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Essay

Celebrating Selma: The Importance of Context in Public Forum Analysis

Ronald J. Krotoszynski, Jr.[†]

At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.¹

Lyndon B. Johnson

Some thirty years ago, five days in March helped to begin a new era for the South, and for the nation. From March 21 to March 25, 1965, thousands of civil rights protesters marched down U.S. Highway 80 from Selma to Montgomery, Alabama, to call attention to the state's systematic disenfranchisement of black citizens. Then as now, Highway 80 was a main regional corridor, connecting Selma and Montgomery with points east and west, symbolically linking Alabama's denial of the right to vote with similar abuses throughout the South. Thus, the Selma march represents a high-water mark for the vindication of speech rights and the democratic values they

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1. Special Message to the Congress: The American Promise, 1965 PUB. PAPERS 281 (Lyndon B. Johnson, Mar. 15, 1965).

embody. In the words of the Rev. Martin Luther King, Jr., "Selma, Alabama became a shining moment in the conscience of man."²

The social significance of the Selma march is well documented.³ By focusing national attention on the disenfranchisement of Southern blacks, it prompted Congress to pass one of the most sweeping civil rights laws in history: the Voting Rights Act of 1965.⁴ The Voting Rights Act, in turn, led to a dramatic rise in black participation in democratic government, forever altering the shape of politics throughout the South and throughout the nation.⁵ Yet the opinion that made the march possible, written by then District Judge Frank M. Johnson, Jr.,⁶ has faded from our collective memory with time. In some ways, however, Judge Johnson's opinion in *Williams v. Wallace*⁷ is every bit as remarkable as the Selma march itself. On the thirtieth anniversary of the march, it is fitting and proper to look back at the events that took place in Selma in the spring of 1965, and to reconsider their relevance to our present.

This Essay argues that the Selma march should be—although it plainly is not—as well regarded for its contribution to the development of First Amendment law as to the development of our national morality. Judge Johnson's opinion rests on the principle that the right to protest on public property should, at least in some circumstances, be determined in relation to the wrongs being protested. When deciding whether to permit the four-day march on U.S. Highway 80, Judge Johnson observed that "it seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against."⁸ After examining an extensive record, he concluded that the wrongs suffered by the black citizens of central Alabama were "enormous."⁹ The scope of the right to protest, he ruled, "should be

2. MARTIN LUTHER KING, JR., *Our God Is Marching On!* (Mar. 25, 1965), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 227, 228 (James M. Washington ed., 1986) [hereinafter *A TESTAMENT OF HOPE*].

3. One historian has observed, "In the long saga of southern blacks' efforts to win free and equal access to the ballot, no one event meant more than the voting rights campaign in Selma, Alabama" DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 1 (1978) [hereinafter *GARROW, PROTEST AT SELMA*].

4. 42 U.S.C. §§ 1973–1973p (1988). Historians have acknowledged the causal relationship between the Selma protests and passage of the Voting Rights Act. See JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* 254–55 (1993); GARROW, *PROTEST AT SELMA*, *supra* note 3, at 133–78.

5. See U.S. COMM'N ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: TEN YEARS AFTER* 1–9, 39–52 (1975) (noting substantial increase in minority political participation and voting rates as result of Act); BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 1–3, 15–16, 21–23 (1992) (noting that direct barriers to electoral participation by minorities have largely fallen).

6. President Carter elevated Judge Johnson to the Fifth Circuit Court of Appeals in 1979.

7. 240 F. Supp. 100 (M.D. Ala. 1965).

8. *Id.* at 106.

9. *Id.*

determined accordingly.”¹⁰ In light of the State of Alabama’s longstanding and systematic denial of basic civil rights to its black citizens, Judge Johnson issued an injunction that permitted the plaintiffs to conduct a four-day march over fifty-two miles on a major highway.

The proposition that the scope of the right to protest should be commensurate with the wrongs one seeks to protest seems to cut against the grain of contemporary “content-neutral” First Amendment analysis.¹¹ This Essay argues that it is nonetheless a valid means by which to apportion access to public space. Under current First Amendment “forum analysis,” a protest on the scale of the Selma march almost certainly would not be allowed to proceed on a public highway.¹² Given the immense impact of the Selma march on American society, Judge Johnson’s *Williams* opinion suggests that existing public forum doctrine does not adequately protect the rights of citizens to protest.

Yet Judge Johnson’s “principle of proportionality”¹³ has not received the serious consideration that it deserves. In the three decades following Judge Johnson’s decision in *Williams v. Wallace*, his opinion has frequently been cited for the proposition that local hostility to an exercise of First Amendment rights is an insufficient basis for prohibiting the exercise of the right.¹⁴ To be sure, *Williams* is a paradigmatic example of the proposition that a “heckler’s veto” cannot be permitted to silence otherwise protected expressive activity. Most courts have not been willing to apply the broader proportionality principle that Judge Johnson enunciated, however.¹⁵ And while several law

10. *Id.*

11. See, e.g., *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2047 (1994) (O’Connor, J., concurring) (“With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one.”).

For an academic treatment of content neutrality and freedom of speech, see Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 214–31 (1982) (reviewing evolution of Court’s approach to content neutrality); see also Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980) (noting and justifying Court’s recent departures from content neutrality); Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978) (analyzing recent cases in which Court did not adhere to content neutrality).

12. See *infra* notes 74–77 and accompanying text.

13. See Frank M. Johnson, *Civil Disobedience and the Law*, 44 TUL. L. REV. 1, 4 (1969).

14. See, e.g., *National Socialist White People’s Party v. Ringser*, 473 F.2d 1010, 1014 n.4 (4th Cir. 1973); *Collin v. Chicago Park Dist.*, 460 F.2d 746, 755 (7th Cir. 1972); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-10, at 853 n.22 (2d ed. 1988) (citing *Williams* for proposition that public hostility to speaker’s point of view cannot serve as basis for limiting speaker’s exercise of his free speech rights).

15. Another district court applied the proportionality principle when determining whether a municipal government’s refusal to issue a parade permit for an antiwar demonstration was “reasonable” in context. See *Hurwitt v. City of Oakland*, 247 F. Supp. 995, 1002–03 (N.D. Cal. 1965).

The Fifth Circuit has never directly passed on the substance of Judge Johnson’s *Williams* opinion. In *Wilkins v. United States*, 376 F.2d 552 (5th Cir. 1967), however, the court did uphold a conviction for a civil rights violation based in part on interference with the march. The court held that the protesters had a legal right to march, but reserved judgment as to whether that authority stemmed from the district court’s order. *Id.* at 560–61.

review articles in the late 1960's and early 1970's criticized the proportionality principle in passing, none has undertaken a comprehensive analysis—or a defense—of Judge Johnson's opinion.¹⁶

This Essay revisits both the Selma march and the legal opinion that made it possible. I argue that the proportionality principle recognized in *Williams* can help to ensure adequate access to public space when it is most needed—a result largely foreclosed under current First Amendment jurisprudence. Although the specific circumstances that led Judge Johnson to embrace the proportionality principle in 1965 are, thankfully, long gone, the problem of ensuring that adequate public space is available to accommodate meaningful social protest remains. Properly understood and carefully limited, the proportionality principle can continue to help vindicate democratic values today, just as it did thirty years ago in Selma.

I. MARCHING TO FREEDOM

Perhaps the most striking (and therefore memorable) moment of the Selma march was its conclusion, when 25,000 people marched up Dexter Avenue to the Alabama state capitol to demand that the state guarantee all its citizens their civil rights.¹⁷ The march ended with a rally on the steps of the capitol, at which Martin Luther King announced to the nation that segregation was “on its deathbed.”¹⁸ His rhetorical question “How long?” was both a call to arms and a ringing indictment of Southern society:

I know you are asking today, “How long will it take?” I come to say to you this afternoon however difficult the moment, however frustrating the hour, it will not be long, because truth pressed to earth will rise again.

How long? Not long, because no lie can live forever.

How long? Not long, because you still reap what you sow.

How long? Not long, because the arm of the moral universe is long but it bends toward justice.

16. For criticism of the *Williams* decision, see Nicholas DeB. Katzenbach, *Protest, Politics and the First Amendment*, 44 TUL. L. REV. 439, 443–44 (1969) (characterizing proportionality test as exercise in “interpreting existing doctrine imaginatively”); Burke Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785, 788–89 (1965) (noting novelty of proportionality test); Elliot Zashin, *Civil Rights and Civil Disobedience: The Limits of Legalism*, 52 TEX. L. REV. 285, 300–01 (1974) (noting controversial nature of Johnson's opinion). But see BASS, *supra* note 4, at 252 (quoting Archibald Cox's description of Judge Johnson's approach as “novel, but sound”).

The most recent discussion of the principle appearing in a law review appears to misconstrue Judge Johnson's opinion. See Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 675–76 (1985) (arguing that under proportionality principle, Nazis would not be permitted to march in Skokie, Illinois, because Nazis are bad people). Downs' claim that Judge Johnson would look to the morality of the person or group seeking to exercise speech rights is plainly wide of the mark. See *infra* text accompanying notes 92–94.

17. See DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 412 (1986) [hereinafter GARROW, *BEARING THE CROSS*].

18. KING, *supra* note 2, at 228.

How long? Not long, 'cause mine eyes have seen the glory of the coming of the Lord, trampling out the vintage where the grapes of wrath are stored. He has loosed the fateful lightning of his terrible swift sword. His truth is marching on.¹⁹

These images, these words, remain with us because of their scope and poignancy. The Selma-to-Montgomery march, however, was not simply the product of inspiring leadership and the commitment of the civil rights community to progressive change. It was also the result of thoughtful judicial intervention. Any analysis of the march's significance must therefore include some consideration of the federal judiciary's role in securing for the marchers the right to protest. And in order to appreciate that role, one must first understand the context in which the march arose, and the precise facts on which Judge Johnson relied in reaching his *Williams* decision.

