that this case is different because the plaintiffs have challenged a law ostensibly enacted to protect the women whose rights they are asserting. But that is a common feature of cases in which we have found third-party standing. The restriction on sales of 3.2% beer to young men challenged by a drive-through convenience store in [*Craig v. Boren* (1976)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976141349&pubNum=0000780&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))was defended on “public health and safety grounds,” including the premise that young men were particularly susceptible to driving while intoxicated. . . .

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9), dissenting.

. . . .

For most of its history, this Court maintained that private parties could not bring suit to vindicate the constitutional rights of individuals who are not before the Court. But in the 20th century, the Court began to deviate from this traditional rule against third-party standing. From these deviations emerged our prudential third-party standing doctrine, which allows litigants to vicariously assert the constitutional rights of others when “the party asserting the right has a ‘close’ relationship with the person who possesses the right” and “there is a ‘hindrance’ to the possessor's ability to protect his own interests.”

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Louisiana argues that the abortionists and abortion clinics lack standing under Article III to assert the putative rights of their potential clients. No waiver, however explicit, could relieve us of our independent obligation to ensure that we have jurisdiction before addressing the merits of a case. And under a proper understanding of Article III's case-or-controversy requirement, plaintiffs lack standing to invoke our jurisdiction because they assert no private rights of their own, seeking only to vindicate the putative constitutional rights of individuals not before the Court.

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. . . . [T]his Court has never provided a coherent explanation for why the rule against third-party standing is properly characterized as prudential. . . . It is especially puzzling that a majority of the Court insists on continuing to treat the rule against third-party standing as prudential when our recent decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.* (2014), questioned the validity of our prudential standing doctrine more generally. In that case, we acknowledged that requiring a litigant who has Article III standing to also demonstrate “prudential standing” is inconsistent “with our recent reaffirmation of the principle that ‘a federal court's “obligation” to hear and decide’ cases within its jurisdiction ‘is “virtually unflagging.” ’ ” . . .

The Court has acknowledged that the traditional rule against third-party standing is “closely related to Art[icle] III concerns.”  It has repeatedly noted that the rule “is not completely separable from Art[icle] III's requirement that a plaintiff have a sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy.” And most recently, in *Spokeo, Inc.* v. *Robins* (2016), the Court appeared to incorporate the rule against third-party standing into its understanding of Article III's injury-in-fact requirement. There, the Court stated that to establish an injury-in-fact a plaintiff must “show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’ ” . . . .

A brief historical examination of Article III's case-or-controversy requirement confirms what our recent decisions suggest: The rule against third-party standing is constitutional, not prudential. The judicial power is limited to “ ‘ “cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.” ’ ”  Thus, to ascertain the scope of Article III's case-or-controversy requirement, “we must ‘refer directly to the traditional, fundamental limitations upon the powers of common-law courts.’ ”  “One focus” of these traditional limitations was “on the particular parties before the court, and whether the rights that they [were] invoking [were] really theirs to control.” An examination of these limitations reveals that a plaintiff could not establish a case or controversy by asserting the constitutional rights of others.

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Contrary to the plurality's assertion otherwise, abortionists’ standing to assert the putative rights of their clients has not been settled by our precedents. It is true that this Court has reflexively allowed abortionists and abortion clinics to vicariously assert a woman's putative right to abortion. But oftentimes the Court has not so much as addressed standing in those cases. . . .

Under a proper understanding of [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), plaintiffs lack standing. As explained above, in suits seeking to vindicate private rights, the owners of those rights can establish a sufficient injury simply by asserting that their rights have been violated. Constitutional rights are generally considered “private rights” to the extent they “ ‘ belon[g] to individuals, considered as individuals.’ ”  And the purported substantive due process right to abort an unborn child is no exception—it is an individual right that is inherently personal. After all, the Court “creat[ed the] right” based on the notion that abortion “ ‘ involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.’ ”  Because this right belongs to the woman making that choice, not to those who provide abortions, plaintiffs cannot establish a personal legal injury by asserting that this right has been violated.

