AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Religion/Free Exercise

**Dr. A v. Hochul I, \_\_\_ U.S. \_\_\_** (2021)

**Dr. A. v. Hochul II, \_\_\_ U.S. \_\_\_** (2022)

*Dr. A. was one of many health care providers who claimed a right to refuse to be vaccinated against COVID-19 for religious reasons: because the available vaccines were produced using fetal tissue. Although a proposed New York regulation included a religious exemption, the final state vaccine mandate exempted only persons who had medical reasons for not taking vaccines. Dr. A filed a lawsuit against Kathy Hochul, the Governor of New York, claiming that the failure to exempt religious believers violated their rights under the free exercise clause of the First Amendment as incorporated by the due process clause of the Fourteenth Amendment. A federal district court granted a preliminary injunction, but that injunction was dissolved by the Court of Appeals for the Second Circuit. Dr. A. appealed to the Supreme Court of the United States.*

*The Supreme Court by a 6-3 vote first refused to grant an injunction and then refused to grant certiorari. Justice Neil Gorsuch dissented from the denial of an injunction, claiming that the New York refusal to grant injunction exhibited hostility toward religion and did not satisfy the strict scrutiny requirement. On what basis does Gorsuch maintain New York was hostile to religion? Compare* Trump v. Hawaii *(2018)? Are President Trump’s anti-Muslim statements different that Governor Hochul’s assertions? Should evidence of unconstitutional motivation matter more in race and gender cases? On what basis does Gorsuch think the lack of exemption violates free exercise? Note that only medical reasons justified exemptions. Is religion being treated much better than most rationales? How do you think the majority might respond to the Gorsuch dissent?*

*Nine months later, Justice Clarence Thomas dissented from the denial of certiorari. Thomas made two arguments for granting certiorari that were independent of the merits. He first noted that the circuit courts were divided on whether the refusal to grant religious exemptions violated free exercise rights. He then pointed out that because past decisions were made on the court’s emergency/shadow docket,* Dr. A. *provided the justices with an opportunity to determine the free exercise issue with normal briefing and arguments. Do these reasons suggest the court should have taken certiorari? Why might the justices have declined to take the case? Might the justices have felt the COVID crisis is largely over? Thomas put in quotes that the vaccine mandate was designed to “stop the spread” of COVID-19. Does this indicate doubts about the purpose of the mandate? What other purposes might the mandate have had?*

Dr. A. v. Hochul I

The application for injunctive relief presented to Justice [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I10377efb479e11ec9f24ec7b211d8087&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=ef6da7d5eb6c43ecbcbcf60b7eae47d2&contextData=(sc.Search)&analyticGuid=I10377efb479e11ec9f24ec7b211d8087) and by her referred to the Court is denied.

JUSTICE THOMAS would grant the application.

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, dissenting from the denial of application for injunctive relief.

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. . . . Governor Hochul acknowledged that “we left off [the religious exemption] in our regulations intentionally.” Asked why, the Governor answered that there is no “sanctioned religious exemption from any organized religion” and that organized religions are “encouraging the opposite.”  Apparently contemplating Catholics who object to receiving a vaccine, Governor Hochul added that “everybody from the Pope on down is encouraging people to get vaccinated.” Speaking to a different audience, the Governor elaborated: “How can you believe that God would give a vaccine that would cause you harm? That is not truth. Those are just lies out there on social media.” . . .

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We assess requests for temporary injunctive relief under a familiar standard that focuses, among other things, on the merits of the applicants’ underlying claims and the harms they are likely to suffer. *Roman Catholic Diocese of Brooklyn* v. *Cuomo* (2020). In this case, no one seriously disputes that, absent relief, the applicants will suffer an irreparable injury. Not only does New York threaten to have them fired and strip them of unemployment benefits. This Court has held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” . . .

