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The 'Weaponized' First Amendment at the Marble Palace and the Firing Line: Reaction and Progressive Advocacy Before the Roberts Court and Lower Federal Courts

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THE 'WEAPONIZED' FIRST AMENDMENT AT THE MARBLE PALACE AND THE FIRING LINE: REACTION AND PROGRESSIVE ADVOCACY BEFORE THE ROBERTS COURT AND LOWER FEDERAL COURTS

Seth F. Kreimer[*]

ABSTRACT

It once seemed that the First Amendment doctrine developed by the Supreme Court stood as a bulwark protecting grassroots struggles for social change. In the twenty-first century, however, particularly since the appointments of Chief Justice Roberts and Justice Alito in 2005, a number of observers have begun to view the Supreme Court's First Amendment work as a "weaponized" redoubt of reaction.

This sense of the rightward tilt of Supreme Court decisions is rooted in reality. Examining 104 Supreme Court First Amendment cases decided during the 2005–2020 Terms, it turns out that successful litigants are four times as likely to come from the coalition of right-wing interests (businesses, right-wing Christian organizations and individuals, and mobilizations against abortion and LGBTQ rights) as from progressive proponents of change. Right-wing and allied litigants prevailed more than twice as often as progressive allies.

This Article considers whether the right-wing "weaponization" of the First Amendment looks the same at the firing line. Examining a sample of 733 First Amendment cases decided in 2020 and 2021 in the lower federal courts reveals a different story. Viewed from the firing line, First Amendment doctrine is not monopolized by the forces of reaction. It continues to open doors for advocates of progressive social change. In the lower court sample, successful litigants were far more likely to come from the ranks of progressives; progressive litigants were almost twice as likely to succeed as their right-wing counterparts.

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This Article concludes by exploring reasons that might explain this divergence: the possibility that lower courts simply lag Supreme Court case law, the unremarked Roberts Court reaffirmation of earlier doctrines which can be invoked by progressive litigants, the impact of the central role "content neutrality" plays under the Roberts Court, the differences between Supreme Court adjudication and the dynamics of litigation in lower courts, and the emerging protections for access to and dissemination of information.

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I. THE GOLDEN AGE OF THE PROGRESSIVE FIRST AMENDMENT

When I began teaching the law of free expression four decades ago, it seemed clear that the doctrine developed by the Supreme Court in the previous generation stood as a bulwark protecting grassroots progressive struggles for social change—call this the Golden Age of the Progressive First Amendment. In the four decades after the New Deal, the Court's doctrine provided shields against official repression to contemporary activists seeking to realize the promise of America.

In the 1940s, the Supreme Court deployed First Amendment doctrine to protect the labor movement.[1] The Court established the constitutional rights of labor organizers to hold open-air meetings and distribute leaflets in streets and parks as "public forums."[2] It guarded the right of labor activists to picket peacefully,[3] to criticize judges,[4] and to encourage union membership without seeking a state license.[5]

The Court equivocated in confronting the red-baiting of the McCarthy Era. But by the end of the 1950s and through the next decade, it established firm protections for civil rights organizers against intrusive investigations;[6]

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[1] *See, e.g.*, Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2067 (2018); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 30–32 (2007); LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 304 (2016).

[2] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

[3] Thornhill v. Alabama, 310 U.S. 88, 91, 101–03 (1940) ("Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." (quoting Senn v. Tile Layers Protective Union, 301 U.S. 468, 478 (1937))).

[4] Bridges v. California, 314 U.S. 252, 270 (1941) (reversing contempt conviction of labor union leader); *id.* ("The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste.").

[5] Thomas v. Collins, 323 U.S. 516, 536–37 (1945) ("When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end.").

[6] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462, 466 (1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved."); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960) ("[C]ompulsory disclosure of the membership lists of the local branches of the National Association for the Advancement of Colored People would work a significant interference with the freedom of association of their members."); Shelton v. Tucker, 364 U.S. 479, 485–86, 486 n.7 (1960) ("[T]o compel a teacher to disclose his every associational tie is to impair that teacher's right of free association . . . . [A] witness who was a member

retaliatory defamation actions;[7] efforts to hamper litigation campaigns;[8] prosecution of organizing activities;[9] interference with picketing, demonstrations, and protest marches;[10] and suits to penalize boycott

of the Capital Citizens Council testified that his group intended to gain access to some of the Act 10 affidavits with a view to eliminating from the school system persons who supported . . . the American Civil Liberties Union, the Urban League, the American Association of University Professors, and the Women's Emergency Committee to Open Our Schools.").

[7] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) ("The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection."); *see id*. at 256, 264 n.4 (indicating that the opinion addressed the actions against civil rights organizers as well as the action against the *New York Times*).

[8] NAACP v. Button, 371 U.S. 415, 429 (1963) ("In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.").

[9] Dombrowski v. Pfister, 380 U.S. 479, 482, 487, 494 (1965) ("Appellant Southern Conference Educational Fund, Inc. (SCEF), is active in fostering civil rights for Negroes in Louisiana and other States of the South. . . . Appellants' allegations and offers of proof outline the chilling effect on free expression of prosecutions initiated and threatened in this case. . . . This overly broad statute also creates a 'danger zone' within which protected expression may be inhibited.").

[10] *E.g.*, Edwards v. South Carolina, 372 U.S. 229, 231, 237 (1963) ("[P]etitioners, in . . . small groups, walked single file or two abreast in an orderly way through the grounds, each group carrying placards bearing such messages as 'I am proud to be a Negro' and 'Down with segregation.'. . . [T]hey were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." (footnote omitted)); Henry v. City of Rock Hill, 376 U.S. 776, 777 (1964) ("[P]etitioners[,] . . . while at a place where the State's law did not forbid them to be, were engaged in the 'peaceful expression of unpopular views.' They assembled in a peaceful, orderly fashion in front of the City Hall to protest segregation." (quoting *Edwards*, 372 U.S. at 237)); Cox v. Louisiana, 379 U.S. 536, 545–46 (1965) ("Appellant led a group of young college students who wished 'to protest segregation' and discrimination against Negroes and the arrest of 23 fellow students. They assembled peaceably at the State Capitol building and marched to the courthouse where they sang, prayed and listened to a speech."); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969) ("[O]ur decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection."); Gregory v. City of Chicago, 394 U.S. 111, 111–12 (1969) ("Petitioners . . . marched in a peaceful and orderly procession from city hall to the mayor's residence to press their claims for desegregation of the public schools. . . . [The march] falls well within the sphere of conduct protected by the First Amendment."); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 93 (1972) ("Mosley would walk the public sidewalk adjoining the school, carrying a sign that read: 'Jones High School practices black discrimination. Jones High School has a black quota.'"); Carey v. Brown, 447 U.S. 455, 457 (1980) ("[A]ppellees, all of whom are members of a civil rights organization entitled the Committee Against Racism, participated in a peaceful demonstration on the public sidewalk in front of the home of Michael Bilandic, then Mayor of Chicago, protesting his alleged failure to support the busing of schoolchildren to achieve racial integration.").

organizers.[11] The McCarthy Era equivocation came to be viewed as a regrettable lapse.[12]

During the public contention of the 1960s and 1970s over the Vietnam War, the Court recognized the rights of students to peacefully wear anti-war symbols in schools,[13] and the rights of demonstrators to wear military uniforms in skits that "tended to discredit armed forces,"[14] to tape a peace symbol over an American flag,[15] to use "opprobrious words" to police officers,[16] and to display vulgar anti-war slogans.[17] It recognized First Amendment limits on the discretion of public universities to refuse recognition of dissident student

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[11] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912–13 (1982) ("Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens. . . . While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case.").

[12] *See, e.g.*, Communist Party of Ind. v. Whitcomb, 414 U.S. 441, 450 (1974) (rejecting "an argument that . . . any group that advocates violent overthrow as abstract doctrine must be regarded as necessarily advocating unlawful action" because acceptance of that argument "would only return the law to the 'thoroughly discredited' regime of *Whitney v. California*, unanimously overruled by the Court in *Brandenburg v. Ohio*" (citation omitted)); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[L]ater decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); Keyishian v. Bd. of Regents of the Univ. of N.Y., 385 U.S. 589, 605–06 (1967) (rejecting McCarthy era employment cases, stating "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege" (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

[13] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) ("In December 1965, a group of . . . students . . . determined to publicize their objections to the hostilities in Vietnam . . . by wearing black armbands during the holiday season . . . . [The students] were all sent home and suspended from school until they would come back without their armbands.").

[14] Schacht v. United States, 398 U.S. 58, 70 (1970) (White, J., concurring); *id.* at 60 (majority opinion) ("The street skit in which Schacht wore the army uniform as a costume was designed, in his view, to expose the evil of the American presence in Vietnam and was part of a larger, peaceful antiwar demonstration at the induction center that morning."). *But cf.* United States v. O'Brien, 391 U.S. 367, 386, 370, 372 (1968) (upholding conviction for burning draft card).

[15] Spence v. Washington, 418 U.S. 405, 415 (1974) (per curiam) ("Given the protected character of his expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated."); *see* Texas v. Johnson, 491 U.S. 397, 399 (1989) (reversing conviction of defendant who burned American flag in the context of "'die-ins' intended to dramatize the consequences of nuclear war").

[16] Gooding v. Wilson, 405 U.S. 518, 518, 519 n.1, 523, 525 (1972) (overturning conviction based on the defendant's remarks to police officers while the defendant was participating in a picketing protest against the war in Vietnam).

[17] Cohen v. California, 403 U.S. 15, 16 (1971) ("[T]he defendant was observed . . . outside . . . the municipal court wearing a jacket bearing the words 'Fuck the Draft' . . . as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.").

organizations,[18] and on the authority of the U.S. government to prevent publication of the Pentagon Papers.[19] It reversed the conviction of an anti-war demonstrator whose words did not amount to incitement[20] and that of a critic of conscription whose hyperbolic political commentary did not constitute a "true threat."[21]

The doctrines developed by the Supreme Court during these years thus emphatically and prominently protected each of the links of the process of citizen-driven social change: (A) the process of organization; (B) the effort to protest, publicize, and persuade in speech and in the press; and (C) the efforts to mobilize outrage into action.

Importantly, the Court not only protected each of these links from criminal prosecution. It constrained non-criminal sanctions and limited the ability of governments to deprive organizers of the channels of communication that facilitated public contention.[22]

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[18] Healy v. James, 408 U.S. 169, 170, 187 (1972) ("The mere disagreement of the President with the . . . philosophy [of Students for Democatic Society] affords no reason to deny it recognition. As repugnant as these views may have been, . . . the mere expression of them would not justify the denial of First Amendment rights.").

[19] N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) ("The Government 'thus carries a heavy burden of showing justification for the imposition of . . . a [prior] restraint.' . . . [T]he Government had not met that burden.").

[20] Hess v. Indiana, 414 U.S. 105, 107 (1973) ("The sheriff . . . arrested him on the disorderly conduct charge. It was later stipulated that what appellant had said was 'We'll take the fucking street later,' or 'We'll take the fucking street again.'").

[21] Watts v. United States, 394 U.S. 705, 706, 708 (1969) ("'I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J.' . . . We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. . . . '[Petitioner's statement] was a kind of very crude offensive method of stating a political opposition to the President.'").