In King's words, "The Civil Rights Act of 1964 gave Negroes some part of their rightful dignity, but without the vote it was dignity without strength."²⁰ In 1965, the disenfranchisement of the black citizens of Alabama was nearly complete. Although 15,115 black persons of voting age resided in Dallas County, the central Alabama county of which Selma is the principal city, only 335 (representing 2.2% of all black citizens) were registered to vote.²¹ In contrast, 9542 of the 14,400 white residents of Dallas County were registered.²² This appalling pattern repeated itself throughout other counties in central Alabama's "black belt."²³ In some areas, dead white Alabama residents apparently enjoyed greater access to the ballot than live black ones. In Wilcox County, for example, none of the 6085 black residents were registered to vote, but 2959 of only 2647 white residents were registered.²⁴

The reason for this pattern was simple: The State of Alabama maintained a systematic program to prevent its black citizens from voting, relying on devices such as discriminatory application of qualifying tests, discriminatory enforcement of registration rules, poll taxes, and outright racial gerrymandering.²⁵ "Throughout the state . . . all types of conniving methods [were] used to prevent Negroes from becoming registered voters and there [were] some counties without a single Negro registered to vote despite the fact that the Negro constitute[d] a majority of the population."²⁶ By 1965, this

19. *Id.* at 230.

20. *Id.* at 227.

21. *Williams v. Wallace*, 240 F. Supp. 100, 104, 112 (M.D. Ala. 1965).

22. *Id.*

23. In Perry County, 365 of 5202 black residents were registered to vote, compared with 3260 of the 3441 white residents. *Id.* at 114. In Hale County, 218 of 5999 black residents and 3395 of 3594 white residents were registered. *Id.* at 116. In Choctaw County, 284 of 3982 black residents and 4886 of 5192 white residents were registered. *Id.* at 118.

24. *Id.* at 115.

25. See BASS, *supra* note 4, at 146-48, 152-53; GARROW, BEARING THE CROSS, *supra* note 17, at 380-81; see also KING, *supra* note 2, at 228.

26. MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail* (1963), reprinted in A TESTAMENT OF HOPE, *supra* note 2, at 289, 299.

state of affairs had become intolerable to the black citizens of Alabama. The time for change had come.

The horrors of Birmingham in 1963, when Police Commissioner Bull Connor used dogs and firehoses to terrorize protesters who were engaging in a peaceful protest seeking basic civil rights, played no small part in the passage of the Civil Rights Act of 1964.²⁷ King and his colleagues believed a similar mass demonstration would be necessary to secure the voting rights of Southern blacks. In late December 1964, leaders of the Southern Christian Leadership Conference (SCLC), including King, decided that it was time to implement a new phase of the "Alabama Project," a series of demonstrations designed to wrest the right to vote from reactionary Southern state governments.²⁸ On New Year's Day in 1965, Jim Bevel of the SCLC met with the Dallas County Voters League to discuss renewed efforts to roll back Jim Crow.²⁹

Selma's sheriff, Jim Clark, enjoyed a statewide reputation for "vicious and violent behavior" toward civil rights protesters.³⁰ The organizers of the Alabama Project chose Selma as the focal point of the voting rights campaign because the volatile Sheriff Clark was likely to react badly to their demands for suffrage.³¹ They hoped that publicity generated by the SCLC's nonviolent protests would arouse the conscience of the nation and lead to federal legislation securing the right of all citizens to vote without regard to race.

King and his staff held an organizational meeting on January 2, 1965, at the Brown Chapel A.M.E. church.³² At the meeting, King set forth the goals of the Alabama Project, and emphasized his determination to force the nation to take action to end the disenfranchisement of black citizens.³³ King returned to Selma on January 14 for a second organizational rally.³⁴ At this meeting,

27. Following the most notorious incident, which took place on May 3, 1963, the national media carried pictures of dogs attacking young children and firehoses literally blowing the clothes off their bodies. GARROW, BEARING THE CROSS, *supra* note 17, at 249-50. These images left President John F. Kennedy "sick." *Id.* at 250; see also CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT at xvii-xx (1985) (noting causal relationship between events in Birmingham, Alabama, and introduction of civil rights legislation). In the late spring of 1963, with President Kennedy's approval, the Justice Department drafted comprehensive legislation that would provide for the desegregation of all public accommodations. GARROW, BEARING THE CROSS, *supra* note 17, at 267-69. Ultimately, Congress approved the legislation, and President Lyndon B. Johnson signed it on July 2, 1964. WHALEN & WHALEN, *supra*, at 227-29. For a comprehensive history of the Birmingham civil rights protests in the spring of 1963, see TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 673-802 (1988).

28. CHARLES E. FAGER, SELMA, 1965, at 8-10 (2d ed. 1985); GARROW, BEARING THE CROSS, *supra* note 17, at 369-72.

29. GARROW, BEARING THE CROSS, *supra* note 17, at 371.

30. GARROW, PROTEST AT SELMA, *supra* note 3, at 3 (1978); see also FAGER, *supra* note 28, at 5.

31. See GARROW, PROTEST AT SELMA, *supra* note 3, at 3-4, 42-43.

32. See *id.* at 39-40.

33. See FAGER, *supra* note 28, at 9-10; GARROW, PROTEST AT SELMA, *supra* note 3, at 39.

34. See GARROW, PROTEST AT SELMA, *supra* note 3, at 42.

he outlined the SCLC's plan for escalating the confrontation with the state authorities, and urged the local citizens to support the coming mass actions.³⁵

In January and February, the black citizens of Selma repeatedly marched on the county courthouse, demanding the right to register to vote.³⁶ Sheriff Clark responded with mass arrests, beatings, and forced marches.³⁷ The protests reached a climax on Sunday, March 7. On that day, about 650 protesters left the Brown Chapel, intent on marching from Selma to Montgomery to demand a redress of their grievances from the state government.³⁸ Proceeding in an orderly and peaceful manner through Selma, the marchers crossed the Edmund Pettus Bridge and continued to march east on U.S. Highway 80 towards Montgomery. Sheriff Clark and Colonel Al Lingo, head of the Alabama Highway patrol, met the marchers with around 70 state troopers, a detachment of Dallas County deputy sheriffs, and a group of neo-vigilante "possemen" nominally under the control of Sheriff Clark.³⁹

Major John Cloud of the State Highway Patrol ordered the marchers to disperse within two minutes. After only a single minute expired, however, the "lawmen" moved against the protesters.⁴⁰ Using tactics "similar to those recommended for use by the United States Army to quell armed rioters in occupied countries," the state troopers attacked the marchers with clubs, tear gas, nausea gas, and canisters of smoke.⁴¹ More than six dozen people were injured in the melee, some seriously.⁴²

The public's response to the events of March 7 was "little less than seismic."⁴³ As had happened after the Birmingham protests in 1963, the brutality of the Alabama authorities provoked national and international revulsion. The SCLC immediately began a national campaign to draw attention to the events in Selma, issuing a public call urging leaders of the civil rights community to come to Selma for a second attempt to march from Selma to Montgomery.⁴⁴ King wrote that "[n]o American is without responsibility" for the events in Selma and that "[c]lergy of all faiths" should come to Selma to make their voices heard.⁴⁵ Thousands responded to this call to action.⁴⁶ The second march was to take place on Tuesday, March 9, 1965.

35. *Id.*

36. See GARROW, BEARING THE CROSS, *supra* note 17, at 370-92; GARROW, PROTEST AT SELMA, *supra* note 3, at 42-67.

37. See FAGER, *supra* note 28, at 26-40, 49-56, 66-71; GARROW, PROTEST AT SELMA, *supra* note 3, at 42-73.

38. *Williams v. Wallace*, 240 F. Supp. 100, 104 (M.D. Ala. 1965); see also GARROW, PROTEST AT SELMA, *supra* note 3, at 73-77.

39. See *Williams*, 240 F. Supp. at 104-05; GARROW, BEARING THE CROSS, *supra* note 17, at 397-98, see also FAGER, *supra* note 28, at 150.

40. *Williams*, 240 F. Supp. at 105; GARROW, BEARING THE CROSS, *supra* note 17, at 398.

41. *Williams*, 240 F. Supp. at 105.

42. GARROW, BEARING THE CROSS, *supra* note 17, at 399.

43. FAGER, *supra* note 28, at 99; see GARROW, BEARING THE CROSS, *supra* note 17, at 399-400.

44. GARROW, BEARING THE CROSS, *supra* note 17, at 399.

45. *Id.* at 400.

46. *Id.* at 400, 412; GARROW, PROTEST AT SELMA, *supra* note 3, at 85-86.

In light of the March 7 attack at the bridge, the leaders of the protest movement decided to seek federal court protection for the planned march.⁴⁷ The protest organizers filed a class-action lawsuit on March 8, 1965, in the federal district court for the Middle District of Alabama, on which Frank M. Johnson, Jr. served as Chief Judge, seeking an order permitting a peaceful protest march from Selma to Montgomery.⁴⁸ Hosea Williams, a young SCLC activist from Savannah, Georgia, who had proved his ability by organizing demonstrations in St. Augustine, Florida, in 1963, served as the lead plaintiff.⁴⁹ The protest organizers hoped to obtain an immediate injunction from the court on an *ex parte* basis allowing them to proceed with the march. The court, however, rejected this request.⁵⁰ Instead, Judge Johnson entered a temporary restraining order that barred the plaintiffs from marching until the court could conduct a full hearing on the merits of their complaint.⁵¹ The hearing was scheduled for March 11.