. . . . The Free Exercise Clause protects not only the right to hold unpopular religious beliefs inwardly and secretly. It protects the right to live out those beliefs publicly in “the performance of (or abstention from) physical acts.”  [*Employment Div., Dept. of Human Resources of Ore.*v. *Smith* (1990)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990064132&pubNum=0000780&originatingDoc=I10377efb479e11ec9f24ec7b211d8087&refType=RP&fi=co_pp_sp_780_877&originationContext=document&transitionType=DocumentItem&ppcid=ef6da7d5eb6c43ecbcbcf60b7eae47d2&contextData=(sc.Search)#co_pp_sp_780_877). Under this Court's precedents, laws targeting acts for disfavor only when they are religious in nature or because of their religious character are “doubtless ... unconstitutional.” As a result, where “official expressions of hostility to religion” accompany laws or policies burdening free exercise, we have simply “set aside” such policies without further inquiry. *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n* (2018). But even where such overt animus is lacking, laws that impose burdens on religious exercises must still be both neutral toward religion and generally applicable or survive strict scrutiny. [*Church of Lukumi Babalu Aye, Inc.* v. *Hialeah* (1993)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993120503&pubNum=0000780&originatingDoc=I10377efb479e11ec9f24ec7b211d8087&refType=RP&fi=co_pp_sp_780_546&originationContext=document&transitionType=DocumentItem&ppcid=ef6da7d5eb6c43ecbcbcf60b7eae47d2&contextData=(sc.Search)#co_pp_sp_780_546). To meet its burden under strict scrutiny, the government must demonstrate that its law is narrowly tailored to serve a compelling state interest. . . .

Under the Free Exercise Clause, government “cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.”  As a result, we have said that government actions burdening religious practice should be “set aside” if there is even “slight suspicion” that those actions “stem from animosity to religion or distrust of its practices.”

New York's mandate is such an action. The State began with a plan to exempt religious objectors from its vaccine mandate and only later changed course. . . . The Governor offered an extraordinary explanation for the change. . . . She said that “God wants” people to be vaccinated—and that those who disagree are not listening to “organized religion” or “everybody from the Pope on down.” . . . This record gives rise to more than a “slight suspicion” that New York acted out of “animosity [toward] or distrust of ” unorthodox religious beliefs and practices.  This record practically exudes suspicion of those who hold unpopular religious beliefs. That alone is sufficient to render the mandate unconstitutional as applied to these applicants.

New York's regulation fares no better if the question is the law's neutrality and general applicability.

Begin with neutrality. Even absent proof of animus, a law will not qualify as neutral if a religious exercise is the “object” of a law and not just “incidental[ly]” or unintentionally affected by it. At “minimum,” that means a law must not “discriminate on its face.”  Apart from that, it also means that a law will not qualify as neutral if it is “specifically directed at ... religious practice.” For reasons we have already seen, New York's mandate fails this test too. Rather than burden a religious exercise incidentally or unintentionally, by the Governor's own admission the State “intentionally” targeted for disfavor those whose religious beliefs fail to accord with the teachings of “any organized religion” and “everybody from the Pope on down.” . . .

Consider general applicability next. Recently, a majority of this Court reiterated that a law loses its claim to general applicability when it “prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.” *Fulton* v. *Philadelphia* (2021). That is exactly what New York's regulation does: It prohibits exemptions for religious reasons while permitting exemptions for medical reasons. And, as the applicants point out, allowing a healthcare worker to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain unvaccinated for religious reasons or medical ones.

To be sure, the State speculates that a religious exemption could undermine the purpose of its vaccine mandate differently from a medical exemption if *more people*were to seek a religious exemption than a medical exemption. But this Court's general applicability test doesn't turn on that kind of numbers game. . . .

If the estimated number of those who might seek different exemptions is relevant, it comes only later in the proceedings when we turn to the application of strict scrutiny. At that stage, a State might argue, for example, that it has a compelling interest in achieving herd immunity against certain diseases in a population. It might further contend the most narrowly tailored means to achieve that interest is to restrict vaccine exemptions to a particular number divided in a nondiscriminatory manner between medical and religious objectors. With sufficient evidence to support claims like these, the State might prevail. But none of that bears on the preliminary question whether such a mandate is generally applicable or whether it treats a religious person less favorably than a secular counterpart.