[22] During the 1990s, the Court's First Amendment doctrine provided shelter for mobilization by opponents of abortion. Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 361 (1997) (invalidating injunction requiring "floating buffer zone"); Madsen v. Women's Health Ctr. Inc., 512 U.S. 753, 757 (1994) (invalidating portions of injunction requiring abortion protestors to observe restrictions on demonstrations around abortion clinic); Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 243–45 (1986) (discussing a newsletter exempt from campaign finance regulation); *cf.* Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9, 14, 16 (2006) (dismissing RICO action against abortion opponents); Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 397–98 (2003) (same); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 266–68 (1993) (dismissing conspiracy action against abortion opponents); U.S. Cath. Conf. v. Abortion Rts. Mobilization, Inc., 487 U.S. 72, 73–74 (1988) (ordering procedural protection for nonparty witnesses where Abortion Rights Mobilization sued to revoke the tax-exempt status of the Catholic Church).

But the Court also denied First Amendment protection. *E.g.*, Cloer v. Gynecology Clinic, Inc., 528 U.S. 1099, 1099 (2000) (denying certiorari regarding injunction against abortion opponents); Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 149–50 (2003) (upholding prohibition on direct campaign expenditures); Hill v. Colorado, 530 U.S. 703, 707–14 (2000) (upholding statute limiting anti-abortion demonstrations); Lawson v. Murray, 525 U.S. 955, 955 (1998) (denying petition for certiorari challenging injunction that restricted

II. REACTION AND THE FIRST AMENDMENT: THE VIEW FROM THE ROBERTS COURT

A. The First Amendment "Weaponized"

By contrast to the Golden Age, in the twenty-first century, and particularly since the appointments of Chief Justice Roberts and Justice Alito, a number of observers have begun to view the Supreme Court's First Amendment work as a redoubt of reaction.[23] These concerns have basis in the case law.

The Roberts Court's free speech decisions have entrenched plutocracy by eviscerating campaign finance regulation.[24] They have barred transparency

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demonstration by anti-abortion protesters); Williams v. Planned Parenthood Shasta-Diablo, Inc., 520 U.S. 1133, 1133 (1997) (same); Winfield v. Kaplan, 512 U.S. 1253, 1253 (1994) (same); Frisby v. Schultz, 487 U.S. 474, 476, 488 (1988) (sustaining ordinance barring targeted residential picketing by abortion opponents); Cath. League v. Feminist Women's Health Ctr., Inc., 469 U.S. 1303, 1303–05 (1984) (denying stay of order preventing release of fetuses to abortion opponents).

And abortion providers successfully invoked newly minted protection for commercial speech in *Bigelow v. Virginia*, 421 U.S. 809, 825 (1975), which invalidated prohibition of advertising by out-of-state abortion providers.

[23] *E.g.*, Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1977–78 (2018) ("Not only does the contemporary First Amendment landscape give the high ground to those already rich in financial and cultural capital, but it also places numerous obstacles in the path of . . . undercapitalized social groups . . . ."); Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2219 (2018) ("The answer . . . is 'no.'"); Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), http://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html; Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223, 1223 (2020) ("Once a defense of the powerless, the First Amendment over the last hundred years has mainly become a weapon of the powerful." (footnote omitted)).

The concern is no twenty-first-century novelty. *See, e.g.*, Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein's* Democracy and the Problem of Free Speech, 62 U. CHI. L. REV. 423, 427 (1995).

For a more balanced recent account, see Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1645, 1647 (2021).

> [N]ot only is speedy, cheap, and abundant speech increasingly weaponized to frustrate meaningful public discourse and democratic outcomes, so too is the First Amendment itself increasingly weaponized to frustrate regulatory interventions that seek to enhance democracy or to achieve equality, public welfare, and other democratic goals. . . . [But] speech obviously can, and does, promote democratic values, autonomy, human creativity, enlightenment, and character development. The judiciary thus *must* protect expression from government censorship.

Id.

[24] The marquee case is *Citizens United v. Federal Election Commission*, 558 U.S. 310, 365 (2010). *Citizens United* is a part of a rising tide of protection for money in politics. *See* Fed. Election Comm'n v. Cruz, 142 S. Ct. 1638, 1656 (2022); Thompson v. Hebdon, 140 S. Ct. 348, 351 (2019); McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 192–93 (2014); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 727–28 (2011); Davis v. Fed. Election Comm'n, 554 U.S. 724, 736–38 (2008); Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 455–57 (2007).

requirements regarding tax-deductible contributions to right-wing advocacy organizations.[25] But the Roberts Court abandoned the field when it came to protecting democracy and minority voices from partisan gerrymandering and onerous voting rules.[26]

The Roberts Court's First Amendment doctrine has protected business interests against health and privacy regulation.[27] It has innovated to "weaponize" the First Amendment against labor unions.[28] Under the Roberts Court, the First Amendment has guarded homophobic zealots who vented vituperation against a grieving family.[29] It has protected a baker who declined to sell cakes for same-sex weddings, and an adoption agency that refused to serve same-sex families.[30]

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[25] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021). It is unclear which disclosure requirements regarding campaign contributions will survive the corrosive force of the new First Amendment. *Compare* Del. Strong Fams. v. Denn, 579 U.S. 953–54 (2016) (Thomas, J., dissenting from denial of certiorari), *with* Doe v. Reed, 561 U.S. 186, 190–91 (2010).

[26] Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019) (holding that partisan gerrymandering might be unconstitutional, but claim was not justiciable); *see* Householder v. Ohio A. Philip Randolph Inst., 140 S. Ct. 101, 101 (2019) (mem.) (vacating and remanding invalidation of Ohio partisan gerrymander); Chatfield v. League of Women Voters of Mich., 140 S. Ct. 429, 429–30 (2019) (mem.) (vacating and remanding invalidation of Michigan partisan gerrymander); Gill v. Whitford, 138 S. Ct. 1916, 1922–23 (2018) (holding plaintiffs had not alleged adequate standing to challenge partisan gerrymander); *see also* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (narrowing protection of Voting Rights Act); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 185, 188–89 (2008) (upholding voter ID requirement); Purcell v. Gonzalez, 549 U.S. 1, 2–3, 6 (2006) (limiting authority to grant relief from proof of citizenship requirement).

Three members of the Court are inclined to go further and bar state courts from reviewing partisan gerrymanders as well. Moore v. Harper, 142 S. Ct. 1089, 1089–90 (2022) (mem.) (Alito, Thomas & Gorsuch, JJ., dissenting from denial of application for stay). We will learn more this Term. *See* Moore v. Harper, 142 S. Ct. 2901, 2901 (2022) (mem.) (granting certiorari).

[27] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011); Thompson v. W. States Med. Ctr., 535 U.S. 357, 360 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001); United States v. United Foods, Inc., 533 U.S. 405, 408, 410 (2001). But business interests do not always prevail. *See, e.g.*, City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1468–69 (2022); Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2344 (2020); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 232 (2010).

[28] Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) ("The majority . . . prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."); *see* Harris v. Quinn, 573 U.S. 616, 620 (2014); Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 302, 322 (2012).

[29] *See* Snyder v. Phelps, 562 U.S. 443, 448, 461 (2011) (holding that the First Amendment barred imposing liability for intentional infliction of emotional distress on members of Westboro Baptist Church for picketing outside a soldier's funeral).

[30] *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723–24 (2018) (holding that the Colorado Civil Rights Commission's sanction against a baker who refused to make a wedding cake for a same-sex couple violated the Free Exercise Clause); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (holding that the city's refusal to contract with Catholic Social Services because it refused to serve same-sex couples violated the Free Exercise Clause).

It has shielded abortion protesters from a requirement that they clear a buffer zone around the premises of abortion providers, anti-abortion "crisis pregnancy clinics" from the requirement that they alert patients to their lack of medical training, and anti-abortion businesses from being required to furnish contraceptive coverage to their employees.[31]

At the same time, the Roberts Court denied First Amendment protection to progressive plaintiffs who sought to train members of disfavored foreign organizations "on how to use humanitarian and international law to peacefully resolve disputes"; to "engag[e] in political advocacy on behalf of Kurds who live in Turkey"; "to petition various representative bodies such as the United Nations for relief"; or "to present claims for tsunami-related aid to mediators and international bodies."[32]

B. The Political Incidence of the First Amendment in the Supreme Court: A Census

These eye-catching highlights from the Roberts Court in fact represent broader trends. Table 1 below sets forth a full census of the 104 Roberts Court First Amendment cases decided during the 2005–2020 Terms, revealing fifty-nine cases where First Amendment claims were successful—a success rate of 56%.[33] These successes predominantly vindicated the claims of right-wing litigants. Among the successful cases, two out of three of the claimants (39/59) came from the coalition of right-wing interests: businesses, right-wing Christian organizations and individuals,[34] mobilization against abortion and LGBTQ+

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[31] *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2367 (2018) (invalidating disclosure requirements for "crisis pregnancy centers"); McCullen v. Coakley, 573 U.S. 464, 469, 497 (2014) (holding that statute limiting approach to patients outside of abortion clinic violated the First Amendment); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014) (holding requirement that a corporation provide its employees insurance coverage for contraception violates the Religious Freedom Restriction Act); *see also* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 151–52 (2014) (granting standing for anti-abortion political committee); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020) (holding that the government lawfully exempted religious employers from regulatory requirements for contraceptive coverage). *But cf.* Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1071 (9th Cir. 2015) (declining to protect anti-abortion pharmacists), *cert. denied*, 579 U.S. 942 (2016).

[32] Holder v. Humanitarian L. Project, 561 U.S. 1, 14–15 (2010) (quoting Humanitarian L. Project v. Mukasey, 552 F.3d 916, 921 n.1 (9th Cir. 2009)).

[33] This top-line census of Supreme Court cases includes both cases decided after argument and shadow docket cases with reported opinions, but does not include denials of certiorari. A full list of cases is available from *Emory Law Journal*.

[34] Throughout this Article, in the cases examined, the great bulk of Christian litigants are right-wing claimants. Because progressive Christian claimants are so rare in the courts, they were coded, along with

rights, and right-wing activists. Only 13% (8/59) of successful claims involved progressive proponents of citizen-driven change and their religious allies. Unaligned individuals and organizations, along with prisoners, accounted for the remaining 20% of the cases (12/59).

Table 1

First Amendment Claimants Supreme Court 2006–2021: Distribution of Successful and Unsuccessful Claimants

	Loss	**% of Loss**	**Win**	**% of Win**
Business	1	2.22%	6	10.17%
Christian Individual	1	2.22%	5	8.47%
Christian Organization	5	11.11%	10	16.95%
Individual	14	31.11%	9	15.25%
Left Individual	6	13.33%	2	3.39%
Left Organization	6	13.33%	2	3.39%
Media	2	4.44%	1	1.69%
Nonprofit Organization	1	2.22%	2	3.39%
Prison Litigant	1	2.22%	1	1.69%
Religious Individual	2	4.44%	2	3.39%
Religious Organization	0	0.00%	1	1.69%
Right Individual	2	4.44%	10	16.95%
Right Organization	2	4.44%	8	13.56%
Union	2	4.44%	0	0.00%
Grand Total	**45**	**100.00%**	**59**	**100.00%**

Indeed, if analysis excludes idiosyncratic individual litigants and prisoners, more than eight out of ten Roberts Court cases where First Amendment claims prevailed vindicated claims of right-wing litigants.[35]

Muslim, Jewish, and other minority religious claimants, as "Religious Individual" or "Religious Organization." This does not, of course, reflect the overall political stance of Christians in the real world. *See infra* Appendix.