Prior to the hearing, another confrontation took place. Because of the high visibility of the events of March 7, King was under intense pressure to proceed with the march, notwithstanding the district court's restraining order.⁵² On the night of Monday, March 8, King wrestled with the question of whether to violate the restraining order by going forward with the march.⁵³ Late that evening, he apparently decided that the march would proceed. On the following morning, March 9, civil rights activists gathered at the Brown Chapel for a mass rally.⁵⁴

Following the rally, King led a procession of civil rights demonstrators through downtown Selma toward the Edmund Pettus Bridge. Before the marchers crossed the bridge, U.S. Marshal H. Stanley Fountain halted them and read Judge Johnson's restraining order, but made no attempt to stop the march from proceeding.⁵⁵ King then led the marchers across the bridge.

47. FAGER, *supra* note 28, at 101.

48. See *Williams v. Wallace*, 240 F. Supp. 100, 102 (M.D. Ala. 1965).

49. GARROW, *BEARING THE CROSS*, *supra* note 17, at 317-37, 678 n.2.

50. *Williams*, 240 F. Supp. at 103. The Supreme Court later cited Judge Johnson's example as an appropriate refusal to provide relief on an *ex parte* basis. See *Carroll v. President & Comm'rs*, 393 U.S. 175, 184 n.11 (1968).

51. *Williams*, 240 F. Supp. at 103.

52. Many of the organizers from the Student Non-Violent Coordinating Committee (SNCC) argued, apparently quite fervently, that King should disregard the order. On the other hand, many of King's legal advisers counseled against such action. See Bernard G. Segal, *The Lawyer and Civil Rights*, Remarks at the Third Circuit Judicial Conference (Sept. 8, 1966), in 42 F.R.D. 442, 450-51 (1966); see also FAGER, *supra* note 28, at 101-03; GARROW, *BEARING THE CROSS*, *supra* note 17, at 401-03.

53. David Garrow has suggested that King reached an agreement not to march beyond the Edmund Pettus Bridge through the intervention of former Florida Governor Leroy Collins. See GARROW, *BEARING THE CROSS*, *supra* note 17, at 402-03; GARROW, *PROTEST AT SELMA*, *supra* note 3, at 84-86. Certainly, the apparent lack of detailed logistical preparations for a 54-mile march suggests that King did not intend to go forward, but rather was concerned with maintaining control over his followers.

54. FAGER, *supra* note 28, at 102-03; GARROW, *BEARING THE CROSS*, *supra* note 17, at 403.

55. FAGER, *supra* note 28, at 103-04; FRANK SIKORA, *THE JUDGE: THE LIFE & OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR.* 191 (1992).

On the eastern side of the bridge, they were met by Sheriff Clark, his deputies, and Alabama state troopers. Once again, Major Cloud ordered the crowd to disperse.⁵⁶ He and the other law enforcement officers then withdrew, leaving the road open to King.⁵⁷ Their accommodating stance was reportedly the result of direct orders from Governor Wallace.⁵⁸ Wallace may have hoped to place King in a Catch-22. If King led the marchers down Highway 80 toward Montgomery, he would violate the court's restraining order, exposing himself and the other SCLC leaders to contempt charges. On the other hand, if King failed to proceed with the march, his credibility within the movement might be damaged.

King did not proceed with the march. Instead, he turned around and led the would-be marchers back across the bridge to the Brown Chapel.⁵⁹ The reasons for King's decision to turn back are not entirely clear. It is perhaps best understood as an example of his overall commitment to the rule of law, at least insofar as particular laws were "just."⁶⁰ One of King's advisors, Bernard Segal, later commented that if King had "suit[ed] his deed to his word" by violating the order, "his act would be no different in principle from the defiance of Governor Wallace and Governor Barnett."⁶¹

Hearings on the *Williams* lawsuit began two days later.⁶² They lasted over four days, and established a conclusive record of systematic state-sponsored brutality against black citizens designed to deny them the vote.⁶³ Judge Johnson found that Sheriff Clark and his deputies had engaged in a pattern of behavior that included mass arrests without just cause, forced marches, and the

56. FAGER, *supra* note 28, at 104.

57. *Id.*; GARROW, BEARING THE CROSS, *supra* note 17, at 403-04.

58. GARROW, PROTEST AT SELMA, *supra* note 3, at 87.

59. See BASS, *supra* note 4, at 239-42; FAGER, *supra* note 28, at 104-05.

60. See KING, *supra* note 26, at 293. King defined a "just law" as "a code that a majority compels a minority to follow that it is willing to follow itself. This is sameness made legal." *Id.* at 294. Conversely, an "unjust law" is "a code that a majority inflicts on a minority that is not binding on itself [or that is] inflicted upon a minority which that minority had no part in enacting or creating because they did not have the unhampered right to vote." *Id.* Although King questioned the basic fairness of the order restraining the march, he apparently never intended to defy the court. See BASS, *supra* note 4, at 238-39; GARROW, PROTEST AT SELMA, *supra* note 3, at 84. Plainly, King was not prepared to challenge the law without a stronger showing that it was unjust.

Significantly, as defined by King, an "unjust" law will usually, if not always, be inconsistent with the equal protection and due process guarantees of the Fifth and Fourteenth Amendments, and therefore not law at all. See Katzenbach, *supra* note 16, at 444-45; Marshall, *supra* note 16, at 794-800.

61. Segal, *supra* note 52, at 450-51. At the time of the march, Segal was an attorney for the Lawyers' Committee for Civil Rights Under Law.

62. For a historical perspective on the court proceedings, see BASS, *supra* note 4, at 241-49; GARROW, BEARING THE CROSS, *supra* note 17, at 406-11; GARROW, PROTEST AT SELMA, *supra* note 3, at 95-96.

63. *Williams v. Wallace*, 240 F. Supp. 100, 104 (M.D. Ala. 1965). Judge Johnson explained that: The evidence in this case reflects that, particularly as to Selma, Dallas County, Alabama, an almost continuous pattern of conduct has existed on the part of defendant Sheriff Clark, his deputies, and his auxiliary deputies known as "possemen" of harassment, intimidation, coercion, threatening conduct, and, sometimes, brutal mistreatment toward these plaintiffs and other members of their class who were engaged in their demonstrations for the purpose of encouraging Negroes to attempt to register to vote and to protest discriminatory voter registration practices in Alabama.

Id.; see also GARROW, PROTEST AT SELMA, *supra* note 3, at 99, 102, 108 (describing progress of hearings)

use of cattle prods and night sticks on peaceful marchers.⁶⁴ The court also found that Sheriff Clark had been assisted by Colonel Al Lingo, the head of the Alabama state troopers. The state troopers' contributions to Sheriff Clark's efforts included beating protesters, and in at least one instance, shooting and killing a protester.⁶⁵

The court held that the State of Alabama had undertaken a program of intimidation aimed at "preventing and discouraging Negro citizens from exercising their rights of citizenship, particularly the right to register to vote and the right to demonstrate peaceably for the purpose of protesting discriminatory practices in this area."⁶⁶ The court further observed:

The attempted march alongside U.S. Highway 80 from Selma, Alabama, to Montgomery, Alabama, on March 7, 1965, involved nothing more than a peaceful effort on the part of Negro citizens to exercise a classic constitutional right; that is, the right to assemble peaceably and to petition one's government for the redress of grievances.⁶⁷

Based on the facts before it, the court reasoned that the protesters had a right to march. The question that it had to decide was the scope of the remedy.

II. RIGHTS AND REMEDIES

Judge Johnson's opinion in *Williams* is notable for its restraint. He approached the legal questions presented in *Williams* dispassionately, and his opinion demonstrates a careful and systematic adaptation and application of law to the facts presented to the court. To be sure, the task before the court was not an easy one. Even if the black citizens of Selma had a right to engage in peaceful protest, it was not clear that this right was so broad as to encompass a fifty-two-mile march along the main east-west corridor in central Alabama over four consecutive days.⁶⁸

64. *Williams*, 240 F. Supp. at 104.

65. *Id.*

66. *Id.* at 105.

67. *Id.*

68. Judge Johnson's law clerk at the time observed that the judge knew that contemporary case law favored denial of the march, if only because of its proposed scope and the state's "duty to maintain the safety and commerce on those highways." BASS, *supra* note 4, at 243 (internal quotation marks omitted). Throughout his tenure on the bench, however, Judge Johnson has never been one to shrink from deciding hard cases in ways that might prove controversial. *See, e.g.*, *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (holding that state-sponsored prayer before high school football game violated Establishment Clause); *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985) (holding that constitutional right of privacy encompasses homosexual acts between consenting adults in their home), *rev'd*, 478 U.S. 186 (1986); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970) (holding that dismissal of high school teacher for assigning particular short story violated her right to academic freedom under First Amendment); *Lewis v. Greyhound Corp.*, 199 F. Supp. 210 (M.D. Ala. 1961) (desegregating interstate and intrastate motor carriers and bus terminals); *Gilmore v. City of Montgomery*, 176 F. Supp. 776 (M.D. Ala. 1959) (desegregating Montgomery, Alabama, public parks).

Judge Johnson began his analysis of the plaintiffs' request with a few simple observations. He noted that "[t]he law is clear that the right to petition one's government for the redress of grievances may be exercised in large groups."⁶⁹ Conversely, however, he recognized that government officials "have the duty and responsibility of keeping [the] streets and highways open and available for their regular uses."⁷⁰ As a result, he held that governments may place "reasonable" restrictions on speech activities "in order to assure the safety and convenience of the people in the use of public streets and highways."⁷¹

These principles clearly conflict to some degree. The use of a public street for protest activities will obviously impinge on the ability of motorists and other pedestrians to use the same street at the same time for travel. Judge Johnson noted that such conflicts existed in this case, but explained that "there is room in our system of government for both, once the proper balance between them is drawn."⁷² The court had "the duty and responsibility . . . of drawing the 'constitutional boundary line.'"⁷³ The trick, of course, was to draw the proper line.

