AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights: Free Speech: Advocacy

**Nieves v. Bartlett**, \_\_\_ U.S. \_\_\_ (2019)

*Sergeant Luis Nieves was on patrol during the Arctic Man festival held near Paxson, Alaska. Early in the morning, he asked Russell Bartlett to move his beer keg inside to prevent underage drinking. Nieves claims Bartlett refused to speak to him. Later, Nieves began interrogating a minor he suspected of underage drinking. Bartlett intervened, urging the minor not speak with police officers. Some shoving occurred. Nieves’s partner, Trooper Bryce Weight took Bartlett to the ground. Nieves and Weight subsequently arrested Bartlett for disorderly conduct and resisting arrest. Bartlett clams that as he was arrested, Nieves said, “[B]et you wish you would have talked to me now.” After charges were dismissed, Bartlett filed a* [*§ 1983*](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *lawsuit against Nieves, claiming that the officer had arrested him in violation of his free speech rights under the First Amendment as incorporated by the due process clause of the Fourteenth Amendment because he had refused to speak to Nieves earlier in the night. Nieves claimed that Bartlett’s facts were false and, even so, the arrest was constitutional because he had probable cause to arrest Bartlett for disorderly conduct. The local federal district court granted Nieves’s motion for summary judgment, but that decision was reversed by the Court of Appeals for the Ninth Circuit. Nieves appealed to the Supreme Court of the United States.*

*The Supreme Court by an 8-1 vote declared that Nieves had not violated constitutional rights. Chief Justice John Roberts’s majority opinion held that, except in rare circumstances, plaintiffs could not make retaliatory arrest claims when probable cause existed that they had committed a crime. Under what conditions does Roberts believe persons have a legal claim of retaliatory arrest, even when probable cause exists that they have committed a crime? Why does Justice Clarence Thomas think probable cause is always a bar to a claim of retaliatory arrest? Why do Justices Sonya Sotomayor and Ruth Bader Ginsburg think the Chief Justice’s standard too strict? Who has the better of the argument? Note that many facts in this case were in dispute. Was this a good vehicle to discuss the legal standards for retaliatory arrest? Why did the justices take this case?*

Chief Justice [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If5759612813e11e9ab27b3103407982a) delivered the opinion of the Court.

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“[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions” for engaging in protected speech. . . To prevail on such a claim, a plaintiff must establish a “causal connection” between the government defendant's “retaliatory animus” and the plaintiff's “subsequent injury.” . . . Specifically, it must be a “but-for” cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.

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. . . . Like retaliatory prosecution cases, “retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury.” The causal inquiry is complex because protected speech is often a “wholly legitimate consideration” for officers when deciding whether to make an arrest. Officers frequently must make “split-second judgments” when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is “ready to cooperate” or rather “present[s] a continuing threat.” Indeed, that kind of assessment happened in this case. The officers testified that they perceived Bartlett to be a threat based on a combination of the content and tone of his speech, his combative posture, and his apparent intoxication.

In addition, “[l]ike retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case.” And because probable cause speaks to the objective reasonableness of an arrest, its absence will—as in retaliatory prosecution cases—generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite.

. . . . Unlike retaliatory prosecution cases, retaliatory arrest cases do not implicate the presumption of prosecutorial regularity or necessarily involve multiple government actors (although this case did). But regardless of the source of the causal complexity, the ultimate problem remains the same. For both claims, it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct. Because of the “close relationship” between the two claims, their related causal challenge should lead to the same solution: The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest.

Bartlett . . . argues that the “causation in retaliatory-arrest cases is not inherently complex” because the “factfinder simply must determine whether the officer intended to punish the plaintiff for the plaintiff's protected speech.” That approach fails to account for the fact that protected speech is often a legitimate consideration when deciding whether to make an arrest, and disregards the resulting causal complexity previously recognized by this Court. . . .