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Maybe the most telling evidence that New York's policy isn't narrowly tailored lies in how unique it is. It seems that nearly every other State has found that it can satisfy its COVID–19 public health goals without coercing religious objectors to accept a vaccine. . . .

Though this alone is sufficient to show that New York's law is not narrowly tailored, still more proof exists. In a similar case, Maine recently argued that it needed a 90% [vaccination](https://1.next.westlaw.com/Link/Document/FullText?entityType=mproc&entityId=Iaff07d61475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=ef6da7d5eb6c43ecbcbcf60b7eae47d2) rate among workers in each of its healthcare facilities to protect against an undue number of COVID–19 breakout cases.  By contrast, in the case before us, New York has not even attempted to identify what percentage of vaccinated workers it thinks is necessary to protect public health. And even assuming New York could prove it needed to achieve a similar [vaccination](https://1.next.westlaw.com/Link/Document/FullText?entityType=mproc&entityId=Iaff07d61475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=ef6da7d5eb6c43ecbcbcf60b7eae47d2) rate, the evidence before us shows that employee [vaccination](https://1.next.westlaw.com/Link/Document/FullText?entityType=mproc&entityId=Iaff07d61475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=ef6da7d5eb6c43ecbcbcf60b7eae47d2) rates in the State's healthcare facilities already stand at between roughly 90% and 96%. . . .

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Today, we do not just fail the applicants. We fail ourselves. It is among our Nation's proudest boasts that, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in [matters of] religion.” [*West Virginia State Bd. of Ed.* v. *Barnette* (1943)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120939&pubNum=0000780&originatingDoc=I10377efb479e11ec9f24ec7b211d8087&refType=RP&fi=co_pp_sp_780_642&originationContext=document&transitionType=DocumentItem&ppcid=ef6da7d5eb6c43ecbcbcf60b7eae47d2&contextData=(sc.Search)#co_pp_sp_780_642). In this country, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit ... protection.” . . . Millions have fled to this country to escape persecution for their unpopular or unorthodox religious beliefs, attracted by America's promise that “[e]very citizen here is in his own country. To the protestant it is a protestant country; to the catholic, a catholic country; and the jew, if he pleases, may establish in it his New Jerusalem.” . . .

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More than 80 years ago, in the shadow of a looming second world war, local governments across the country rushed to encourage displays of national unity. A public school in Minersville, Pennsylvania, did its part by requiring all students to stand daily and salute the American flag. But Lillian and William Gobitas would not oblige. As Jehovah's Witnesses, they believed they could not pledge fealty to anything or anyone except God. When the children refused to salute, the school expelled them.  When the Gobitas family sought this Court's intervention, it demurred. The Court ruled that the Constitution does not “compel exemption from doing what society thinks necessary for the promotion of some great common end.” [*Minersville School Dist.*v. *Gobitis* (1940)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1940122853&pubNum=0000780&originatingDoc=I10377efb479e11ec9f24ec7b211d8087&refType=RP&fi=co_pp_sp_780_593&originationContext=document&transitionType=DocumentItem&ppcid=ef6da7d5eb6c43ecbcbcf60b7eae47d2&contextData=(sc.Search)#co_pp_sp_780_593). In doing so, the Court not only erred in the small matter of the children's last name; it erred in the most fundamental of things. It took the view that the collective was more important than the individual—and that the demands of an impending emergency were more pressing than holding fast to the timeless promises of our Constitution.

Eventually, the Court changed course and overruled *Gobitis*. In *West Virginia State Bd. of Ed.* v. *Barnette*, the Court finally acknowledged what had been true all along—that our Constitution is intended to prevail over the passions of the moment, and that the unalienable rights recorded in its text are not matters to “be submitted to vote; they depend on the outcome of no elections.”  Instead, it is this Court's duty to “apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.” . . .