In striking the balance, Judge Johnson could have viewed the proposed activity without regard to the specific context in which it arose. Considered out of its context, *Williams* would not have been a difficult case. Heavily trafficked highways exist principally to facilitate travel and commerce, not speech activities. As a general matter, protesters cannot routinely be permitted to march down such highways for four days at a stretch. Hence if the court had attempted to make a universal pronouncement on the availability of highways for speech activities, it almost certainly could not have permitted the Selma march.

Current First Amendment doctrine supports this conclusion. Under the existing analytical framework, a major highway would undoubtedly be classified as a "nonpublic forum," in which speech rights are severely limited. In a nonpublic forum, the government may impose any regulations it wants so long as they are reasonable and not intended to suppress the expression of a particular point of view.⁷⁴ By contrast, in traditional public forums—places like parks and city streets, which "by long tradition or by government fiat have been devoted to assembly and debate"⁷⁵—the government may impose only reasonable and content-neutral restrictions as to time, place, or manner of speech. Content-based restrictions may be applied to traditional public forums

69. *Williams*, 240 F. Supp. at 106.

70. *Id.*

71. *Id.*

72. *Id.* (quoting *Kelly v. Page*, 335 F.2d 114 (5th Cir. 1964)).

73. *Id.*

74. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46–47 & n.7 (1983)

75. *Id.* at 45.

only if the regulation directly advances a compelling state interest, is narrowly drawn, and leaves open "ample alternative channels of communication."⁷⁶

Thus, if a court today were to confront a situation like the Selma march, it would almost certainly deny the plaintiffs the requested relief on the grounds that state restrictions on protest activities on public highways are reasonable. Although such plaintiffs would be able to protest in other spaces, they probably could not receive legal sanction for a protest on the scale the Selma marchers intended.⁷⁷ The impact of this mode of analysis is significant. It is doubtful that the Selma march would be long remembered had it taken place on a single day on a side street or seldom-used park in Selma.

The *Williams* court, however, did not ignore the context of the plaintiffs' proposed speech activity.⁷⁸ Instead, it considered the context in which the suit arose *essential* to determining whether the requested relief was appropriate. Judge Johnson explained:

[T]he extent of a group's constitutional right to protest peaceably and petition one's government for redress of grievances must be, if our American Constitution is to be a flexible and "living" document, found and held to be commensurate with the enormity of the wrongs being protested and petitioned against. This is particularly true when the usual, basic and constitutionally-provided means of protesting in our American way—voting—have been deprived.⁷⁹

Applying the foregoing test to the facts of the case, the court concluded that "plaintiffs' proposed plan of march from Selma to Montgomery, Alabama, for its intended purposes, is clearly a reasonable exercise of a right guaranteed by the Constitution of the United States."⁸⁰

Essentially, the court began its analysis with a recognition of a constitutional floor, a minimum of inconvenience that the First and Fourteenth

76. *Id.* A similar standard applies to so-called "designated" public forums, although the government may limit the categories of speech permissible in such areas. *See id.* at 46 & n.7; *Crowder v. Housing Auth.*, 990 F.2d 586, 590-91 (11th Cir. 1993).

77. *See United States v. Kokinda*, 497 U.S. 720, 736-37 (1990) (plurality opinion); *Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Perry*, 460 U.S. at 45-49.

78. Judge Johnson's failure to employ public forum analysis did not indicate a lack of familiarity with the applicable law. From the 1930's through the 1960's, the Supreme Court relied on a rebuttable presumption that public property could be used for speech-related activities. *See, e.g.*, *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939). Under the First Amendment, public property presumptively was available for speech activities, unless under particular circumstances the government established content-neutral, reasonable time, place, and manner restrictions on the use of the property. *See, e.g.*, *Brown v. Louisiana*, 383 U.S. 131 (1966) (holding, without undertaking forum analysis, that First Amendment protected protest activity in public library). It was not until the 1970's that the Supreme Court began engaging in formal "public forum" analyses. *See, e.g.*, *Southeastern Promotions v. Conrad*, 420 U.S. 546, 547, 552-58 (1975) (undertaking forum analysis to determine scope of First Amendment rights in public auditorium). Thus *Williams* might be understood in part as a reflection of the state of First Amendment jurisprudence in the mid-1960's.

79. *Williams v. Wallace*, 240 F. Supp. 100, 108 (M.D. Ala. 1965).

80. *Id.* at 109.

Amendments require the general public to countenance. It did not stop there, however. Instead, the court recognized that the constitutional floor does not necessarily define the limits of what is permissible expressive activity. This allowed the court to ask two questions: what is constitutionally required, and what is constitutionally permitted.

In approving the marchers' plan and enjoining the state from interfering, the court observed:

[T]he plan as proposed and as allowed reaches, under the particular circumstances of this case, to the outer limits of what is constitutionally allowed. However, the wrongs and injustices inflicted upon these plaintiffs and the members of their class (part of which have been herein documented) have clearly exceeded—and continue to exceed—the outer limits of what is constitutionally permissible.⁸¹

The court sanctioned a march large enough to disrupt the lives of thousands of people trying to go about their daily business. Protests on this scale, and in this type of venue, are an anomaly; other persons or groups could not routinely obtain official sanction for demonstrations on a similar scale. Hence the court provided the *Williams* plaintiffs with expanded speech and assembly rights that other individuals probably would not have received.

Several commentators have criticized *Williams* for this result, arguing that the decision appears to give greater speech rights to certain groups on the basis of an individual judge's sympathies for the policy preferences of particular speakers.⁸² The danger of allowing judges to apportion speech rights based on their individual assessments of the value of particular types of speech is suggested by Justice Scalia in his partial dissent in the recent case of *Madsen v. Women's Health Center*.⁸³ In *Madsen*, the Court upheld a thirty-six-foot "buffer zone" around abortion clinics that had been the target of numerous

81. *Id.* at 108. It is worth noting that the plaintiffs' planned use of U.S. Highway 80 was not *per se* unlawful. Alabama state law clearly permitted pedestrians to walk along highways. *Id.* at 107 & n.5. Moreover, the court did not authorize the marchers to take over the highway incident to the march. On the contrary, the plan proposed by the marchers and approved by the court specifically limited the number of marchers permitted along the two-lane stretch of Highway 80, and included detailed plans for providing logistical support for the march. *Id.* at 107–08.

It is also important to realize that much of the disruption that ultimately occurred was not inherent in the plan for the march but was rather a result of local hostility so intense that the protesters had to be protected by a phalanx of armed national guardsmen. See Marshall, *supra* note 16, at 788 (noting that march "necessitated the closing of half the highway, cost the taxpayers over \$500,000 in the pay of National Guardsmen alone, caused innumerable traffic jams, and again exposed to world opinion the magnitude of the discrimination in the United States against Negro citizens").

82. See, e.g., Downs, *supra* note 16, at 676 ("Johnson's 'commensurability theorem' is not legitimate because it incorporates the ends and substance of the speech.") (citation omitted); Zashin, *supra* note 16, at 300–01 (describing Judge Johnson's holding in *Williams* as "a slender reed on which to base the larger question of the socially tolerable amounts of disruption" caused by speech activities on public property); cf. Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 536 & n.336 (1991) (arguing that First Amendment requires "official agnosticism on questions of social policy").

83. 114 S. Ct. 2516 (1994).

disruptive abortion protests. Within the zone, protesters were prohibited from engaging in any speech activities—even in traditional public forums like public streets and sidewalks. Justice Scalia suggested that the Court would not have sustained a similar restriction if the object of the protest had been racial equality, instead of the protection of unborn fetuses.⁸⁴ He accused the majority of protecting speech rights subjectively.⁸⁵ Justice Scalia's concern about the selective protection of speech rights is not particularly farfetched. Any doctrine that openly vests the judiciary with the power to favor one speaker over another deserves to be greeted with healthy skepticism.

Even those who argue that courts should take context into consideration when deciding the scope of First Amendment protections balk at the prospect of giving particular speakers enhanced First Amendment rights based on the content of their message.⁸⁶ Professor Blasi has suggested that context is essential to applying the First Amendment properly, but in his model of the First Amendment, all boats rise and fall with the same tide.⁸⁷ He argues that courts should carefully consider historical context and contemporary attitudes toward dissent when determining the scope of the First Amendment's protection of social protest and speech activities. Hence, in periods when the public's tolerance of dissent is low (such as during the Red Scare years), the courts' efforts and determination to protect speech rights should be higher than in more stable periods.⁸⁸ But he expressly disavows any interest in having courts lift some of the boats, some of the time.⁸⁹

The visceral aversion to context-specific applications of the First Amendment is somewhat puzzling. Contemporary First Amendment jurisprudence makes a number of fine distinctions based solely on the content of the speech at issue.⁹⁰ Perhaps the objection stems not from the idea of considering context, but rather from the belief that speech rights should not be apportioned on the basis of the speaker's identity.

If this is the case, much of the criticism that commentators have leveled at *Williams* has been wide of the mark. *Williams* neither stands for nor supports the proposition that courts should bestow preferential speech rights on some individuals or groups based on the court's perception of the "justice" of the individual's or group's cause.⁹¹ In *Williams*, the court rested its holding

84. *Id.* at 2534–35 (Scalia, J., concurring in part and dissenting in part); *cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (providing broad First Amendment protection to civil rights protesters engaged in economic boycott of local merchants).

85. *Madsen*, 114 S. Ct. at 2541–50.

86. *See, e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–52 (1985). Professor Blasi did not consider the implications that *Williams* might have for his theory.

87. *Id.* at 452–59, 512–14.

88. *Id.* at 456–59, 462–69.

89. *Id.* at 451, 484. Indeed, he describes such an approach as “antithetical to my thesis.” *Id.* at 451.

90. *See* sources cited *supra* note 11.