In the Fourth Amendment context, . . . “we have almost uniformly rejected invitations to probe subjective intent.” . . . Because a state of mind is “easy to allege and hard to disprove,” a subjective inquiry would threaten to set off “broad-ran[https://i1.next.westlaw.com/StaticContent_45.2.1025/images/v1/flag_yellow_small.png?ignoreDeliveryNewLine](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ia09f6e839c9a11d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=984f5da227ef44689cdd7886324a35b4&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))ging discovery” in which “there often is no clear end to the relevant evidence.” As a result, policing certain events like an unruly protest would pose overwhelming litigation risks. . . .

. . . .As the parties acknowledge, when [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was enacted in 1871, there was no common law tort for retaliatory arrest based on protected speech. We therefore turn to the common law torts that provide the “closest analogy” to retaliatory arrest claims. The parties dispute whether the better analog is false imprisonment or malicious prosecution. . . . Here, both claims suggest the same result: The presence of probable cause should generally defeat a First Amendment retaliatory arrest claim. Malicious prosecution required the plaintiff to show that the criminal charge against him “was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice.” . . .

For claims of false imprisonment, the presence of probable cause was generally a complete defense for peace officers. . . .

Although probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. In such cases, an unyielding requirement to show the absence of probable cause could pose “a risk that some police officers may exploit the arrest power as a means of suppressing speech.” . . . For example, at many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest. . . . For those reasons, we conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been. . . .

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If5759612813e11e9ab27b3103407982a), concurring in part and concurring in the judgment.

When [42 U.S.C. § 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was enacted, “the common law recognized probable cause as an important element for ensuring that arrest-based torts did not unduly interfere with the objectives of law enforcement.” Applying that principle resolves this case: “[P]laintiffs bringing a First Amendment retaliatory-arrest claim under [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) should have to plead and prove a lack of probable cause.” . . . I do not join Part II–D, however, because I do not agree that “a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.” . . . The common law provides no support for this exception. Indeed, the majority cites not a single common-law case that supports imposing liability based on an officer's treatment of similarly situated individuals. . . . The majority's exception is also untethered from our First Amendment precedents. . . .

With no guidance from the common law or relevant precedents, the majority crafts its exception as a matter of policy. But this “narrow” qualification threatens to derail our retaliation jurisprudence in several ways. For one, although the majority's stated concern is with “ ‘warrantless misdemeanor arrests’ ” for “ ‘very minor’ ” offenses like “jaywalking,” its exception apparently applies to all offenses, including serious felonies. . . . Moreover, the majority's rule risks chilling law enforcement officers from making arrests for fear of liability, thus flouting the reasoning behind the emphasis on probable cause in arrest-based torts at common law. . . .

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If5759612813e11e9ab27b3103407982a), concurring in part and dissenting in part.

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. . . . History shows that governments sometimes seek to regulate our lives finely, acutely, thoroughly, and exhaustively. In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age. . . .

So if probable cause can't erase a First Amendment violation, the question becomes whether its presence at least forecloses a civil claim for damages as a statutory matter under [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). But look at that statute as long as you like and you will find no reference to the presence or absence of probable cause as a precondition or defense to any suit. Instead, the statute imposes liability on anyone who, under color of state law, subjects another person “to the deprivation of any rights, privileges, or immunities secured by the Constitution.” . . .

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. . . . [T]he point of the common law tort of false arrest or false imprisonment was to remedy arrests and imprisonments effected without lawful authority. So maybe probable cause should be enough today to defeat claims for false arrest or false imprisonment, given that arrests today are usually legally authorized if supported by probable cause. But that doesn't mean probable cause is also enough to defeat a First Amendment retaliatory arrest claim. The point of this kind of claim isn't to guard against officers who lack lawful authority to make an arrest. Rather, it's to guard against officers who abuse their authority by making an otherwise lawful arrest for an unconstitutional reason.