[35] These top-line counts include cases where claimants invoked both Free Exercise and Free Speech claims and prevailed on the Free Exercise claims. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1719, 1727 (2018).

Excluding Free Exercise cases, the numbers are similar. Of the claimants in the forty-one cases where unadorned free expression claims prevailed, 61% came from the right-wing coalition, 17% came from progressive allies, and 22% were unaffiliated individuals.

Conversely, among litigants in the forty-five Roberts Court cases where First Amendment claims did not prevail, right-wing claimants constituted 23% of decided cases, while progressive proponents of change and their allies accounted for 36% of cases.

In the 2021 Term, the pattern of disproportionate right-wing success in First Amendment cases recurred, although the Court rejected more right-wing shadow docket claims for religious accommodation.[36]

In the thirty-nine cases where unadorned free expression claims failed, 18% of claimants came from the right-wing coalition, 46% came from progressive allies, and 36% were unaffiliated individuals.

[36] The Court has accepted right-wing claims in one series of cases. *E.g.*, FEC v. Cruz, 142 S. Ct. 1638, 1645, 1656–57 (2022) (invalidating statute barring campaigns from using more than $250,000 of funds raised after election day to repay a candidate's personal loans); Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022) (invalidating the city's refusal to fly Christian flag outside Boston City Hall); Ramirez v. Collier, 142 S. Ct. 1264, 1284 (2022) (deciding in favor of Christian prisoner who claimed First Amendment right to have pastor lay hands on him at execution); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2432–33 (2022) (deciding in favor of Christian high school coach who insisted on kneeling in prayer at the fifty-yard line); Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) ("Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment.").

The Court rejected right-wing claims in *City of Austin v. Reagan National Advertising of Austin, LLC*. 142 S. Ct. 1464, 1470 (2022) ("[Business] filed suit against the City in state court alleging that the code's prohibition against digitizing off-premises signs, but not on-premises signs, violated the Free Speech Clause of the First Amendment.").

The Court rejected right-wing shadow docket claims in another series of cases. Austin v. U.S. Navy Seals 1–26, 142 S. Ct. 1301, 1301 (2022) (mem.) (granting stay decision accepting First Amendment claims to refuse vaccination in shadow docket); Dr.A. v. Hochul, 142 S. Ct. 552, 552 (2021) (mem.) (denying in shadow docket interim injunctive relief to healthcare workers whose "sincere religious beliefs prevent them from taking one of the currently available vaccines"); Does 1–3 v. Mills, 142 S. Ct. 17, 17–18 (2021) (mem.) (Barrett, J., concurring) (denying interim injunctive relief to healthcare workers asserting religious objections to receiving COVID-19 vaccines in shadow docket).

The Court granted relief to one progressive claimant in *NetChoice, LLC v. Paxton*. 142 S. Ct. 1715, 1715–16 (2022) (mem.) (vacating stay of injunction granted in *NetChoice, L.L.C. v. Paxton*, No. 21-51178, 2022 WL 1537249 (5th Cir. 2021), which had suspended the injunction against a Texas statute limiting the curation rights of internet platforms in *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1099–1100 (W.D. Tex. 2021)). The underlying injunction was subsequently reversed and vacated by 49 F.4th 439 (5th Cir. 2022), but a motion for stay of appellate mandate was granted.

It denied relief to progressive claimants in two cases. Egbert v. Boule, 142 S. Ct. 1793, 1801–02 (2022) ("Boule lodged a grievance with Agent Egbert's supervisors, alleging that Agent Egbert . . . retaliated against [Boule] by reporting Boule's 'SMUGLER' license plate to the Washington Department of Licensing for referencing illegal conduct, and by contacting the Internal Revenue Service and prompting an audit of Boule's tax returns."); Fed. Bureau of Investigation v. Fazaga, 142 S. Ct. 1051, 1056, 1062 (2022) (rejecting on procedural grounds claims by Muslims that FBI illegally surveilled them on religious grounds).

The Term also saw one unsuccessful individual claim. Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1263–64 (2022) (holding that the plaintiff did not possess an actionable First Amendment claim after being censured from criticizing the board's alleged malfeasance).

Looked at another way, as Table 2 illustrates, right-wing and allied litigants prevailed in 76% of their First Amendment cases; progressives and their allies prevailed in only 30% of their assertions of First Amendment rights.[37]

Table 2

Success Rates of First Amendment Claimants in the Supreme Court 2006–2021

	Loss	**Win**	**Win %**
Business	1	6	85.71%
Christian Individual	1	5	83.33%
Christian Organization	5	10	66.67%
Individual	14	9	39.13%
Left Individual	6	2	25.00%
Left Organization	6	2	25.00%
Media	2	1	33.33%
Nonprofit Organization	1	2	66.67%
Prison Litigant	1	1	50.00%
Religious Individual	2	2	50.00%
Religious Organization	0	1	100.00%
Right Individual	2	10	83.33%
Right Organization	2	8	80.00%
Union	2	0	0.00%
Grand Total	**45**	**59**	**56.73%**

III. THE POLITICAL INCIDENCE OF THE FIRST AMENDMENT AT THE FIRING LINE

Does this mean the First Amendment no longer provides a foundation for grassroots progressive organization and advocacy?

[37] These counts are relatively consistent with those reported in *6+ Decades of Freedom of Expression in the U.S. Supreme Court.* LEE EPSTEIN, ANDREW D. MARTIN & KEVIN QUINN, 6+ DECADES OF FREEDOM OF EXPRESSION IN THE U.S. SUPREME COURT 1 (2018), https://static1.squarespace.com/static/60188505fb790b33c3d33a61/t/6050e2cb7018917f3e9e9566/1615913676838/FreedomOfExpression.pdf ("The current Court seems to favor speech promoting (or allied with) conservative causes, and seems to disfavor speech promoting (or allied with) liberal causes."). For the Roberts Court, 2006–2017, the study, which coded by "liberal" and "conservative" expression, rather than litigant identity, found "liberal expression" prevailed in 21% of cases. "Conservative expression" prevailed in 69% of cases.

Over the years, I have been active in assisting the litigation of the American Civil Liberties Union ("ACLU") of Pennsylvania. It seems to me that the First Amendment is still an important tool for progressive advocates. In my experience, the First Amendment (1) protects organizers, demonstrators, and critics of the status quo against arrest and harassment; (2) assures access to public forums; and (3) protects the right of civilian observers to record the actions of police.

To try to determine whether my perceptions are parochial or idiosyncratic, after being invited to this forum I worked with a research assistant to survey LEXIS-reported lower federal court cases in which the First Amendment was invoked for ten of twenty months between January 2020 and August 2021.

Table 3 sets forth the results of the survey. In the 733 relevant non-employment cases in lower courts,[38] First Amendment claimants overall succeeded less often than before the Supreme Court. The lower court success rate is 39%, compared to 56% at the Supreme Court. The success rate was comparable at the trial and appellate court levels.

Table 3

Lower Court Success Rates

	Loss	**Win**	**Total**	**Win %**
Circuit	100	65	165	39.39%
District	346	222	568	39.08%
Total	**446**	**287**	**733**	**39.15%**

As Table 4 illustrates below, in the lower courts, the political identities of the successful First Amendment litigants differed strikingly from the lineup in the Roberts Court. Before the Roberts Court, two out of three of winning litigants came from the right, outnumbering successful progressive allied litigants nearly four to one. In the lower courts, by contrast, the right accounted for only 25% of winning litigants. Far more of the winning cases, 37%, came from the First Amendment claimants who had prevailed in the Golden Age: progressive activists and their allies.

[38] The methodology of our survey is outlined in the appendix. *See infra* Appendix.

Table 4

Lower Court Proportion of Winning Cases by Claimant

Adult Business	2.79%
Business	8.36%
Christian Individual	1.39%
Christian Organization	4.53%
Individual	27.87%
Left Individual	9.41%
Left Organization	13.59%
Media	8.36%
Nonprofit Organization	1.05%
Prison Litigant	9.76%
Religious Individual	0.35%
Religious Organization	1.39%
Right Individual	5.57%
Right Organization	4.88%
Union	0.70%

As Table 1 sets forth, before the Roberts Court, right-wing and allied litigants prevailed more than twice as often as progressive allies. By contrast, in the lower courts in the sample, as Table 5 illustrates, progressive-allied individuals and organizations were almost twice as likely to succeed as their right-wing counterparts. For cases involving progressive-allied plaintiffs, the success rate was 53% (108/203). For cases that involved conservative-allied plaintiffs, the success rate was 29% (75/257).

Table 5

Lower Court Cases Win/Loss (Total n = 733)

	Loss	Win	Win %
Adult Business	6	8	57.14%
Business	55	24	30.38%
Christian Individual	13	4	23.53%
Christian Organization	25	13	34.21%
Individual	145	80	35.56%
Left Individual	36	27	42.86%
Left Organization	29	38	56.72%
Media	8	24	75.00%
Municipality	1	0	0.00%
Nonprofit Organization	7	3	30.00%
Prison Litigant	30	28	48.28%
Religious Individual	3	1	25.00%
Religious Organization	3	4	57.14%
Right Individual	46	16	25.81%
Right Organization	36	14	28.00%
Union	4	2	33.33%
Grand Total	**447**	**286**	**39.02%**

Table 6 illustrates that overall patterns were comparable at trial and appellate levels.

Table 6

Left/Right Success Rates at Trial and Appellate Levels

	Win Left	Win Right
Circuit	48.84%	25.00%
District	54.38%	30.00%
Grand Total	**53.20%**	**28.86%**

At a more granular level, as set forth in Table 7, although individuals allied with progressive causes were substantially less successful on appeal than at the trial level, prison litigants were notably more successful, and the success rate of right-wing and conservative Christian plaintiffs remained comparably low at appellate levels.

Table 7

Success Rate by Litigant Type—Trial and Appellate Cases

Claimants/Courts	Loss	Win	Win %
Adult Business	**6**	**8**	**57.14%**
Circuit	0	1	100.00%
District	6	7	53.85%
Business	**55**	**24**	**30.38%**
Circuit	10	5	33.33%
District	45	19	29.69%
Christian Individual	**13**	**4**	**23.53%**
Circuit	3	1	25.00%
District	10	3	23.08%
Christian Organization	**25**	**13**	**34.21%**
Circuit	8	3	27.27%
District	17	10	37.04%
Individual	**145**	**80**	**35.56%**
Circuit	31	18	36.73%
District	114	62	35.23%
Left Individual	**36**	**27**	**42.86%**
Circuit	7	2	22.22%
District	29	25	46.30%
Left Organization	**28**	**39**	**58.21%**
Circuit	8	6	42.86%
District	20	33	62.26%
Media	**8**	**24**	**75.00%**
Circuit	2	8	80.00%
District	6	16	72.73%

Municipality	**1**	**0**	**0.00%**
Circuit	0	0	0.00%
District	1	0	0.00%
Nonprofit Organization	**7**	**3**	**30.00%**
Circuit	2	0	0.00%
District	5	3	37.50%
Prison Litigant	**30**	**28**	**48.28%**
Circuit	5	12	70.59%
District	25	16	39.02%
Religious Individual	**3**	**1**	**25.00%**
Circuit	2	0	0.00%
District	1	1	50.00%
Religious Organization	**3**	**4**	**57.14%**
Circuit	0	3	100.00%
District	3	1	25.00%
Right Individual	**46**	**16**	**25.81%**
Circuit	11	2	15.38%
District	35	14	28.57%
Right Organization	**36**	**14**	**28.00%**
Circuit	10	3	23.08%
District	26	11	29.73%
Union	**4**	**2**	**33.33%**
Circuit	1	1	50.00%
District	3	1	25.00%
Grand Total	**446**	**287**	**39.15%**

IV. WHY DOES THE VIEW FROM THE LOWER COURTS DIFFER?

What accounts for the discrepancy between the views from the Supreme Court and the lower courts? To begin to address this question it is useful to break out the types of claims that were brought before the lower courts. Details appear in Table 8 below.