91. In fact, Judge Johnson was highly skeptical that public protests would bring about meaningful reform. *See* Frank M. Johnson, Jr., *Civil Disobedience and the Law*, 20 U. FLA. L. REV. 267, 267–68

on an analysis of the particular wrongs that the protest would call to the attention of the state, the nation, and the world.⁹² In deciding whether the state's restrictions were "reasonable," the court paid primary attention to the issue of government culpability for the unlawful acts that the plaintiffs wished to protest.⁹³ Hence Judge Johnson keyed his analysis to the nature of the wrongs being protested, not the identity of the protesters.⁹⁴ The court did not sanction the parceling of speech rights based on the perceived merit of particular speakers, but rather on the importance of particular speech.

III. THE RIGHT TO A PREFERRED PUBLIC FORUM

Even so, Judge Johnson's *Williams* opinion is open to criticism. Perhaps the most powerful argument against the proportionality principle is that it threatens to move the courts a step closer to the creation of a First Amendment with two distinct classes: the preferential forum haves and the preferential forum have-nots. If one believes that absolute equality of access to public forums is necessary to avoid marginalizing unpopular groups, it is inappropriate for courts to afford some groups preferred access to nonpublic forums, even when they wish to protest a serious legal wrong. One might reasonably argue that the result in *Williams* was well and good, but that vesting judges with the power to favor some groups over others in the allocation of public space for speech activities is at best misguided and at worst quite dangerous. Although this criticism of *Williams* is not easily overcome, it can be answered.

Simply put, it is necessary to provide some groups with greater speech rights than others in certain situations if we are to secure the full benefits of the First Amendment. To be sure, this proposition fits uncomfortably into our current jurisprudence. If one starts from the proposition that the First Amendment is designed to protect speech by persons holding minority views, then vesting the federal courts with the power to pick and choose among

(1968); see also TINSLEY E. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA 122-24 (1981).

92. *Williams v. Wallace*, 240 F. Supp. 100, 108-09 (M.D. Ala. 1965).

93. *Id.* at 106-09.

94. See *id.* at 106, 108. To be sure, some of the language in *Williams* focuses on the "wrongs and injustices inflicted upon [the] plaintiffs." 240 F. Supp. at 108. Other parts of the opinion, however, make it clear that the court's holding rests on the legal wrongs established by the record evidence, not on a more generalized sense of justice or morality. See *id.* at 104-05, 109. Although Judge Johnson has described a judge's role as one of "remov[ing] injustice," see Frank M. Johnson, Jr., *Civilization, Integrity, and Justice. Some Observations on the Function of the Judiciary*, 43 SW. U. L. REV. 645, 647 (1989), he has also said that a judge possesses only the limited tools provided by the law for accomplishing this task, see Frank M. Johnson, *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 909 (1979) ("[I]t is one thing for a judge to adopt a theory of public morality because it is his own; it is another for him to exercise his judgment about what the public morality implied by the Constitution is."). Thus, a judge is bound in the first instance by law, but can inform the application of particular laws with the broader policy choices reflected in the Constitution.

speakers seems inappropriate.⁹⁵ If one properly limits the scope of the proportionality principle, however, the danger of creating a speech caste system can be significantly reduced, if not entirely avoided.

A. *Values and Public Policies Underlying the First Amendment*

Whether one embraces the proportionality principle will turn at least in part on how one views the *raison d'être* of the First Amendment's free speech and assembly guarantees. If these clauses are meant to foster democratic self-governance though the maintenance of a lively and robust public debate⁹⁶—one that includes in particular discussion of government wrongdoing—it is entirely appropriate (and indeed necessary) to afford groups suffering legal wrongs at the hand of the government greater access to public forums than groups wishing to protest other matters.

The free speech and assembly guarantees of the First Amendment provide political minority groups an outlet to express their concerns over government conduct. They help to ensure that these groups can obtain a hearing by the general community. Moreover, the ability to engage in social protest on the public streets may reduce the likelihood that groups will undertake other, less savory measures to attract the community's attention.⁹⁷ The First Amendment

95. *Cf. Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting):

To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Id. at 630. Would federal judges permit speakers whose overall purpose is “fraught with death” to enjoy heightened access to preferred public forums on the same basis as groups whose aims seem to be less odious? A modicum of faith in the judiciary is certainly required if the proportionality principle is to be implemented. Indeed, our current First Amendment jurisprudence already presupposes a basic faith in the professionalism of federal judges. *See WILLIAM VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT* 39–47 (1984).

96. *See, e.g.,* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22–27 (1948) [hereinafter MEIKLEJOHN, *FREE SPEECH*]; ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 20–28 (1960); Owen M. Fiss, *Silence on the Street Corner*, 26 *SUFFOLK U. L. REV.* 1, 19–20 (1992).

97. *See, e.g.,* Charles L. Black Jr., *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 *TEX. L. REV.* 492, 505 (1965) (“A radical catharsis through drastic civil disobedience may be the only alternative in some places to solutions infinitely more dreadful.”). The desire for publicity is a significant motivation for many acts of terrorism. Blowing up the World Trade Center gets the world to pay attention to a political cause, albeit in a destructive, negative way. *See* Graham Zellick, *Spies, Subversives, Terrorists and the British Government: Free Speech and Other Casualties*, 31 *WM. & MARY L. REV.* 773, 779–82, 819–21 (1990). *See generally* Sheldon L. Leader, *Free Speech and*

thus provides disenfranchised subgroups within the community with a peaceful means of agitating for change.

Relatedly, the community can benefit from having its conscience pricked. Without speech activities by affected groups, unlawful government conduct might go unnoticed by the general public.⁹⁸ The exercise of free speech rights can call problems to the attention of the majority, permitting them to make necessary corrections through the democratic process, rather than through the courts.

The Selma march is a perfect example of speech activities facilitating democratic reform. Six months after the march, Congress passed the Voting Rights Act of 1965,⁹⁹ which had a "spectacular" impact on minority political participation.¹⁰⁰ Within two months of its passage, the number of black voters in counties subject to Justice Department monitoring programs more than doubled, and within a decade black voters would increase their numbers from 1.5 million to 3.5 million.¹⁰¹ The number of black officeholders increased correspondingly: "By 1990, more than 4,000 blacks held elective office in the South, including a governor, five members of Congress, and more than 175 legislators, compared with less than 100 black elected officials in the region before passage of the Voting Rights Act."¹⁰²

The march facilitated democratic reform in two ways. First, it alerted the immediate community to the concerns of the black citizens of Alabama, serving as a classic petition for a redress of grievances. In this way, it provided the white citizens of both Dallas County and the entire state of Alabama with the opportunity to initiate reform without the intervention of federal authorities. Although the white citizens of Alabama failed to respond to this historic demand for the observance of basic constitutional rights, the march nevertheless facilitated a process that could have resulted in a local resolution of the crisis. In other circumstances, one can imagine local citizens demanding reform in response to speech activity.

Second, the Selma march created tremendous pressure at the level of the national government for the enfranchisement of all citizens. The sad truth is that, more than a decade after the Supreme Court's decision in *Brown v. Board of Education*,¹⁰³ segregation was still a pervasive feature of Southern culture

the Advocacy of Illegal Action in Law and Political Theory, 82 COLUM. L. REV. 412, 418-20, 428-29 (1982).

98. See *Connick v. Myers*, 461 U.S. 138, 160-65, 170 (1982) (Brennan, J., dissenting); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

99. See 42 U.S.C. §§ 1973-1973p (1988).

100. BASS, *supra* note 4, at 255.

101. *Id.* On the effectiveness of the Voting Rights Act, see also sources cited *supra* note 5.

102. BASS, *supra* note 4, at 255; see also HAROLD W. STANLEY, *VOTER MOBILIZATION AND THE POLITICS OF RACE: THE SOUTH AND UNIVERSAL SUFFRAGE 1952-1984*, at 94-99 (1987).

103. 347 U.S. 483 (1954).

in 1965. Indeed, some have argued that *Brown* was never fully implemented.¹⁰⁴ *Brown* and its progeny provide a striking example of the potential shortcomings of judicial relief. When one compares the present-day results of the Voting Rights Act to the results of *Brown*, it is obvious that legislative reform is often not only faster than judicial reform, but also may be much more effective.¹⁰⁵ Thus, it may be logical for those suffering systematic deprivations of legal rights to engage in mass public protest campaigns seeking legislative relief.

The public forum doctrine, however, has created a barrier to the public spaces needed for effective protest activity directed against existing legal wrongs. The contemporary approach to free speech issues leads courts to adopt unduly narrow definitions of public forums. Once a particular location is declared a public forum, it is open season for all comers. Understandably, courts are reluctant to open up new public spaces for speech activities.¹⁰⁶ Instead, courts define public forums narrowly in order to ensure that public spaces are available for their principal uses, and speech activities are, if not entirely prohibited, severely restricted.¹⁰⁷ This approach leaves groups wishing to protest particularly egregious wrongs with insufficient public space to make their protest heard.¹⁰⁸

It is doubtful that courts will reverse course and expand the public spaces that must be made available for speech activities. Given the constant danger

104. See, e.g., Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518-19 (1980) (arguing that *Brown* is "irrelevant" to most black children). But see Drew S. Days III, *The Other Desegregation Story: Eradicating the Dual School System in Hillsborough County, Florida*, 61 FORDHAM L. REV. 33, 37 (1992) (arguing that *Brown* was a relative success).

105. Almost 10 years after the *Brown* decision, less than 2% of Southern schools had been desegregated. RICHARD KLUGER, *SIMPLE JUSTICE* 758 (1975). Conversely, 10 years after passage of the Voting Rights Act, black voter registration equaled, and in some cases exceeded, that of white voters. See GARROW, *PROTEST AT SELMA*, *supra* note 3, at 179-211; STANLEY, *supra* note 102, at 94-99.