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9), with whom Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9) joins, with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9) joins [in part], and with whom Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9) joins [in part], dissenting.

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On remand, the District Court should not permit June Medical to assert the rights of women wishing to obtain an abortion. The court should require the joinder of a plaintiff whose own rights are at stake. Our precedents rarely permit a plaintiff to assert the rights of a third party, and June Medical cannot satisfy our established test for third-party standing. Indeed, what June Medical seeks is something we have never allowed. It wants to rely on the rights of third parties whose interests conflict with its own.

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This case features a blatant conflict of interest between an abortion provider and its patients. Like any other regulated entity, an abortion provider has a financial interest in avoiding burdensome regulations such as Act 620's admitting privileges requirement. Applying for privileges takes time and energy, and maintaining privileges may impose additional burdens. Women seeking abortions, on the other hand, have an interest in the preservation of regulations that protect their health. The conflict inherent in such a situation is glaring.

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The problem with the rule that the majority embraces is highlighted if we consider challenges to other safety regulations. Suppose, for example, that a clinic in a State that allows certified non-physicians to perform abortions claims that the State's certification requirements are too onerous and that they imperil the clinic's continued operation. Should the clinic be able to assert the rights of women in attacking this regulation, which the state lawmakers thought was important to protect women's health?

When an abortion regulation is enacted for the asserted purpose of protecting the health of women, an abortion provider seeking to strike down that law should not be able to rely on the constitutional rights of women. Like any other party unhappy with burdensome regulation, the provider should be limited to its own rights.

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The conflict of interest inherent in a case like this is reason enough to reject third-party standing, and our standard rules on third-party standing provide a second, independent reason. As a general rule, a plaintiff “must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”  We have recognized a “limited” exception to this rule, but in order to qualify, a litigant must demonstrate (1) closeness to the third party and (2) a hindrance to the third party's ability to bring suit.

The record shows that abortion providers cannot satisfy either prong of this test. First, a woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure. . . . .

. . . . Nor can the second [be satisfied], which requires that there be a hindrance to the ability of the third party to bring suit. . . . First, a woman who challenges an abortion restriction can sue under a pseudonym, and many have done so. . . . Second, if a woman seeking an abortion brings suit, her claim will survive the end of her pregnancy under the capable-of-repetition-yet-evading-review exception to mootness. . . . .

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I68d43d82b9cf11eaacfacd2d37fb36e9&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I68d43d82b9cf11eaacfacd2d37fb36e9), dissenting.

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. . . . To establish standing in federal court, a plaintiff typically must assert an injury to her own legally protected interests—not the rights of someone else. This rule ensures that the judiciary stays focused on the “factual situation before it, while “questions of wide public significance” remain with “governmental institutions ... more competent to address” them. No one even attempts to suggest this usual prerequisite is satisfied here. . . . In narrow circumstances, to be sure, this Court has allowed cases to proceed based on “third-party standing.” But to qualify, the plaintiff must demonstrate both that he has a “ ‘close’ relationship” with the person whose rights he wishes to assert *and* that some “ ‘hindrance’ ” hampers the right-holder's “ability to protect his own interests.” . . . Nothing like that exists here. In the first place, the plaintiff abortion providers identify no reason to think affected women are unable to assert their own rights if they wish. . . .Separately and additionally, the abortion providers cannot claim a “close relationship” with the women whose rights they assert. Normally, the fact that the plaintiffs do not even know who those women are would be enough to preclude third-party standing. . . . Even when a plaintiff can identify an actual and close relationship, this Court will normally refuse third-party standing if the plaintiff has a potential conflict of interest with the person whose rights are at issue. And it's pretty hard to ignore the potential for conflict here. After all, Louisiana's law expressly aims to protect women from the unsafe conditions maintained by at least some abortion providers who, like the plaintiffs, are either unwilling or unable to obtain admitting privileges.