Table 8

Types of Claims Asserted Before Lower Courts

	Loss	**Win**	**Win %**
Access to Information	19	22	53.66%
Channels of Communication/3D	24	30	55.56%
Channels of Communication/Online	16	7	30.43%
Direct Regulation of Expressive Activity	198	106	34.87%
Janus/Union Regulation	18	4	18.18%
Libel Defense	3	10	76.92%
Politics/Finance	8	10	55.56%
Politics/Structure	37	21	36.21%
Protest	24	21	46.67%
Retaliation	97	54	35.76%
Union Regulation	3	1	25.00%
Grand Total	**447**	**286**	**39.02%**

A. Lagging Lower Courts? Political Access Cases

One possible explanation would hold that the lower courts have simply not yet internalized the case law emerging from the Roberts Court, and the divergence from the rightward tilt at the Supreme Court will dissipate with time. One set of cases in the sample may indicate such a lag: litigation in the lower court sample concerning the First Amendment's impact on political structures that limit voter participation, such as in person voting rules and requirements for gathering ballot initiative signatures. Table 9 analyzes those cases.

Table 9

Political Structure Cases in the Lower Courts

	Loss	Win	Win %
Politics/Structure			
Business	1	0	0.00%
Individual	9	4	30.77%
Left Individual	8	4	33.33%
Left Organization	8	10	55.56%
Nonprofit Organization	1	0	0.00%
Prison Litigant	0	1	100.00%
Right Individual	1	0	0.00%
Right Organization	8	3	27.27%
Grand Total	**36**	**22**	**37.93%**

As Table 9 sets forth, in the lower court sample, progressive organizations and their allies initially prevailed in almost half (14/30) of their political structure cases. Yet, the First Amendment law of political access in the Roberts Court trends strongly against vindication of claims for political participation.[39] And, as set forth in Table 1, neither progressive organizations nor political structure claims prevailed often before the Roberts Court.

When we investigate the ultimate outcomes of the cases in the lower court sample, it turns out that in more than half of the cases where progressives and their allies prevailed, relief was ultimately denied to progressive plaintiffs after appeal or further litigation. In three of these cases, the relief obtained in the lower courts was stayed by a summary decision on the Supreme Court's shadow docket.[40] In three other cases, the relief granted by the trial court was reversed

[39] *See supra* note 26.

[40] Andino v. Middleton, 141 S. Ct. 9, 9 (2020) (mem.) (granting stay of relief after refusal to dismiss claim for COVID-19 accommodation for voting in *Middleton v. Andino*, 474 F. Supp. 3d 768, 770, 777 (D.S.C. 2020)); Clarno v. People Not Politicians Or., 141 S. Ct. 206, 206 (2020) (mem.) (granting stay of relief for COVID-19 accommodation for ballot initiative qualification granted in *People Not Politicians Oregon v. Clarno*, 472 F. Supp. 3d 890, 893, 900 (D. Or. 2020)); Little v. Reclaim Idaho, 140 S. Ct. 2616, 2616 (2020) (mem.) (granting stay of relief for COVID-19 accommodation to ballot initiative solicitors in *Reclaim Idaho v. Little*, 469 F. Supp. 3d 988, 992, 1002 (D. Idaho 2020)).

on appeal.[41] And, in two other cases, the lower court ultimately withdrew relief.[42]

So, in political structure cases where progressive plaintiffs prevailed, it may be that the initial decision makers simply had not caught up with the Roberts Court; subsequent litigation brought the results in line with emerging Supreme Court hostility to progressive claims.[43]

B. Classic Doctrines Protecting Progressive Contention Remain Available

This reversal rate, however, was unusual among the cases where First Amendment claims of progressive plaintiffs initially prevailed in lower courts.

A more prevalent reason for divergence between Roberts Court outcomes and lower court outcomes arises from the stability of much Supreme Court doctrine. Recent Roberts Court cases have innovated in ways that benefit reaction and plutocracy. But they have not repudiated the classic First Amendment doctrines, which in earlier eras provided protection for organizing, persuading, protesting, and mobilizing by labor, civil rights, and anti-war movements. To the contrary, the Roberts Court continues to reaffirm doctrines from the Golden Age in cases that do not involve progressive litigants. Thus, some of the rightward drift of First Amendment doctrine has an element of optical illusion. Movement to the right catches the eye, but progressives need not win new cases before the Roberts Court to take advantage of existing doctrines and to prevail in lower courts.

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[41] Pavek v. Simon, 967 F.3d 905, 909 (8th Cir. 2020) (staying relief as to order of appearance on ballot granted in *Pavek v. Simon*, 467 F. Supp. 3d 718, 765 (D. Minn. 2020)); Miller v. Thurston, 967 F.3d 727, 732 (8th Cir. 2020) (reversing grant of injunction against requirement of notarization and in-person signature for initiative proponents in light of COVID-19 in *Miller v. Thurston*, No. 5:20-CV-05070, 2020 U.S. Dist. LEXIS 96201, at *2, *9 (W.D. Ark. June 2, 2020)); Mi Familia Vota v. Abbott, 834 F. App'x 860, 865 (5th Cir. 2020) (granting the defendants' emergency motion for stay pending appeal, and reversing relief granted against refusal to provide COVID-19 accommodations to voters pursuant to *Mi Familia Vota v. Abbott*, 977 F.3d 461, 463, 471 (5th Cir. 2020)).

[42] *SawariMedia LLC v. Whitmer*, No. 20-cv-11246, 2020 U.S. Dist. LEXIS 210877, at *1–2 (E.D. Mich. Oct. 19, 2020), reversed its initial grant of an injunction requiring COVID-19-related accommodations previously, although its initial injunction had previously been approved in *SawariMedia, LLC v. Whitmer*, 963 F.3d 595, 598 (6th Cir. 2020).

Similarly, the trial court ultimately denied COVID-19 accommodations to signature threshold and deadline requirements, though it had originally scheduled a hearing in *Kishore v. Newsom*, No. CV 20-5859-DMG (Ex), 2020 U.S. Dist. LEXIS 211126, at *6 (C.D. Cal. July 6, 2020). *See COVID-Related Election Litigation Tracker*, STANFORD-MIT HEALTHY ELECTIONS PROJECT, https://healthyelections-case-tracker.stanford.edu/detail?id=19 (last visited Jan. 17, 2023).

[43] Cases where other plaintiffs prevailed on political structure claims were also not frequently reversed.

Almost every one of the important cases protecting mobilization from earlier eras has been cited with approval by Roberts Court majority opinions. Cases protecting labor, civil rights, and anti-war organizers against retaliation or prosecution were cited as good law by six Roberts Court majority opinions.[44] Cases from the 1940s, 1960s, and 1970s protecting rights to protest, publicize, mobilize, and persuade against sanctions were cited as controlling in twelve majority opinions.[45] The repudiation of the red-baiting of the 1950s in *Brandenburg* and *Keyishian* were cited as controlling in eleven Roberts Court majority opinions.[46]

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[44] *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2377, 2382–83 (2021), cited the following Golden Age cases discussed above with approval: *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *Healy v. James*, 408 U.S. 169, 181–82 (1972); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415, 417, 444 (1963); *Shelton v. Tucker*, 364 U.S. 479, 480, 490 (1960); and *Bates v. City of Little Rock*, 361 U.S. 516, 517, 527 (1960).

Trump v. Vance, 140 S. Ct. 2412, 2428 (2020), cited *Dombrowski v. Pfister*, 380 U.S. 479, 484 (1965), as good law.

Janus v. American Federation of State, County & Municipal Employees, Council 31, 138 S. Ct. 2448, 2470 (2018), treated *Shelton v. Tucker*, 364 U.S. 479, 480, 490 (1960), as settled law.

All of the opinions in *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez*, 561 U.S. 661, 668 (2010), relied on *Healy v. James*, which protected Students for a Democratic Society. *See Martinez*, 561 U.S. at 699 (Stevens, J., concurring); *id.* at 703 (Kennedy, J., concurring); *id.* at 718–19 (Alito, J., dissenting).

Thomas v. Collins, 323 U.S. 516, 530, 547 (1945), which protected labor organizers, was cited as good law in *Houston Community College System v. Wilson*, 142 S. Ct. 1253, 1260 (2022), and *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011).

[45] *Janus*, 138 S. Ct. at 2464, cited *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). *Citizens United v. FEC*, 558 U.S. 310, 336 (2010), and *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007), also relied on *Thornhill.*

United States v. Alvarez, 567 U.S. 709, 717 (2012), treated *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) as good law. *See also* Elonis v. United States, 575 U.S. 723, 743 (2015) (Alito, J., concurring) (citing *Watts* with approval).

Cohen v. California, 403 U.S. 15, 19–21 (1971), was cited as controlling in *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2046 (2021); *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1951 (2018) (also citing *Brown v. Louisiana*, 383 U.S. 131, 142–43 (1966)); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 792–93 (2011); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 575 (2011); and *Snyder v. Phelps*, 562 U.S. 443, 459 (2011).

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928–29 (1982), was treated as governing law in *United States v. Williams*, 553 U.S. 285, 298–99 (2008). *See also* Mckesson v. Doe, 141 S. Ct. 48, 50 (2020) (certifying "negligent protest" theory of tort liability to the Louisiana Supreme Court in an effort to avoid First Amendment issues (citing *Claiborne Hardware Co.*, 458 U.S. at 842, 916–17)).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508–14 (1969), provided the basis of analysis in *Mahanoy Area School District*, 141 S. Ct. at 2048; *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1887 (2018); and *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

[46] *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam), was cited as governing law in seven opinions. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2056; Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017); United States v. Alvarez, 567 U.S. 709, 717 (2012); Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 309 (2012); *Brown*, 564 U.S. at 791; *Sorrell*, 564 U.S. at 576; *Williams*, 553 U.S. at 298–99.

Federal protection against defamation actions and prior restraints, forged to protect expression by civil rights organizers and anti-war critics, were cited as controlling in six Roberts Court cases.[47] And Roberts Court majorities regularly invoked protections of access to streets and sidewalks that laid the foundations of protections for labor and civil rights demonstrations.[48]

These foundational doctrines need no new work from the Roberts Court to form the basis for relief to progressives in lower courts. As illustrated by Table 10, the absence of progressive victories before the Roberts Court does not translate into the absence of progressive success at the firing line. The doctrines stand ready for use by participants in citizen-driven efforts for progressive change.