106. See, e.g., *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2706, 2711-15 (1992) (holding that airports are not public forums); *United States v. Kokinda*, 497 U.S. 720, 726-30, 732-37 (1990) (holding that sidewalk and parking lots on post office property were not public forums).

107. For examples of cases in which courts have found areas used by the public to be nonpublic forums, see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267-73 (1988) (public primary and secondary school buildings); *Greer v. Spock*, 424 U.S. 828, 837-39 (1976) (streets and sidewalks on military base); *Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 158 (4th Cir. 1993) (airport terminals); *Crowder v. Housing Auth.*, 990 F.2d 586, 591 (11th Cir. 1993) (auditoriums in public housing development); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1260-62 (3d Cir. 1992) (public libraries); *United States v. LaValley*, 957 F.2d 1309, 1314-15 (6th Cir. 1992) (grassy median strip between road and military base); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1203-04 (11th Cir. 1991) (interstate rest areas); *United States v. Gilbert*, 920 F.2d 878, 885 (11th Cir. 1991) (unenclosed plaza outside federal office building); *Young v. New York City Transit Auth.*, 903 F.2d 146, 161-62 (2d Cir. 1990) (subway stations); *Alabama Student Party v. Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344, 1345-47 (11th Cir. 1989) (public university property). Perhaps the best example of this trend are the "boxes" that appear in obscure locations in major airports. Although the federal courts were unwilling to banish speech activities from public airports completely, they marginalized speech activities in airports in order to ensure that the primary mission of such facilities would not be compromised. See generally Fiss, *supra* note 96, at 3, 8-9.

108. See *TRIBE*, *supra* note 14, § 12-24, at 995-97; Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 690-91 (1991); Deborah A. Schmedemann, *Of Meetings and Mailboxes: The First Amendment and Exclusive Representation in Public Sector Labor Relations*, 72 VA. L. REV. 91, 112-15 (1986).

of undue disruption of community activities, the judicial trend of limiting access to public forums cannot be avoided in a First Amendment jurisprudence that makes no accommodations for context. Unless courts can pick and choose among speakers on the basis of the wrongs they seek to protest, the balancing of the public's need to use public roads and buildings against the use of such facilities for speech activities will invariably cut against the speech activities. Current doctrine forces courts to ask whether groups like the Ku Klux Klan should routinely be permitted to use a particular public space for speech activities. All too often, the answer is "no," not only for small minorities holding extremist views, but also, by operation of the content-neutrality doctrine, for those who wish to call the attention of the community to serious government wrongdoing.

The proportionality principle permits courts to make rational distinctions between proposed uses of public forums for speech activities. Rather than prohibiting all groups from parading on a community's main arteries, the proportionality principle permits most groups to be relegated to less busy corridors, but holds out the possibility of using major highways and byways under sufficiently compelling circumstances.¹⁰⁹ The proportionality principle permits courts to match venues for speech activities with the speaker's need to speak and the community's need to hear. It thus maximizes the "public debate" function of the First Amendment.¹¹⁰

By restriking the balance in favor of speech activities under limited circumstances, the proportionality principle ensures that groups with serious grievances can make their case to the community effectively. If a minority group's protest is invariably relegated to the forums most convenient to the general public, the community at large will not be in a position to hear the group's grievances. The content-neutral approach to apportioning public space for speech activity denies disenfranchised groups adequate forums, just as it denies the general community the right to hear such groups' grievances. If provided with an effective outlet to vent their frustration, such groups are

109. Former Attorney General Nicholas DeB. Katzenbach has explained that "in the spirit of the first amendment, the government has an especially high duty to preserve, and even to welcome, dissent when it is government policy which is under attack." Katzenbach, *supra* note 16, at 450-51. The proportionality principle simply incorporates this idea.

110. Following the Rodney King verdict in May 1992, a group of University of Washington students marched down Interstate 5 in downtown Seattle to protest both the Los Angeles police department's treatment of Rodney King and the jury's subsequent verdict. The organizer of the march explained that "[w]e want[ed] to be peaceful, but at the same time, we want[ed] to be heard." *Students Say Their Peace—UW Senior Maintains Calm in I-5 March to Downtown*, SEATTLE TIMES, May 2, 1992, at A5. The protest caused tremendous disruption to motorists on the highway, and was patently unlawful, since most limited-access highways are closed to pedestrian traffic. See, e.g., WASH. ADMIN. CODE § 468-58-050(1). A similar protest occurred in San Diego, where a group of angry citizens marched down Interstate 5. See Tony Perry, *Keeping Lid On in San Diego*, L.A. TIMES, Apr. 2, 1993, at A3. These demonstrations were certainly preferable as a means of social protest to the riots that erupted in Los Angeles and other U.S. cities. Under the proportionality principle, however, protesters might have legal access to highways and similar forums in these circumstances. See generally Fiss, *supra* note 96, at 3-11, 18-20.

presumably less likely to resort to civil disobedience or criminal acts in order to bring their causes to the attention of the community.

Moreover, to the extent that democratic self-governance both presupposes and requires the existence of an active, informed electorate,¹¹¹ the proportionality principle helps to ensure that the community is fully informed about instances of government wrongdoing, and thereby empowered to act. The proportionality principle makes it easier for the community to listen when a speaker has a legitimate complaint about the government that the community itself has installed. If a sheriff's department is routinely beating minority suspects, the community should tolerate inconvenience in order to accommodate speech activities calling this state of affairs to the body politic's attention. If speech activities are limited to side streets, parks, and other traditional public forums, it is less likely that a group's message will be heard. And if the message is not heard, the problem may never be resolved peaceably.¹¹²

Essentially, the public forum doctrine lacks needed depth, because it fails to take context into account when apportioning public space for speech activity.¹¹³ Although the particular facts and history of the Selma march are unique, one can imagine other situations in which a state government denies or abridges a constitutional right, even though the degree and scale of deprivation pales in comparison to the police state tactics used in the South. In such circumstances, the federal courts should weigh the nature of the alleged constitutional deprivation when considering whether to permit the use of normally unavailable public property for speech activity protesting the deprivation.

Consider the case of Proposition 187, the referendum measure recently approved by California voters, which would severely curtail provision of basic state services, such as education and health care, to illegal immigrants. Opponents of this measure have argued that it is inconsistent with binding Supreme Court precedent.¹¹⁴ Under normal circumstances, the political

111. See MEIKLEJOHN, *FREE SPEECH*, *supra* note 96, at 22-27, 88-89.

112. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257; see also discussion *supra* note 110. Whether a mass protest in downtown Los Angeles could have averted the rioting in the South Central neighborhood is open to question. Nevertheless, the absence of an effective forum for expressing the rage and alienation caused by both the police department's treatment of Mr. King and the subsequent verdict was certainly a contributing factor to the community's choice of rioting as a means of expressing its disapproval of the police officers' behavior and the verdict.

113. Professor William Van Alstyne has suggested that the First Amendment's protection of speech activities can be described as a series of concentric circles, each farther away from a "core" of political speech. See VAN ALSTYNE, *supra* note 95, at 41. This conceptualization of the First Amendment demonstrates one shortcoming of existing doctrine: The model is two-dimensional rather than three-dimensional, and thus lacks the depth that consideration of context would provide.

114. See *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that Texas statute that withheld from local school districts funds for education of children not legally admitted into U.S. violated Equal Protection Clause), *reh'g denied*, 458 U.S. 1131 (1982); see also Paul Feldman & Patrick J. McDonnell, *U.S. Judge Blocks Most Sections of Prop. 187*, L.A. TIMES, Dec. 15, 1994, at A1 (reporting court issuance of stay of enforcement of Proposition 187).

process would offer critics of this measure a forum to voice their opposition. This route is not available to the people most affected by Proposition 187, however. Illegal immigrants—in California, largely Mexicans—cannot vote.¹¹⁵ Because of their covert status, they face great (and perhaps even insurmountable) difficulties in lobbying effectively against this measure. Of course, there are many other people who are likely to be sympathetic to their claim, including Mexican-Americans, who are legal, taxpaying resident aliens but who also cannot vote under California law.¹¹⁶ Suppose, however, that because of their difficulties in obtaining access to the political process, these immigrants and their supporters wish to hold a demonstration to protest the state's enactment of an unconstitutional policy. In this case, the existence of a legal wrong, coupled with the lack of alternative means of obtaining relief, justify providing expanded access to public property for speech activities protesting the referendum.

Contrast this claim with that of a political candidate, the nominee of a major party, who thinks that the colors blue and white look good together, and plans to use them in his campaign materials. Consequently, he does not wish his opponent to use the same colors.¹¹⁷ After being denied copyright and trademark protection, he wishes to engage in speech activities to protest the government's failure to issue a copyright or trademark for the colors blue and white.

Under existing First Amendment jurisprudence, a candidate's speech about his desire to copyright the colors blue and white for his campaign materials is protected no more, and no less, than a protest of a denial of constitutional rights by persons who do not have access to the ballot. Both cases fall within the category of "political speech," and therefore government restrictions on the speech would be analyzed identically in both cases. The illegal immigrants, however, have suffered a much greater wrong than a person who has been denied a copyright for his campaign colors. Similarly, the public's need to know about denial of constitutional rights is of a higher order than its need to know about the intellectual property dispute.

Contemporary First Amendment jurisprudence has no way of distinguishing between the two claims. When attempting to obtain access to a public forum for the purpose of engaging in speech activity, Proposition 187 opponents are limited in their selection of a public forum by the community's interest in avoiding undue inconvenience to the same degree as the political candidate's supporters. The degree of protection afforded the speech activities

115. See CAL. CONST. art. II, § 2 (restricting right to vote to U.S. citizens).

116. *Id.*

117. This hypothetical is not as farfetched as it might initially seem. If one posits an electorate with a low literacy rate and a career politician/candidate who traditionally uses blue and white in his campaign materials, it is entirely plausible that a rival candidate might try to create voter confusion by using promotional materials with the same color scheme.

is content-neutral; within a given class of speech, all speakers are treated equally well (or equally shabbily).