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Everyone accepts that a detention based on race, even one otherwise authorized by law, violates the Fourteenth Amendment's Equal Protection Clause. . . . Following our lead, the courts of appeals have recognized that [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) plaintiffs alleging racially selective arrests in violation of the Fourteenth Amendment don't have to show a lack of probable cause, even though they might have to show a lack of probable cause to establish a violation of the Fourth Amendment. . .

I can think of no sound reason why the same shouldn't hold true here. Like a Fourteenth Amendment selective arrest claim, a First Amendment retaliatory arrest claim serves a different purpose than a Fourth Amendment unreasonable arrest claim, and that purpose does not depend on the presence or absence of probable cause. We thus have no legitimate basis for engrafting a no-probable-cause requirement onto a First Amendment retaliatory arrest claim.

. . . . It seems to me that probable cause to arrest could still bear on the claim's viability in at least two ways that warrant further exploration in future cases. First, consider causation. . . . [I]f the officer had probable cause at the time of the arrest to think the plaintiff committed a serious crime of the sort that would nearly always trigger an arrest regardless of speech, then (absent extraordinary circumstances) it's hard to see how a reasonable jury might find that the plaintiff's speech caused the arrest. . . . In the name of causation concerns, the officers ask us to go further still and hold that a plaintiff can never prove protected speech caused his arrest without first showing that the officers lacked probable cause to make an arrest. But that absolute rule doesn't wash with common experience. No one doubts that officers regularly choose against making arrests, especially for minor crimes, even when they possess probable cause. So the presence of probable cause does not necessarily negate the possibility that an arrest was caused by unlawful First Amendment retaliation.

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For today, I believe it is enough to resolve the question on which we did grant certiorari—whether “probable cause defeats ... a First Amendment retaliatory-arrest claim under [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).” I would hold, as the majority does, that the absence of probable cause is not an absolute requirement of such a claim and its presence is not an absolute defense. At the same time, I would also acknowledge that this does not mean the presence of probable cause is categorically irrelevant: It may bear on causation, and it may play a role under But rather than attempt to sort out precisely when and how probable cause plays a role in First Amendment claims, I would reserve decision on those questions until they are properly presented to this Court and we can address them with the benefit of full adversarial testing.

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If5759612813e11e9ab27b3103407982a), concurring in the judgment in part and dissenting in part.

Arrest authority, as several decisions indicate, can be abused to disrupt the exercise of First Amendment speech and press rights. Given the array of laws proscribing, e.g., breach of the peace, disorderly conduct, obstructing public ways, failure to comply with a peace officer's instruction, and loitering, police may justify an arrest as based on probable cause when the arrest was in fact prompted by a retaliatory motive. If failure to show lack of probable cause defeats an action under [42 U.S.C. § 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), only entirely baseless arrests will be checked. I \*1735 remain of the view that the Court's decision in *Mt. Healthy City Bd. of Ed. v. Doyle* (1977), strikes the right balance: The plaintiff bears the burden of demonstrating that unconstitutional animus was a motivating factor for an adverse action; the burden then shifts to the defendant to demonstrate that, even without any impetus to retaliate, the defendant would have taken the action complained of.

In this case, I would reverse the Ninth Circuit's judgment as to Trooper Weight. As the Court points out, the record is bereft of evidence of retaliation on Weight's part.. As to Sergeant Nieves, there is some evidence of animus in Nieves' statement, “bet you wish you would have talked to me now,” but perhaps not enough to survive summary judgment.

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If5759612813e11e9ab27b3103407982a), dissenting.

. . . . There is no basis in [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) or in the Constitution to withhold a remedy for an arrest that violated the First Amendment solely because the officer could point to probable cause that some offense, no matter how trivial or obviously pretextual, has occurred.