Thus, as set forth in Table 10, in the lower court sample, progressive litigants and their allies regularly prevailed in cases involving defamation, access to public forums, protests, and regulation of expressive activities at substantially greater rates than right-wing litigants. They could do so without making new law before the Roberts Court. And, because the Roberts Court has retained doctrines from the Golden Age, opponents had no basis to ask the Court to overturn the progressive victories on petitions for certiorari.[49]

Keyishian v. Board of Regents of the University of New York, 385 U.S. 589, 605–06, 609–10 (1967), was cited as controlling in four opinions. *Janus*, 138 S. Ct. at 2470; Lane v. Franks, 573 U.S. 228, 236 (2014); *Guarnieri*, 564 U.S. at 386; Holder v. Humanitarian L. Project, 561 U.S. 1, 39 (2010).

[47] *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 270, 292 (1964), was cited as controlling in six opinions. *Alvarez*, 567 U.S. at 717; Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 755 (2011); *Sorrell*, 564 U.S. at 567; *Snyder*, 562 U.S. at 452; *Citizens United*, 558 U.S. at 342; *Wis. Right to Life, Inc.*, 551 U.S. at 467–68.

New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam), was cited as good law in three opinions. *Alvarez*, 567 U.S. at 717–18; *Sorrell*, 564 U.S. at 568; *Citizens United*, 558 U.S. at 342.

[48] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) (sidewalks); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939) (streets and parks); Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) (citing Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983)); *Matal*, 137 S. Ct. at 1763; Edwards v. South Carolina, 372 U.S. 229, 237–38 (1963); *Knox*, 567 U.S. at 308–09; City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1472 (2022); Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2346 (2020); Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226–27 (2015) (first citing *Sorrell*, 564 U.S. at 565–66; then citing *Carey*, 447 U.S. at 462; and then citing *Mosley*, 408 U.S. at 95); McCullen v. Coakley, 573 U.S. 464, 477, 479 (2014).

[49] *See, e.g.*, Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453, 2454 (2022) (mem.) (denying certiorari); *cf. id.* at 2453 (Thomas, J., dissenting from the denial of certiorari) (disagreeing with the conclusion that the designation by the Southern Poverty Law Center of a homophobic Christian organization as a "hate group" was protected by "actual malice" enunciated by *New York Times v. Sullivan*).

Part of the observed discrepancy between progressive and right-wing success rates in lower courts may result from a selection effect: right-wing litigants may have been emboldened to bring weaker cases because of a perceived receptiveness of the Roberts Court, while progressive litigators may have culled the weaker cases that would not survive perceived hostility. *Cf.* Seth F. Kreimer, *Good Enough for Government Work: Two Cheers*

Table 10

Types of Claims Before Lower Courts Left/Right Rates

	Loss Left	Win Left	Win % Left	Loss Right	Win Right	Win % Right
Access to Information	6	16	72.73%	2	1	33.33%
Channels of Communication/3D	7	11	61.11%	12	10	45.45%
Channels of Communication/Online	4	4	50.00%	4	0	0.00%
Direct Regulation of Expressive Activity	34	29	46.03%	104	46	30.67%
Janus/Union Regulation	0	2	100.00%	17	2	10.53%
Libel Defense	1	9	90.00%	1	0	0.00%
Politics/Finance	1	3	75.00%	5	5	50.00%
Politics/Structure	17	14	45.16%	10	3	23.08%
Protest	15	16	51.61%	5	1	16.67%
Retaliation	8	3	27.27%	14	3	17.65%
Union Regulation	2	1	33.33%	1	0	0.00%
Grand Total	**95**	**108**	**53.20%**	**175**	**71**	**28.86%**

C. Content Neutrality: Virtual Representation by Right-Wing Litigants

A second reason that the predominance of right-wing victories before the Roberts Court does not entail a similar skew in the lower courts lies in the nature of the doctrines that the Roberts Court invoked. Because the core of current free expression doctrine requires equal treatment of speech, progressive litigants in lower courts can invoke cases where right-wing litigation prevails in a right-leaning Supreme Court.[50]

The modern Roberts Court has brought to the center of its doctrinal universe the mandate of content neutrality. The Roberts Court has proclaimed that "the proudest boast of our free speech jurisprudence is that we protect the freedom to

for Content Neutrality, 16 U. PA. J. CONST. L. 1261, 1288 (2014) ("[T]he robust left/right divergence, which is particularly striking at the district court level, could imply better lawyering by left-wing ideological attorneys, less aggressive case selection, or judicial inclination.").

[50] *See* Kreimer, *supra* note 49, at 1287.

express 'the thought that we hate.'"[51] It has declared that "the First Amendment prevents [government] from discriminating against speakers based on their viewpoint."[52] It has emphasized "the precedents restrict the government from discriminating 'in the regulation of expression on the basis of the content of that expression.'"[53]

Critics maintain that this doctrinal structure entrenches existing structures of domination and precludes speech regulation that would advance progressive values.[54] And it is true that prevailing "content neutrality" claims before the Roberts Court often involve litigants allied with right-wing causes.[55]

But the doctrinal focus on equal treatment also means that lawyers seeking to defend or facilitate grassroots progressive advocacy can deploy decisions issued by the current Supreme Court in litigating on behalf of litigants from the other side of the political struggle. The appealing posture right-wing litigants present to the Supreme Court's conservatives ultimately can redound to the benefit of progressive advocates at the firing line.[56]

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[51] *Matal*, 137 S. Ct. at 1764 (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)); *see, e.g.*, *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046 ("[S]chools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.' (Although this quote is often attributed to Voltaire, it was likely coined by an English writer, Evelyn Beatrice Hall.)").

[52] Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022).

[53] *Barr*, 140 S. Ct. at 2346 (quoting Hudgens v. NLRB, 424 U.S. 507, 520 (1976)); *see Reed*, 135 S. Ct. at 2227.

[54] *See supra* note 23 and accompanying text.

[55] *E.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2435 (2022) (Christian); *Shurtleff*, 142 S. Ct. at 1587 (Christian); *Reed*, 135 S. Ct. at 2225 (Christian); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (anti-abortion); Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1884 (2018) ("Tea Party Patriots"); McCullen v. Coakley, 573 U.S. 464, 469–70 (2014) (anti-abortion); *cf.* Snyder v. Phelps, 562 U.S. 443, 458 (2011) (homophobic Christians); *id.* ("[A] jury is 'unlikely to be neutral with respect to the content of [the] speech,' posing 'a real danger of becoming an instrument for the suppression of . . . "vehement, caustic, and sometimes unpleasan[t]"' expression." (first alteration added) (quoting Bose Corp. v. Consumers Union, Inc., 466 U.S. 484, 510 (1984))).

[56] *See* Kreimer, *supra* note 49, at 1324 (providing a fuller exposition of this point); *id.* ("Decisions based on a protective rule of content neutrality will redound to the plaintiff's ideological opposite Hampdens in the neighboring villages where majorities and minorities are reversed. Successful invocation by each side will yield a continuing stream of examples that highlight the breadth of the doctrine's beneficiaries."). To the extent that the Roberts Court moves toward reliance on religious claims for exemption from regulation under the Free Exercise Clause or the Religious Freedom Restoration Act, right-wing successes before the Supreme Court may be less generative of progressive leverage in lower courts. A great deal will turn on whether the progressive claims are couched as religious convictions and the degree to which the Roberts Court developed doctrines that differentially protect right aligned religious claims. *Cf.* United States v. Hoffman, 436 F. Supp. 3d 1272, 1277 (D. Ariz. 2020) (concluding the Religious Freedom Restoration Act mandated dismissal of trespassing prosecution against the religious organization No More Deaths, which tracked deaths of immigrants and left jugs of water in areas where human remains had been recovered).

One example from my experience illustrates the point. In *Minnesota Voters Alliance v. Mansky*, right-wing activists sought to wear their regalia to the polls: a "Please I.D. Me" button and a t-shirt bearing the words "Don't Tread on Me" adorned with a "Tea Party Patriots" logo.[57] Poll workers barred them on the basis of a state rule prohibiting "political" attire.[58] The Supreme Court held that this rule violated the First Amendment; the vagueness of the phrase "political" granted officials unconstitutionally unbridled discretion, threatening arbitrary and unequal enforcement.[59]

A year later, the Pennsylvania ACLU was approached by the Center for Investigative Reporting ("CIR"), which sought to run advertisements on Philadelphia-area buses highlighting CIR's findings of discrimination in the local housing and mortgage markets.[60] The transit authority refused to run the ads because it determined the ads violated an authority rule prohibiting "political" advertising.[61] When the ACLU brought suit on behalf of CIR, the effort to highlight structural racism benefitted from the work of the Tea Party Patriots: the Third Circuit relied on *Mansky* to conclude that the ban on "political" ads on buses was as improper as a ban on "political" attire at the polls.[62]

The outcomes surveyed here in the lower court sample reflect this dynamic more broadly. Right-wing litigants successfully carried the flag of content neutrality in the bulk of Roberts Court cases; but, in the lower courts, progressives and their allies found shelter under its banner at least as often. One of the most common areas in which litigants prevailed in the lower courts in the sample involved plaintiffs who sought access to public forums—streets, parks, and other government-controlled venues. In these cases, set forth in Table 11, right-wing plaintiffs succeeded in almost half of the cases they brought. But progressive plaintiffs succeeded in two-thirds of their cases, as did individuals of no discernable political orientation.[63]

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[57] 138 S. Ct. at 1879.

[58] *Id.* at 1884.

[59] *Id.* at 1885.

[60] Ctr. for Investigative Reporting v. Se. Pa. Transp. Auth., 975 F.3d 300, 304 (3d Cir. 2020).

[61] *Id.* at 308.

[62] *Id.* at 312.

[63] This result mirrors the finding from a census of lower courts invoking "content neutrality" in 2009–2013: the right-wing skew at the Supreme Court was reversed in the lower courts. Kreimer, *supra* note 49, at 1282–87, 1284 chart 2 (noting right-wing claimants succeed in 61% of Supreme Court content neutrality cases, but 44.6% of district court cases; progressive plaintiffs succeed in 14% of Supreme Court cases, but 55% of trial court cases); *see id.* at 1299–1300, 1300 chart 18 (noting both right-wing and left-wing plaintiffs prevailed roughly half of the time in public forum cases).

Table 11

Public Forum Cases in the Lower Court Sample

	Loss	Win	Win %
PUBLIC FORUM CASES			
Business	2	1	33.33%
Christian Individual	2	2	50.00%
Christian Organization	2	0	0.00%
Individual	4	9	69.23%
Left Individual	3	6	66.67%
Left Organization	2	3	60.00%
Nonprofit Organization	1	1	50.00%
Prison Litigant	1	0	0.00%
Religious Organization	1	1	50.00%
Right Individual	2	4	66.67%
Right Organization	4	3	42.86%
Grand Total	**24**	**30**	**55.56%**

Similarly, in cutting edge cases in the sample seeking to extend "public forum" principles to online venues, progressive plaintiffs and unaligned individuals in lower courts had success invoking content neutrality doctrines to achieve access to official Facebook pages and Twitter feeds.[64]

D. Protests, Facts, and the Norms of Trial Judges

A core element in the repertoire of popular mobilization in American history has been the protest demonstration.[65] Since the record-setting demonstrations in

[64] Felts v. Reed, 504 F. Supp. 3d 978, 988 (E.D. Mo. 2020) (concluding the resident's suit seeking access to Alderman's Twitter feed survived motion to dismiss); Attwood v. Clemons, 818 F. App'x 863, 865 (11th Cir. 2020) (holding that a gun control activist's action against Florida Representative for blocking him on Twitter and Facebook survived claim of immunity); West v. Shea, 500 F. Supp. 3d 1079, 1082, 1084 (C.D. Cal. 2020) (concluding that a BLM activist's action against mayor for blocking access to official Facebook page survived motion to dismiss on claim of immunity); Faison v. Jones, 440 F. Supp. 3d 1123, 1128–29 (E.D. Cal. 2020) (granting BLM activists' and police critics' injunction prohibiting discriminatory denial of access to sheriff's official Facebook page).