The proportionality principle adds needed depth to the forum analysis, by permitting a court to look at the merit of the speech claim, albeit in a limited way. The court's task is not to determine whether speech within a particular category is good or bad for the community, but rather to determine whether the speech seeks to call attention to a legal wrong committed at the hands of the government.¹¹⁸ Under *Williams*, the strength of a speaker's claim of a First Amendment right to use a particular public forum is a function not only of the category of speech at issue, but also of whether the speech seeks to call attention to government misbehavior.¹¹⁹

Returning to the hypothetical, the Proposition 187 opponents have a claim that implicates a serious government wrong—namely, an unconstitutional denial of government services.¹²⁰ In such circumstances, speech activities aimed at calling the government's misconduct to the attention of the community should be accorded preferential public forums; the community should be required to tolerate more than nominal inconvenience in order to provide illegal immigrants, resident aliens, and their citizen-supporters with an effective public forum. Of course, whether they should have the right to march up Interstate 5 from San Diego to Los Angeles would depend on the precise facts of the case.¹²¹ Nonetheless, the proportionality principle would allow some groups greater access to public forums on a principled basis, helping to ensure maximum utility of the First Amendment as an effective means of promoting good governance.

B. *Subjectivity and the Proportionality Principle*

The most serious criticism of the proportionality principle is that it is too subjective. It would allow federal judges to bestow preferential venues for

118. See *Williams v. Wallace*, 240 F. Supp. 100, 107–09 (M.D. Ala. 1965).

119. Of course, it is theoretically possible to permit courts to evaluate the relative importance of various categories of speech, including speech that does not implicate government wrongdoing. Current First Amendment jurisprudence divides speech into a number of such categories: political, religious, commercial, erotic or pornographic, and obscene. See *Barnes v. Glen Theatre*, 501 U.S. 560, 565–66 (1991) (finding nude dancing to be within outer periphery of First Amendment); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) (finding commercial speech protected by First Amendment); *Miller v. California*, 413 U.S. 15, 23–30 (1973) (finding obscenity unprotected by First Amendment).

That said, I cannot endorse a wholesale abandonment of content neutrality. Even well-intentioned judges are apt to favor those groups with which they agree, and undervalue claims by groups they despise. See, e.g., *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878–82 (1990) (refusing to sanction sacramental use of peyote by Native Americans); *Reynolds v. United States*, 98 U.S. 145, 164–67 (1878) (condemning Mormon practice of polygamy as "odious").

120. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 786–88 (1983). But see *Burdick v. Takushi*, 112 S. Ct. 2059, 2063–64 (1992) (finding that if ballot access restrictions are reasonable and nondiscriminatory, "the State's important regulatory interests are generally sufficient to justify the restrictions").

121. See *Williams*, 240 F. Supp. at 109 ("[T]he exercise of such rights in each instance must be determined according to the facts and circumstances presented.").

speech activities on their favored ideological groups. Judges who oppose abortion will hand over Interstate 95 in Richmond to Operation Rescue while environmentally minded judges permit Greenpeace to occupy the Port of Seattle. Even if the proportionality principle can be justified theoretically, difficulties remain regarding the details of its practical application. These practical difficulties, however, are far from insurmountable.

As Judge Johnson made clear in *Williams*, the application of the proportionality principle is not contingent on whether a given judge fancies particular speech, but rather on whether the proposed speech activity has at its core the purpose of calling public attention to a legal wrong, a statutory or constitutional violation committed by the government.¹²² The wrongs at issue in *Williams* were not just moral wrongs, but also clear legal wrongs, stemming from a deprivation of basic constitutional rights.

Not every moral wrong also constitutes a legal wrong, much less a constitutional violation. Under *Williams*, only a group wishing to protest a legal wrong could qualify for heightened access to public forums for speech activities.¹²³ Likewise, most speech activities aimed at producing legislative reforms would not qualify for expanded access to public forums.¹²⁴ Such speech activities would, most assuredly, qualify for protection against arbitrary government suppression; like any political speech activities, the protests would merely be subject to content-neutral, reasonable time, place, and manner restrictions.¹²⁵ Although such speech would be constitutionally protected, it would not qualify for rights approaching "the outer limits of what is constitutionally allowed."¹²⁶ This limiting principle is a necessary manifestation of the rule of law. For better or worse, courts are limited to providing relief for legal wrongs, not moral ones.

The inverse of this principle, however, is that a legal wrong constitutes a basis for judicial relief.¹²⁷ Professor Owen Fiss and others have suggested that the federal courts should possess broad authority to provide a complete remedy for constitutional wrongs, even when such a remedy requires the court to interpose itself in the operation of a state agency.¹²⁸ On the basis of this theory, Fiss has defended the district courts' use of "structural injunctions," in

122. See *id.* at 108.

123. For example, a protest of the atrocities taking place in Bosnia would certainly call attention to the moral wrongs occurring there, but probably does not implicate a constitutional interest.

124. For example, however desirable a 38-hour work week might be, there is no constitutional or statutory right to it. Thus, a group wishing to build popular support for legislation mandating a 38-hour work week would gain no special purchase on the public streets by operation of the proportionality principle.

125. See, e.g., *Burson v. Freeman*, 112 S. Ct. 1846, 1850–51 (1992).

126. *Williams*, 240 F. Supp. at 108.

127. See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 194–98 (1989); Barry Friedman, *Right and Remedy*, 43 VAND. L. REV. 593, 610–11 (1990).

128. See, e.g., OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* 9–12, 36–37, 94–95 (1978); Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 27–28 (1979); see also John Minor Wisdom, *Rethinking Injunctions*, 89 YALE L.J. 825, 828–31, 833 (1980).

which federal courts assume responsibility for the operation of a state agency (e.g., a state prison or mental hospital). Courts only have authority to provide this type of relief, however, when a plaintiff can establish the existence of a constitutional violation:

[A] past wrong is required for the issuance of the structural injunction; the mere threat of a wrong in the future is not likely to be deemed sufficient to trigger the reform enterprise A structural injunction is unlikely to issue without a judgment that the existing institutional arrangement is illegal, is now a wrong, and will continue to be wrongful unless corrected.¹²⁹

Courts possess broad authority to remake institutions, but they possess this authority *only* if a legal wrong has been identified. “[D]epartures from the standard models of judicial behavior are ultimately justified and determined by underlying substantive rights.”¹³⁰

Thus, the requirement that invocation of the proportionality principle be linked to a legal wrong stems not from the First Amendment, but rather from the institutional limitations applicable to the exercise of judicial power. If one thinks of the proportionality principle as a kind of extraordinary injunctive relief, then its application must be limited to situations in which a legal wrong is present. Courts simply do not have the authority to order *any* relief for moral, social, or philosophical wrongs, much less extraordinary relief—relief “at the outer limits of what is constitutionally permissible.”¹³¹

Moreover, the only legal wrongs that can be allowed to “count” for purposes of applying the proportionality principle are legal wrongs suffered at the hands of the government. Even if one concedes that the proportionality principle’s application can logically be limited to legal wrongs, one reasonably could question why those wishing to protest legal wrongs should be afforded special access to public forums only if the government commits the legal wrong. The answer is quite simple: Legal wrongs suffered at the hands of the government implicate the community that constituted the government.¹³²

If one accepts that the principle of popular sovereignty is fundamental to democracy, the government serves as an agent of the people.¹³³ Popularly elected officials, like governors and sheriffs, are accountable to the citizens

129. FISS, *supra* note 128, at 11.

130. *Id.* at 94.

131. *Williams v. Wallace*, 240 F. Supp. 100, 109 (M.D. Ala. 1965).

132. It is possible to establish a rough hierarchy of legal wrongs. In general, courts should assume that a constitutional violation entails a higher order of wrong than a violation of a statute or administrative rule, because of the higher procedural standards necessary for adoption of a constitutional provision. *See* U.S. CONST. art. V.

133. This principle is inherent in the Preamble to the Constitution, which locates power in “We the People.” U.S. CONST. pmbl.

who elected them.¹³⁴ So too are city councils, library boards, and police departments. Public entities and officers exercise authority derived from the community, ostensibly for the benefit of the community that selected them. If an agent of the community violates the legal rights of an individual or group within the community, the community at large shares responsibility for that action. So it is that when a Bull Connor turns loose his dogs on innocent children, or a Jim Clark instructs his men to beat peaceful protesters with billy clubs, or a Daryl Gates permits his officers to terrorize persons suspected of committing crimes, culpability lies in part with the people who delegated that power to them.

When an agent of the people commits a wrong, the aggrieved person can go to court and seek redress on the merits of the claim. That may not be enough to resolve the problem fully, however. The injured person also may wish to call the community's attention to the wrong, in hopes that the community might take action to resolve the problem without judicial intervention. In such circumstances, the public's right not to be inconvenienced is significantly less weighty than in circumstances where the proposed speech activity does not implicate wrongdoing by the government. A group that has suffered a legal wrong at the hands of a government institution has a greater claim on the community's collective ear than, say, a person wishing to protest the use of rabbits in medical experiments. The community's responsibility for the actions of its government requires that the balance between the right to use the streets for speech activities and the right to use the streets for travel be struck in favor of the speech activities more often and to a greater degree when government wrongdoing is at issue.¹³⁵ By delegating power to an official who systematically violates the community's laws, the community has in some measure forfeited the right to avoid the inconvenience occasioned by speech activities on the public streets protesting such action.¹³⁶

134. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819) (noting that government is agent of the people); HENRY S. COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* 4-5 (1958) (discussing principle that "men make government" as fundamental to American politics); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 77-78 (1980) (arguing that Framers of Constitution viewed ballot as means of combating tendency of power to separate rulers from ruled).