Today, our Nation faces not a world war but a pandemic. Like wars, though, pandemics often produce demanding new social rules aimed at protecting collective interests—and with those rules can come fear and anger at individuals unable to conform for religious reasons. . . . We have already lived through the *Gobitis*-*Barnette* cycle once in this pandemic. At first, this Court permitted States to shutter houses of worship while allowing casinos, movie theaters, and other favored businesses to remain open. Falling prey once more to the “judicial impulse to stay out of the way in times of crisis,” the Court allowed States to do all this even when religious institutions agreed to follow the same occupancy limits and protective measures considered safe enough for comparable gatherings in secular spaces But as days gave way to weeks and weeks to months, this Court came to recognize that the Constitution is not to be put away in challenging times, and we stopped tolerating discrimination against religious exercises.  Finally, churches and synagogues and mosques reopened on equal footing with secular institutions.

Still, it seems the old lessons are hard ones. Six weeks ago, this Court refused relief in a case involving Maine's healthcare workers.  Today, the Court repeats the mistake by turning away New York's doctors and nurses. We do all this even though the State's executive decree clearly interferes with the free exercise of religion—and does so seemingly based on nothing more than fear and anger at those who harbor unpopular religious beliefs. . . . One can only hope today's ruling will not be the final chapter in this grim story. Cases like this one may serve as cautionary tales for those who follow. But how many more reminders do we need that “the Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis ... may suggest”?

Dr. A. v. Hochul II

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Id66520e5f62411ec9f24ec7b211d8087&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=aa65f1dbd851481e90e0bdb21288ebff&contextData=(sc.Default)&analyticGuid=Id66520e5f62411ec9f24ec7b211d8087), with whom Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Id66520e5f62411ec9f24ec7b211d8087&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=aa65f1dbd851481e90e0bdb21288ebff&contextData=(sc.Default)&analyticGuid=Id66520e5f62411ec9f24ec7b211d8087) and Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Id66520e5f62411ec9f24ec7b211d8087&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=aa65f1dbd851481e90e0bdb21288ebff&contextData=(sc.Default)&analyticGuid=Id66520e5f62411ec9f24ec7b211d8087) join, dissenting from the denial of certiorari.

In August 2021, New York mandated that all healthcare workers receive a COVID–19 vaccine. It did so to “stop the spread” of the then-prevailing Delta variant of the COVID–19 virus. The State exempted employees from the mandate if [vaccination](https://1.next.westlaw.com/Link/Document/FullText?entityType=mproc&entityId=Iaff07d61475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=aa65f1dbd851481e90e0bdb21288ebff) would be “detrimental to [their] health.”  However, the State denied a similar exemption to those with religious objections. Consequently, those who qualified for the broad medical exemption simply had to employ standard protective measures and could keep their jobs. But those who objected for religious reasons would be fired, even if they took the same protective measures.

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We have held that a “law ... lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.” *Fulton* v. *Philadelphia* (2021). Yet there remains considerable confusion over whether a mandate, like New York's, that does not exempt religious conduct can ever be neutral and generally applicable if it exempts secular conduct that similarly frustrates the specific interest that the mandate serves. Three Courts of Appeals and one State Supreme Court agree that such requirements are not neutral or generally applicable and therefore trigger strict scrutiny. Meanwhile, the Second Circuit has joined three other Courts of Appeals refusing to apply strict scrutiny. This split is widespread, entrenched, and worth addressing.

This case is an obvious vehicle for resolving that conflict. The New York mandate includes a medical exemption but no religious exemption, even though “allowing a healthcare worker to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain unvaccinated for religious reasons or medical ones.”  The Court could give much-needed guidance by simply deciding whether that single secular exemption renders the state law not neutral and generally applicable.

Moreover, I would not miss the chance to answer this recurring question in the normal course on our merits docket. Over the last few years, the Federal Government and the States have enacted a host of emergency measures to address the COVID–19 pandemic. Many were not neutral toward religious exercise or generally applicable. Circumstances forced us to confront challenges to those measures in an emergency posture, a practice that Members of this Court have criticized. See, *e.g.,* *Merrill*v. *Milligan* (2022) (KAGAN, J., dissenting). Here, the Court could grant a petition that squarely presents the disputed question and consider it after full briefing, argument, and deliberation.

Unfortunately, the Court declines to take this prudent course. Because I would address this issue now in the ordinary course, before the next crisis forces us again to decide complex legal issues in an emergency posture, I respectfully dissent.