[65] *See, e.g.*, Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 119 (2001) ("In each era of American history, distinctive forms of organization and communication have characterized insurgent social movements.

early 2017, the United States has seen an upsurge in public protest.[66] The period sampled in the lower courts (January 2020–August 2021) includes several episodes of high public engagement, including the racial justice protests of the summer of 2020, mobilization around hostility to measures to combat COVID-19, and mobilization around the 2020 election and its aftermath.[67]

The Roberts Court has addressed protest issues on only six occasions, and it has leaned toward the right. In three cases, right-wing protestors' First Amendment claims prevailed.[68] In two cases, left-wing protestors' claims were defeated.[69] And one case remains unresolved: the Court remanded a damages

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Revolutionary agitation against Great Britain made use of committees of correspondence, boycotts, liberty poles, and pamphlets. Abolitionists published newspapers, wrote books, evolved networks of religious congregations, and developed the Underground Railroad. The labor movement wielded the strike, the paid organizer, the boycott, the 'free speech fight,' and the mass rally, while the Civil Rights movement supplemented these tactics with civil disobedience and protest marches organized in large part through networks of African-American churches and chapters of the NAACP."); Omar Wasow, *Agenda Seeding: How 1960s Black Protests Moved Elites, Public Opinion and Voting*, 114 AM. POL. SCI. REV., 638, 639 (2020) ("Nonviolent black-led protests played a critical role in tilting the national political agenda toward civil rights . . . .").

[66] *See, e.g.*, Jeremy Pressman, Erica Chenoweth, Tommy Leung, L. Nathan Perkins & Jay Ulfelder, *Protests Under Trump, 2017–2021*, 27 MOBILIZATION: AN INT'L Q. 13, 13 (2022); *Fox News Poll*, FOX NEWS (June 18, 2020), https://static.foxnews.com/foxnews.com/content/uploads/2020/06/Fox_June-13-16-2020_National_Topline_June-18-Release.pdf (noting question 49: reporting 18% of respondents participated in protests against police violence); Dana R. Fischer, Kenneth T. Andrews, Neal Caren, Erica Chenoweth, Michael T. Heaney, Tommy Leung, L. Nathan Perkins & Jeremy Pressman, *The Science of Contemporary Street Protest: New Efforts in the United States*, 5 SCI. ADVANCES REV., no. 10, 2019, at 1. For a monthly census of protests in the United States since January 2017, see *View/Download the Data*, CROWD COUNTING CONSORTIUM, https://sites.google.com/view/crowdcountingconsortium/view-download-the-data (last visited Jan. 17, 2023). For another census of 42,000 reported U.S. protest events, see Tommy Leung & Nathan Perkins, *Counting Protests in News Articles: A Dataset and Semi-Automated Data Collection Pipeline*, CORNELL UNIV. (Feb. 1, 2021), https://arxiv.org/abs/2102.00917.

[67] For discussion of these patterns, see Erica Chenoweth, Tommy Leung, Nathan Perkins, Jeremy Pressman & Jay Ulfelder, *The Trump Years Launched the Biggest Sustained Protest Movement in U.S. History. It's Not Over.*, WASH. POST (Feb. 8, 2021), https://www.washingtonpost.com/politics/2021/02/08/trump-years-launched-biggest-sustained-protest-movement-us-history-its-not-over/; Lara Putnam, Erica Chenoweth & Jeremy Pressman, *The Floyd Protests are the Broadest in U.S. History—and Are Spreading to White, Small-town America*, WASH. POST (June 6, 2020), https://www.washingtonpost.com/politics/2020/06/06/floyd-protests-are-broadest-us-history-are-spreading-white-small-town-america/; Jeremy Pressman & Austin Choi-Fitzpatrick, *Covid19 and Protest Repertoires in the United States: An Initial Description of Limited Change*, APSA PREPRINTS (July 7, 2020), https://preprints.apsanet.org/engage/apsa/article-details/5f04db0c9b0c8100192ffa60; Erica Chenoweth, Barton H. Hamilton, Hedwig Lee, Nicholas W. Papageorge, Stephen P. Roll & Matthew V. Zahn, *Who Protests, What Do They Protest, and Why?* 2–4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29987, 2022), https://www.nber.org/papers/w29987.

[68] Lefemine v. Wideman, 568 U.S. 1, 2 (2012) (granting attorney's fees to anti-abortion protestors); Snyder v. Phelps, 562 U.S. 443, 447 (2011) (involving homophobic Christian protest at funeral). While couched as a protection for anti-abortion "sidewalk counseling," *McCullen v. Coakley* can be viewed as a protest case as well. 573 U.S. 464, 472 (2014).

[69] United States v. Apel, 571 U.S. 359, 361 (2014) (anti-war protestor); Wood v. Moss, 572 U.S. 744, 759 (2014) ("anti-Bush protesters").

action against the organizer of a demonstration that protested a shooting by a local police officer with instructions that the court of appeals certify to the Louisiana Supreme Court the question of whether Louisiana state doctrine could avoid First Amendment issues.[70] The Louisiana Supreme Court declined to construe state law as avoiding the constitutional issues, and the outcome of the First Amendment claims remains uncertain.[71]

But the view from contemporary trial courts in the sample is different. One judge reported in 2021 that "[s]ince the last year's protests in the wake of George Floyd's killing, there have been no fewer than seventy-three cases exploring how these protests shine a light on existing First Amendment or Fourth Amendment principles."[72] Not all of these cases appear in the lower court sample. But, as indicated by Tables 12A and 12B, of the forty-five protest cases in the sample, twenty-nine involve protests regarding police brutality and racial justice. In contrast to the rightward skew at the Supreme Court, racial justice protestors in the lower courts prevailed or survived dismissal motions in more than two-thirds of cases (69.2%).[73]

In the smaller cohort of protest cases that did not involve police and race protests, the right-wing Roberts Court skew was also absent. The scattering of other progressive protestors in the sample prevailed in three of eight cases. Right-wing litigants prevailed in only one of six cases.

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[70] Mckesson v. Doe, 141 S. Ct. 48, 49, 51 (2020) (per curiam).

[71] Doe v. McKesson, No. 2021-CQ-00929, 2022 La. LEXIS 654, at *1 (La. Mar. 25, 2022). Since the First Amendment claim remains alive, *id.* at *26, the case was coded as one in which the claimant prevailed.

[72] Alsaada v. City of Columbus, 536 F. Supp. 3d 216, 251 (S.D. Ohio 2021).

[73] In addition, *Burbridge v. City of St. Louis*, 2 F.4th 774, 778 (8th Cir. 2021), was separately coded to reflect the fact that the plaintiff was a documentary filmmaker assaulted and arrested by police while recording George Floyd protestors. If included as a "protest" case, the success rate would be higher.

Two of the successful race and policing cases involve protests directed to issues of race and policing outside of the George Floyd protests. *See* Ortega v. City of St. Louis, No. 4:18 CV 1576 DDN, 2021 U.S. Dist. LEXIS 143904, at *4 (E.D. Mo. Aug. 2, 2021) (involving protests growing out the 2017 acquittal of then-police officer Jason Stockley of the charge of first-degree murder of Anthony Lamar Smith); Cantu v. City of Portland, No. 3:19-cv-01606-SB, 2020 U.S. Dist. LEXIS 97528, at *2, *19 (D. Or. June 3, 2020) (involving suit brought by counter-protestors opposing "Patriot Prayer," an organization of "far-right extremists" who "rall[y] for the causes of white supremacy, white nationalism, and xenophobia," which was alleged to have coordinated with police officers in assaulting counter-protestors).

Table 12A

Protest Cases in Lower Courts

PROTEST CASES	Loss	Win	Win %
Ag-gag	1	0	0.00%
Animal Rights	1	0	0.00%
Anti-abortion	4	0	0.00%
Anti-riot	1	2	66.67%
Environment	1	0	0.00%
Immigration	0	1	100.00%
Individual	2	2	50.00%
Pro-Trump	0	1	100.00%
Race/Police	8	18	69.23%
Turkish Dissident	0	1	100.00%
White Nationalist	1	0	0.00%
Women 2017	1	0	0.00%
Grand Total	**20**	**25**	**55.56%**

Table 12B

Police/Protest Cases

Police/Protest	Loss	Win	Win %
Anti-riot	1	2	66.67%
Race/Police	8	18	69.23%
Grand Total	**9**	**20**	**68.97%**

Why the difference at the trial level? Part of the answer, again, may lie in the fact that protest cases in the sample involve the application of settled prior law to disputed facts by trial courts. Challenges to excessive force and naked suppression of demonstrations invoked legal doctrines forged well before the emergence of the Roberts Court. And they are doctrines that the Roberts Court has reaffirmed. The legal issues in many of the protest cases, like many of the cases in the broader sample and unlike issues on which the Supreme Court grants certiorari, are not close ones on current doctrine.

Still, settled First Amendment doctrines often provide substantial degrees of freedom to trial judges in applying them to facts.

A second explanation for progressive success in the lower courts lies in the decision process. Examining the data in the sample, the application of law to fact was undertaken by trial judges. Forty-one of the forty-five cases in the sample were decided by district court judges or magistrates. Although resolution of factual issues is not free of the possibility of ideological tilt, trial judges confront the humanity of the individuals whose fates they decide, and they must respond to their arguments.[74] Unlike Supreme Court Justices, who decide cases on the basis of an hour of oral argument and pride themselves on their focus on cases where closely disputed legal issues predominate, trial judges are often required to subject their preconceptions to the extended presentations of trial evidence and argument.

Federal trial judges operate in a professional matrix that prizes care, accuracy, and fair-minded resolution. And there is the possibility of appeal. A trial judge who simply asserts that the facts before her match her preconceptions in the face of contrary determinative evidence is likely to be reversed. The same is not true for authors of opinions in the Supreme Court.[75]

In resolving issues involving public protests, modern technology plays a role. The emergence of pervasive citizen video image capture and sharing has facilitated organizing by the agents of progressive advocacy. As discussed below, cell phone videos and social media posting allow wide and vivid

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[74] *Compare* Dan M. Kahan, David A. Hoffman, Donald Braman, Danieli Evans & Jeffrey J. Rachlinski, *They Saw a Protest: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 880 (2012) (demonstrating that political orientation can affect perceptions of rights of protestors in recorded political demonstrations among student subjects), *with* Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 27–28 (2011) ("My guess is that such study would show, as it has in connection with a range of other sorts of cognitive biases, that judges do in fact possess habits of mind that help to counteract the potentially distorting effects of identity-protective cognition, but not perfectly." (footnote omitted)), *and* Dan M. Kahan, David Hoffman, Danieli Evans, Neal Devins, Eugene Lucci & Katherine Cheng, *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 412 (2016) ("[T]he study results complement and extend other work showing that judges can be expected to display at least some measure of immunity to cognitive biases thought to interfere with the performance of their jobs.").