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. . . . Courts should evaluate retaliatory arrest claims in the same manner as they would other First Amendment retaliation claims. . . . The plaintiff must first establish that constitutionally protected conduct was a “ ‘substantial’ ” or “ ‘motivating’ ” factor in the challenged governmental action (here, an arrest). If the plaintiff can make that threshold showing, the question becomes whether the governmental actor (here, the arresting officer) can show that the same decision would have been made regardless of the protected conduct.\

This timeworn standard is by no means easily satisfied. Even in cases where there is “proof of some retaliatory animus,”  if evidence of retaliatory motive is weak, or evidence of nonretaliatory motive is strong, but-for causation will generally be lacking. That is why probable cause to believe that someone was a serial killer would defeat any First Amendment retaliatory arrest claim—even if, say, there were evidence that the officers also detested the suspect's political beliefs.

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With regard to the majority's concern that establishing a causal link to retaliatory animus will sometimes be complex: That is true of most unconstitutional motive claims, yet we generally trust that courts are up to the task of managing them. . . . As for the risk of litigating dubious claims, the Court pays too high a price to avoid what may well be a marginal inconvenience. . . . Even accepting that, every so often, a police officer who made a legitimate arrest might have to explain that arrest to a jury, that is insufficient reason to curtail the First Amendment. No legal standard bats a thousand, and district courts already possess helpful tools to minimize the burdens of litigation in cases alleging constitutionally improper motives. In addition, the burden of a (presumably indemnified) officer facing trial pales in comparison to the importance of guarding core First Amendment activity against the clear potential for abuse that accompanies the arrest power.

. . . . This analogy is misguided, and the Court has rightly disavowed it before. In *Whren v. United States* (1996), the Court explained that while “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,” that does not make evidence of an officer's “actual motivations” any less relevant to claims of “selective enforcement” under the Equal Protection Clause.” First Amendment retaliation claims and equal protection claims are indistinguishable for these purposes; both inherently require inquiry into “an official's motive.” Thus, even if the “[s]ubjective intent of the arresting officer ... is simply no basis for invalidating an arrest” under the Fourth Amendment, when it comes to First Amendment freedom of speech, “the government's reason” is often “what counts.”

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The basic error of the Court's new rule is that it arbitrarily fetishizes one specific type of motive evidence—treatment of comparators—at the expense of other modes of proof. In particular, the majority goes out of its way to forswear reliance on an officer's own “statements,” even though such direct admissions may often be the best available evidence of unconstitutional motive. As a result, the Court's standard in some cases will have the strange effect of requiring courts to blind themselves to smoking-gun evidence while simultaneously insisting upon an inferential sort of proof that, though potentially powerful, can be prohibitively difficult to obtain. . . .

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Instead, the majority suggests that comparison-based evidence is the sole gateway through the probable-cause barrier that it otherwise erects. Such evidence can be prohibitively difficult to come by in other selective-enforcement contexts, and it may be even harder for retaliatory arrest plaintiffs to muster. After all, while records of arrests and prosecutions can be hard to obtain, it will be harder still to identify arrests that never happened. And unlike race, gender, or other protected characteristics, speech is not typically sorted into statistical buckets that are susceptible of ready categorization and comparison.

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Put into practice, the majority's approach will yield arbitrary results and shield willful misconduct from accountability. . . . Imagine that a reporter is investigating corruption in a police unit. An officer from that unit follows the reporter until the reporter exceeds the speed limit by five miles per hour, then delivers a steep ticket and an explicit message: “Until you find something else to write about, there will be many more where this came from.” If even such objectively probative evidence is irrelevant, [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5759612813e11e9ab27b3103407982a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) will provide no redress for such flagrant conduct. . . .

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For the foregoing reasons, I agree with Justice GINSBURG that the tried-and-true *Mt. Healthy* approach remains the correct one. And because petitioners have not asked us to revisit the Court of Appeals' application of the governing standard, I would affirm.

The power to constrain a person's liberty is delegated to law enforcement officers by the public in a sacred trust. The First Amendment stands as a bulwark of that trust, erected by people who knew from personal experience the dangers of abuse that follow from investing anyone with such awesome power. Because the majority shortchanges that hard-earned wisdom in the name of marginal convenience, I respectfully dissent.