[75] *Compare* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 (2022) ("Mr. Kennedy has indicated repeatedly that he is willing to 'wai[t] until the game is over and the players have left the field' to 'wal[k] to mid-field to say [his] short, private, personal prayer.'" (alterations in original)), *with id.* at 2436, 2438–39 (Sotomayor, J., dissenting) (reproducing photographs of Kennedy praying in the middle of a milling crowd of both the public and players).

exposure of injustice. Those images also allow advocates in court to persuade potentially skeptical trial judges that their claims in fact have visible merit.

As set forth in Table 13, among the racial protest cases in the sample, three quarters of the opinions reported presentation of video evidence. In cases where video evidence was reported, progressive claimants succeeded in three quarters. In the smaller set of cases where no video evidence was reported, success and failure were almost evenly divided.

Table 13

Race/Police Protest Cases and Video Evidence

Race/Police Protest	Loss	Win	Total	Win %
No Video	3	4	7	57.14%
Video	5	14	19	73.68%
Total	**8**	**18**	**26**	**69.23%**

A final reason that the rightward skew does not appear in protest cases may arise from the fact that the Supreme Court resolves cases by majority vote, and the Roberts Court is staffed by an increasingly solid majority of Justices hostile to progressive causes. By contrast, district courts are roughly equally divided between appointees of Democratic and Republican presidents.[76] In the aggregate, any particular case in the contemporary environment has a roughly even chance of drawing a determinative decision-maker whose sympathies initially lie with the right or left.

The racial protest cases in the sample set forth in Table 14 provide an intimation of this effect. The bulk of these cases were decided by judges appointed by Democratic presidents or by magistrates appointed by a merit selection process. Progressive claimants prevailed in 79% of these cases. By contrast, in the smaller cohort of cases decided by Republican appointees, plaintiffs prevailed only 20% of the time.[77]

[76] *See* Russell Wheeler, *Can Biden 'Rebalance' the Judiciary?*, BROOKINGS (Mar. 18, 2021), https://www.brookings.edu/blog/fixgov/2021/03/18/can-biden-rebalance-the-judiciary/ ("There are 311 Democratic-appointed district judges in active status and 310 Republican appointees . . . .").

[77] This is a small sample, and it is important to resist overreading the data. The cases may be subject to geographical effects, selection effects, and the possibility that particular judges are differentially inclined to publish opinions. For further discussion of publication effects, see *infra* note 93.

Table 14

Anti-Riot and Protest Cases and Appointing Party

	Loss	Win	Win%
D/D/R Panel	0	1	100.00%
Democratic	2	11	84.62%
Magistrate	3	7	70.00%
Republican	4	1	20.00%
Grand Total	**9**	**20**	**68.97%**

E. The First Amendment and Persuasion: Protection in Lower Courts for Dissemination and Access to Information by Advocates for Progressive Change

As noted above, more than half of the police and race protest cases in the lower court sample involved the presentation of evidence gathered by citizen or media videographers. And commentators from both the activist and law enforcement communities have recognized that the capture and deployment of images of police violence was crucial to the mobilization that led to the spread of protests against police abuse.[78]

The ability to disseminate these images has been protected by the settled doctrines forged in the Golden Age that immunize debate on public issues both from censorial defamation litigation and official pressure.[79] As of this writing, Twitter, Instagram, Facebook, and TikTok have First Amendment protection

[78] *See, e.g.*, Jamillah Bowman Williams, Naomi Mezey & Lisa Singh, *#BlackLivesMatter—Getting from Contemporary Social Movements to Structural Change*, 12 CALIF. L. REV. ONLINE 1, 7–8 (2021) ("The renewed attention and activism that George Floyd's death inspired in 2020 was possible because video images and social media were effectively harnessed to transform injuries and outrages that were well-known within Black communities into injustices that could no longer be ignored by the broader population."); Sean Patrick Roche, Danielle M. Fenimore & Paul Taylor, *But Did They Get It "Right"? Deadly Force, Body-Worn Camera Footage, and Hindsight Bias*, 45 POLICING: AN INT'L J. 618, 618–19 (2022) ("[T]he 'post–Ferguson' era of public scrutiny . . . is a result of the increasing awareness of this violence among the public stemming from profound increases in the prevalence of technologies for capturing and disseminating video documentation." (citation omitted)).

[79] *See* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 41–42 (2006).

against being dragooned by hostile courts and governments into the role of proxy censors of inconvenient images or social movements.[80]

But a precondition of such deployment is the ability initially to document official misconduct. If officials can prevent citizens from obtaining, gathering, or recording images in the first place, the images cannot be deployed to mobilize for change. It is here that the view from lower court cases becomes particularly important.

The Supreme Court has established a limited right to obtain official information used in court.[81] And the doctrinal foundations of First Amendment protection for citizen documentation have been laid in Supreme Court cases before the advent of the Roberts Court.[82] But the Court has not directly addressed the issue of a right of citizen documentation and has not yet explicitly recognized a more general First Amendment right of access to information.

In the lower courts, by contrast, rights of access to information have flourished, and the crucial First Amendment right to observe and record information regarding public issues and official conduct has become firmly established.[83] As illustrated by Tables 15A and 15B, in the lower court sample

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[80] *See id.* at 22. The protection is coming under attack by some elements of the Roberts Court. *Compare* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (protecting "uninhibited, robust, and wide-open" discussion of civil rights issues in media from defamation litigation), *with* Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453, 2455 (2022) (mem.) (Thomas, J., dissenting from denial of certiorari) (advocating reversal of protection against defamation litigation); *compare* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (holding that First Amendment barred injunction against publication of alleged state secrets), *and* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 65 n.6 (1963) (noting that the First Amendment barred efforts to intimidate book stores into refusing to carry disfavored books), *and* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 121 (1973) (holding that broadcasters were not obligated to publish paid issue advertisements), *with* NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1718 (2022) (mem.) (Alito, J., dissenting) (advocating for government intervention in autonomy of social media sites), *and* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1227 (2021) (mem.) (Thomas, J., concurring) (same).

The coming Term may illuminate the status of the autonomy of internet intermediaries under the Barrett-augmented Court. *See* Petition for Writ of Certiorari, Att'y Gen. v. NetChoice, LLC, No. 22-277 (Sept. 21, 2022); NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 492 (5th Cir. 2022) (upholding constitutionality of statute notwithstanding Supreme Court stay).

[81] *See, e.g.*, David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 840 (2017).

[82] *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 371–73 (2011).

[83] *See, e.g.*, Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing "First Amendment right to film matters of public interest"); Irizarry v. Yehia, 38 F.4th 1282, 1294 (10th Cir. 2022) ("Although neither the Supreme Court nor the Tenth Circuit has recognized a First Amendment right to record the police performing their duties in public, we hold that the right was clearly established here based on the persuasive

examined here, litigants asserting a right of access to information succeeded in more than half of the cases, with success between media and left litigants predominating.[84]

Table 15A

Access to Information Cases

Access to Information	Loss	Win	Win %
Access to News Conference	0	2	100.00%
Drones	0	1	100.00%
Investigation	0	4	100.00%
Records	5	5	50.00%
Video	13	11	45.83%

authority from six other circuits, which places the constitutional question 'beyond debate.'" (quoting Cummings v. Dunn, 913 F.3d 1227, 1239 (10th Cir. 2019))); Am. Civ. Liberties Union v. Alvarez, 679 F.3d 583, 589 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Turner v. Lieutenant Driver, 848 F.3d 678, 690 (5th Cir. 2017); Gericke v. Begin, 753 F.3d 1, 7 (1st Cir. 2014); Fields v. City of Philadelphia, 862 F.3d 353, 355, 360 (3d Cir. 2017); Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1203 (9th Cir. 2018); Project Veritas Action Fund v. Rollins, 982 F.3d 813, 837, 844 (1st Cir. 2020); Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1228 (10th Cir. 2021); Chestnut v. Wallace, 947 F.3d 1085, 1090 (8th Cir. 2020). *But cf.* Frasier v. Evans, 992 F.3d 1003, 1022 (10th Cir. 2021) (finding right to record police not clearly established in 2014); Clark v. Stone, 998 F.3d 287, 303 (6th Cir. 2021) (finding right to film social worker during home visit not clearly established).

[84] Likewise, in the struggle in Graham, North Carolina, discussed *infra* notes 86–90, federal vindication of rights to protest appears in the federal court sample in *Allen v. City of Graham*, No. 1:20-CV-997, 2021 U.S. Dist. LEXIS 103255, at *16 (M.D.N.C. June 2, 2021). A parallel state case provided access to video compiled by official sources that documented the level of police abuse of demonstrators. *See* Jordhan Wilkie, *Body Cam Footage from Graham March Made Public Despite Court Delays*, CAROLINA PUB. PRESS (July 7, 2021), https://carolinapublicpress.org/46996/body-cam-footage-from-graham-march-made-public-despite-court-delays/. The state trial court provided access, invoking the First Amendment right of access to public records in court cases and commenting:

> There is good cause shown to release all portions of the recording. This Court finds that the photos and the recordings speak for themselves, and this Court does not have the authority to sensor [sic] this information absent a legitimate or compelling state interest not to do so. Most importantly this Court gives great weight to transparency and public accountability with regard to police action and considers a failure to release this information to possibly undermine the public interest and confidence in the administration of justice.

Quoted in Brief for the Media Coalition Appellees at 6, *In re* Custodial L. Enf't Recordings Sought by the McClatchy Co., 2022 WL 1157232 (N.C. Ct. App. Apr. 1, 2022) (No. 21-716).

Table 15B

Identity of Claimants

	Loss	Win	Win %
Access to Information	**19**	**22**	**53.66%**
Individual	11	5	31.25%
Left Individual	2	1	33.33%
Left Organization	1	4	80.00%
Media	3	11	78.57%
Right Individual	1	0	0.00%
Right Organization	1	1	50.00%

As displayed in Table 16 below, in cases involving a First Amendment right to video-record public officials, successful cases came almost exclusively from the left or unaffiliated individuals.

Table 16

Video Claims

	Loss	Win	Win %
Video	**13**	**11**	**45.83%**
Individual	9	5	35.71%
Left Individual	1	1	50.00%
Left Organization	0	1	100.00%
Media	1	3	75.00%
Right Organization	1	1	50.00%
Right Individual	1	0	0.00%

CONCLUSION

In closing, I want to emphasize three points.

First, examined from the firing line, First Amendment doctrine is not monopolized by the forces of reaction. It continues to open doors for advocates of progressive social change.

Second, First Amendment doctrine opens doors; it does not propel progressive organizers and advocates across the threshold. Progressive success in the courts often comes on a schedule that fails to match the pace of social contention. The crucial element is the willingness of organizers, activists, and citizens to take risks and initiative and to persist.

In my sample, demonstrators against racism and police violence in Graham, North Carolina, who turned out to march to the polls on October 31, 2020, were met with pepper spray and arrests by local police and sheriff's deputies.[85] The protestors, who planned another voting rights rally for Election Day, responded with a complaint requesting injunctive relief and damages.[86] No preliminary relief was granted.[87] But amid the national scrutiny and legal mobilization, the demonstrators again turned out on election day—this time without repression.[88] Their First Amendment claims survived a motion to dismiss, and they ultimately

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[85] *Allen*, 2021 U.S. Dist. LEXIS 103255, at *5.

[86] Complaint for Temporary Restraining Order and Emergency Declaratory and Injunctive Relief at 3, 21, Drumwright v. Johnson, No. 1:20-CV-997/1:20-CV-998, 2020 WL 6472463 (M.D.N.C. Nov. 2, 2020) (No. 1:20-cv-00998-CCE-LPA) ("Plaintiffs Drumwright and J4tNG plan to hold a get-out-the-vote march in Graham on Election Day, November 3, 2020, and all Plaintiffs intend to continue to exercise their First Amendment rights to protest police violence . . . .").

[87] *Cf. Allen*, 2021 U.S. Dist. LEXIS 103255, at *5, *31 (dismissing constitutional claims associated with requests for preliminary relief).

[88] *See* Elaina Athans, *Reverend Leads Second March to the Polls Days After Graham Law Enforcement Used Pepper Spray to End First One*, ABC 11 (Nov. 3, 2020), https://abc11.com/graham-nc-pepper-spray-rev-greg-drumwright-alamance-county/7610741/; Johnathan Drake, Photograph of protestors, *in Reverend Greg Drumwright and Demonstrators March for Voting Rights on Election Day in Graham, North Carolina, U.S.*, ALAMY (Nov. 3, 2020), https://www.alamy.com/reverend-greg-drumwright-and-demonstrators-march-for-voting-rights-on-election-day-in-graham-north-carolina-us-november-3-2020-reutersjonathan-drake-image384380133.html.

recovered almost half a million dollars in damages.[89] It was the willingness of advocates to take risks that made their work effective.[90]

The moral here is that the courts can often help provide opportunities, but it is only with the hard work and courage involved in taking advantage of the opportunities the First Amendment preserves that progressive campaigns for social change can succeed.

Third, and most sobering, the view from the marble palace is not entirely an illusion. There has been a rightward drift under the Roberts Court, and future developments could threaten the current opportunities. Moreover, the doors that the current First Amendment doctrine opens are open to all: the forces of reaction can step through them on an equal footing with advocates of progressive social change.[91]

In the end, for progressive advocates today as in the past, lamenting those forces of reaction—or their successes before the Supreme Court—is not a strategy. To borrow the words of Joe Hill: "Don't waste any time in mourning. *Organize*."[92]

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[89] *Allen*, 2021 U.S. Dist. LEXIS 103255, at *31; *see also Case: Drumwright v. Cole*, C.R. LITIG. CLEARINGHOUSE (June 23, 2022), https://clearinghouse.net/case/17830/ (providing a fuller account); Isaac Groves, *Alamance County, Graham to Pay $120K to Settle Protest Lawsuit*, TIMES NEWS, https://www.thetimesnews.com/story/news/2021/06/11/graham-alamance-county-pay-120-k-settle-one-protest-lawsuit-oct-31-voting-rights-first-amendment/7622753002/ (June 11, 2021, 4:32 PM); Jordan Wilkie, *Graham Police Chief Admits Officers' Unprofessionalism; City Denies Wrongdoing*, CAROLINA PUB. PRESS (July 15, 2021), https://carolinapublicpress.org/47152/graham-police-chief-admits-officers-unprofessionalism-city-denies-wrongdoing/; Rusty Jacobs, *City of Graham, Law Enforcement Agencies, Civil Rights Group Settle Lawsuit Over 2020 Protest*, N.C. PUB. RADIO (June 15, 2022), https://www.wunc.org/news/2022-06-15/city-of-graham-law-enforcement-agencies-civil-rights-group-settle-lawsuit-over-2020-protest (reporting additional $336,000 settlement).

[90] Indeed, the plaintiffs had met a prior wave of repression by successfully suing local officials in the summer of 2020 for adopting a manifestly unconstitutional anti-protest ordinance and banning protests near a Confederate statue. NAACP Alamance Cnty. Branch v. Peterman, No. 1:10CV613/1:20-CV-613, 2020 U.S. Dist. LEXIS 141860, at *3–4 (M.D.N.C. Aug. 7, 2020), *injunction granted by* NAACP Alamance Cnty. Branch v. Peterman, 479 F. Supp. 3d 231, 233–34, 241 (M.D.N.C. 2020); *see NAACP Alamance v. Peterman (Protest Rights)*, ACLU N.C., https://www.acluofnorthcarolina.org/en/cases/naacp-alamance-v-peterman-protest-rights (Apr. 21, 2021). *See generally* Carli Brosseau, *In a Small NC Town, a Battle for Racial Justice Confronts Bloody Past and an Uncertain Future*, THE NEWS & OBSERVER, https://www.newsobserver.com/news/state/north-carolina/article251204239.html (Feb. 24, 2022, 2:27 PM).

[91] *See* Kreimer, *supra* note 65, at 148.

[92] 16 JOE HILL, THE INTERNATIONAL SOCIALIST REVIEW 330 (1915).

APPENDIX: METHODOLOGY

A. Samples

1. Supreme Court

In the fall of 2021, I reviewed every case decided by the Supreme Court since the appointment of Chief Justice Roberts: cases from the 2005 Term through the 2021 Term. That review yielded 104 cases in which the First Amendment was a determinative issue, including shadow docket cases where relief was granted without full briefing.

2. Lower Courts

During the fall of 2021, a research assistant and I reviewed a sample of lower court federal cases from the prior two years which were identified by the LEXIS search [(speech or expression) and "first amendment" and not (counsel (pro se))].

The review examined cases decided in ten of twenty months between January 2020 and August 2021.[93] I excluded pro se cases, in which plaintiffs are almost invariably unsuccessful, and which almost invariably generate opinions providing no guidance to attorneys, advocates, citizens, or officials.

After reviewing the cases identified by the search, we excluded cases in which First Amendment claims were not actually at issue. We also excluded cases involving claims by employees regarding discharges, compensation, or working conditions because employment cases almost always primarily invoked contract law or employment discrimination law and added First Amendment claims as auxiliary theories in ways that had very little political valence. This left a total of 741 cases. Excluding cases in which the decision was entirely procedural and thus had no political valence yielded a total of 733 cases.

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[93] We reviewed cases appearing in LEXIS that were decided in January 2020, February 2020, June 2020, July 2020, October 2020, November 2020, December 2020, June 2021, July 2021, and August 2021.

More rigorous research than my own suggests that online published opinions do not represent the entire universe of decided cases, although the reported case percentage seems to be increasing. *See* Alexander A. Reinert, *Measuring Selection Bias in Publicly Available Judicial Opinions*, 38 REV. LITIG. 255, 262 & tab.1 (2019) (finding a publication rate of motion to dismiss opinions to be 57.5% in 2006 and 72% in 2010).

Judges seem marginally more likely to publish opinions granting motions to dismiss than those denying motions to dismiss. *Id.* at 269 tab.7 (showing in 2006, motions to dismiss were granted in 37.3% of PACER cases and 40.4% of published cases, and in 2010, motions to dismiss were granted in 51.7% of PACER cases and 54.5% of published cases).

Table A

Lower Court Sample

	Loss	Procedural Decision	Win	Grand Total
Circuit	100	3	65	168
District	346	5	222	573
Grand Total	**446**	**8**	**287**	**741**

B. Coding

1. Types of Claimants

The party invoking First Amendment free expression rights, whether postured as the defendant or the plaintiff, was designated the "claimant."

Claimants were coded in constellations of cultural and political affiliation in sixteen categories:

1. Adult Business
2. Business
3. Christian Individual
4. Christian Organization
5. Individual
6. Left Individual
7. Left Organization
8. Media
9. Municipality
10. Nonprofit Organization
11. Prison Litigant
12. Religious Individual
13. Religious Organization
14. Right Individual

15. Right Organization

16. Union

"Business" claimants [category 2] were generally not disaggregated by product service or size.

"Adult Businesses" [category 1], however, which provide sexualized goods or services and are subject to distinctive First Amendment doctrines, were coded separately, as were "Media" claimants [category 8] for the same reason.

"Christian Individual" [category 3] and "Christian Organization" [category 4] claimants included conservative Christian organizations and activists seeking to evangelize, to publicize their commitments, to challenge COVID-19 precautions, to oppose rights for LGBTQ+ individuals, to limit abortions, or to avoid anti-harassment, anti-discrimination, or other regulatory obligations. It did not include the occasional progressive Christian litigants, which were coded "Religious Individuals."

"Religious Individual" [category 12] and "Religious Organization" [category 13] claimants, who sought to exercise non-Christian religious beliefs, included Muslims, adherents of Krishna Consciousness, the Thai Meditation Association of Alabama, Jewish organizations, and the Satanic Temple. They were coded separately. This category also included a Christian pastor seeking protection for her ministry to asylum seekers who did not fit in the right-wing constellation that typified Christian claimants.

"Nonprofit Organization" [category 10] claimants of no discernible political orientation and "Union" claimants [category 16] were coded separately.

"Left Individual" [category 6] and "Left Organization" [category 7] claimants included protestors against racism and police brutality, advocates of criminal justice reform, Democratic activists, proponents of electoral reform, voting rights, Native American activists, antimilitary demonstrators, animal rights activists, immigrant rights activists, environmental activists, civil rights protestors, LGBTQ+ rights activists, advocates of the homeless, and proponents of reproductive autonomy.

"Right Individual" [category 14] and "Right Organization" [category 15] claimants included conservative secular activists ranging from proponents of confederate monuments; "Unite the Right" demonstrators; and the Sons of Confederate Veterans; through the Islamophobic "American Freedom Defense Initiative"; the Chamber of Commerce; Ted Cruz; the Illinois Republican Party;

"Cowboys for Trump" and the Trump campaign; anti-union activists; libertarians; opponents of LGBTQ+ rights, abortion and immigration; conservative college enthusiasts; Prager University; and "Project Veritas"; to gun rights and property rights groups; anti-vaccine enthusiasts; Q-Anon proponents; and "Latinos for Trump"; which sought relief from the 2020 presidential election.

"Individuals" [category 5] included politically unaligned individual claimants: parents, students, motorcycle clubs, idiosyncratic local curmudgeons, political enthusiasts and gadflies, artists, property owners, former sex offenders, and an individual who was arrested after vehemently protesting a court clerk's refusal to accept payment for his $10 parking ticket with $10 in rolled pennies.

"Prison Litigants" [category 11], who were subject to distinctive First Amendment doctrines, were coded separately.

2. Right/Left

Business, Christian Individual, Christian Organization Right Individual, and Right Organization claimants, together, were coded as "right" claimants.

Adult Business, Left Individual, Left Organization, Media Nonprofit Organization, Religious Individual, Religious Organization, and Union claimants were coded as "left" claimants.

3. Win/Loss

When a claimant asserting First Amendment claims prevailed on any issue in a case, the case was coded a "win," regardless of whether the decision was final or interlocutory. The rationale here is that in looking for guidance, both future claimants and governments will treat interlocutory determinations as indicative of viable claims. Where the decision is purely procedural, it was coded as "Procedural," leaving a total of 733 cases, which were either wins or losses.

This coding may inflate the ultimate success rates of claimants where an interlocutory determination is reversed either on appeal or by future final determinations.

The coding also does not disaggregate issues present in a single case. The rationale here is that in many cases, plaintiffs invoke a variety of theories to challenge a government action and may obtain relief if they prevail on any of them. Again, in some cases, this characterization may inflate success rates;

where a plaintiff challenges a package of government actions (for example, an array of regulations interfering with demonstrations) and prevails against only one of the packages, the case is coded as a win. Life is short.

4. Case Types

"Case Type" coding refers to the predominant set of First Amendment issues in the case.

Most of the codings are obvious and distinctive.