135. First Amendment law already makes special accommodations for persons wishing to speak about the existence of government wrongdoing. See *Rankin v. McPherson*, 483 U.S. 378, 384-87 (1987); *Connick v. Myers*, 461 U.S. 138, 149 (1983); *Perry v. Sinderman*, 408 U.S. 593, 598 (1972); *Pickering v. Board of Educ.*, 391 U.S. 563, 568-73 (1968). Thus, a government employee who speaks out about a matter of "public concern" is generally protected from retaliation by her government employer. Moreover, application of *Pickering* and its progeny requires courts to balance the public employer's interest in "promoting the efficiency of the public services it performs" against the "[employees'] opportunities to contribute to public debate." *Id.* at 573. At the same time, the Supreme Court has recognized that the general public has a constitutionally protected interest in receiving information, even information of a (mere!) commercial nature. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 & n.15, 761-70 (1976). *Williams* simply applies this same value in the context of weighing the availability of a particular public forum for speech activities.

136. Former Attorney General Nicholas DeB. Katzenbach has endorsed this approach in relatively strong terms:

My point is that if the objective of government is—as it should be—to maintain confidence in its processes, it may often have to go well beyond what is constitutionally required to prove its

Williams can be viewed as an instance in which the community, through its governor, sheriff, and voting registrars, permitted the systematic violation of fundamental constitutional rights. In such circumstances, it was (and is) entirely appropriate to require the community to be inconvenienced by persons wishing to call the community's attention to its abrogation of responsibility for the actions of its elected officials. Viewed in this light, whether a speech restriction is "reasonable" will turn as much on the content of the speech as on the venue for the speech activity.¹³⁷

Indeed, some legal wrongs committed by the government reflect a failure of executive and legislative officials to act in the face of clear legal obligations.¹³⁸ In such circumstances, the federal judiciary may have to act creatively in order to provide meaningful relief. In the context of social protest, "[t]his is particularly true when the usual, basic, and constitutionally provided means of protesting in our American way—voting—have been deprived."¹³⁹ Thus, to the extent that the legal wrongs offered to support the invocation of the proportionality principle include an assertion that the aggrieved group has been effectively denied access to the political process by the state, the group has established a sufficient condition for the application of the proportionality principle.¹⁴⁰

The proportionality principle does not sanction subjective decisions by judges based on ideological factors, but rather calls upon judges to consider the relationship of the proposed speech activity to the community in which the speech activity will occur when analyzing claims to a particular public forum.¹⁴¹ To the extent that the speech is the direct result of actions

point. In the spirit of Judge Johnson's decision with respect to the Selma-Montgomery march, it may have to go to extremes of inconvenience to prove its fundamental dedication to free political processes. Where the government itself is the object of criticism, the obligation to tolerate dissent, to make available suitable public forums, and to refrain from even the appearance of repression is particularly important.

Katzenbach, *supra* note 16, at 449.

137. See *Williams*, 240 F. Supp. at 106–09; see also *Rankin*, 483 U.S. at 384–88; *Pickering*, 391 U.S. at 568–69, 572.

138. See, e.g., *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977) (ordering judicially supervised reform of prisons following failure of state authorities to undertake meaningful reform); *Wyatt v. Stickney*, 344 F. Supp. 373 & 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (ordering judicially supervised reform of state-operated mental institutions following failure of state authorities to undertake meaningful reform).

139. *Williams*, 240 F. Supp. at 108.

140. This is not to say that such exclusion is a *necessary* condition for the application of the principle. Rather, when a group has been denied access to the political process, the need for an alternative means of registering dissent is particularly acute. Thus, if individuals or groups seeking enhanced access to public property for speech activities can establish the existence of a legal wrong, the proportionality principle should potentially apply, even if the individual or group has not been completely excluded from the political process.

141. It should not matter whether the speaker is the actual person or group that has suffered the wrongs; it is the existence of the wrong that is critical. Not permitting third parties to claim the benefit of the proportionality principle would effectively preclude some wrongs from being called to the community's attention through mass protest. For example, the prevailing conditions in a state's prisons or mental hospitals might be unconstitutional; obviously the persons suffering the wrongs—the prisoners and mental

implicitly sanctioned by the community through the democratic process, the court must correspondingly discount the community's interest in reserving the forum for its normal, everyday uses. Considered in this light, *Williams* requires judges to do little more than determine whether the proposed speech activity involves a protest of unlawful conditions brought about by the state.

Of course, not every claim of government wrongdoing can give rise to mass protests that significantly disrupt the everyday life of the community. Not every group wishing to protest a legal wrong caused by the government may be permitted to qualify for a preferred venue for its speech activities. Courts must evaluate the strength of such requests on an individual basis, granting requests for expanded access to public spaces in some cases and rejecting them in others. But this process is really no different than the balancing of equities that courts routinely conduct in evaluating requests for preliminary injunctions.¹⁴² Like the preliminary injunction analysis, the proportionality principle requires the development of a rational limiting principle that permits courts to sift competing claims to public space.

The *Williams* court painstakingly documented the existence of grievous legal wrongs committed by agents of the state government.¹⁴³ The court granted enhanced speech rights to the plaintiffs only after the plaintiffs had established that the wrongs that they sought to protest were colorable claims raising serious constitutional issues.¹⁴⁴ Courts should undertake application of the proportionality principle only after a similarly rigorous analysis.

C. *The Problem of Judicial Discretion*

Even if the proportionality principle is thus limited, its exercise raises potential problems concerning the application of judicial discretion. The decision to grant Group A, but not Group B, access to a particular forum requires an exercise of discretion. And for Group B to be told that it cannot

patients—would not be able to protest the wrongs themselves, although they might have other legal recourses. See, e.g., *Alabama v. Pugh*, 438 U.S. 781 (1978); *Wyatt*, 503 F.2d at 1305. However, a third party (e.g., a family support group for prisoners) should be permitted to engage in speech activities calling the unconstitutional conditions to the community's attention, and in determining an appropriate venue for such activities, the gravity of the wrongs suffered by the prisoners or mental patients should be considered. See generally *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403–07 (1980) (permitting third party to assert legal rights of another); *Singleton v. Wulff*, 428 U.S. 106, 117–18 (1976) (same). Thus, "the spokesman need not . . . be the victim. . . . An individual member of the victim group can be a spokesman, but there is no reason why individual membership should be required, or for that matter even preferred." Fiss, *supra* note 128, at 19.

142. See *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 817–18 (1986) (O'Connor, J., dissenting); *University of Texas v. Camenisch*, 451 U.S. 390, 392 (1981). In addition to establishing the probability of success on the merits, in order to qualify for a preliminary injunction, a petitioner must also show: (1) irreparable harm, (2) that the respondent will not suffer undue harm if the injunction issues, and (3) that issuance of the injunction would not be inconsistent with the public interest. See, e.g., *Thornburgh*, 476 U.S. at 817–18.

143. *Williams*, 240 F. Supp. at 103–05.

144. *Id.* at 108–09.

use the same public space that Group A can use will, to Group B, seem arbitrary indeed.

No easy answer exists to this criticism. Clearly, implementation of the proportionality principle will mean that some groups will perceive themselves to have been unfairly disadvantaged.¹⁴⁵

There are at least two partial responses, however. First, the proportionality principle deals only with the constitutional ceiling, not the constitutional floor. Thus, every individual or group will have access to traditional or designated public forums. Incorporation of the principle will not leave any individual or group without significant access to public space in which to engage in speech activities. At worst, some people may not enjoy access to the particular forum that they wish to use.

Second, existing First Amendment jurisprudence already makes a number of fine distinctions based on a judge's characterization of particular speech. For example, depending on its context, a court could characterize nude dancing as mere "conduct" or alternatively as "expressive activity."¹⁴⁶ The degree of protection afforded the communicative element of the activity will depend almost entirely upon which characterization the court chooses. Similarly, deciding how to characterize the nature of the speech requires the exercise of discretion.¹⁴⁷ Whether speech is "political," "commercial," "erotic," or "obscene" will turn, to some degree, on the sensibilities and professionalism of individual jurists.¹⁴⁸ Such decisions are essentially no different in character from the exercise of the discretion the proportionality principle would require. If anything, the existing distinctions are potentially more troublesome, because they may well determine whether the expressive activity at issue enjoys *any* protection.¹⁴⁹

145. For better or worse, constitutional law cannot entirely cabin judicial discretion. See Lawrence C. George, *King Solomon's Judgment: Expressing Principles of Discretion and Feedback in Legal Rules and Reasoning*, 30 HASTINGS L.J. 1549, 1559-66, 1573-75 (1979); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1524, 1538-39 (1991). Rather than reject a doctrine that requires the exercise of judgment in its application, we should attempt to find reasonable ways of limiting the scope of the discretion.

146. See *Barnes v. Glen Theatre*, 501 U.S. 560, 565-68 (1991).

147. See VAN ALSTYNE, *supra* note 95, at 47-49.

148. Perhaps the best proof of this is Justice Potter Stewart's famous "I know it when I see it" comment on the problem of identifying obscenity:

I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (footnotes omitted); see also BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 192-204 (1979) (describing "movie days" at Supreme Court).

149. See *New York v. Ferber*, 458 U.S. 747, 753-65 (1982); *Miller v. California*, 413 U.S. 15, 23-30 (1973).

When applying the proportionality principle, judges will have to use their discretion to fit particular forums to particular wrongs.¹⁵⁰ The task is one of “fashioning relief to fit the case.”¹⁵¹ Although this exercise creates the possibility of unfairness in individual cases, the benefits of providing adequate public forums for speech activity aimed at official government wrongdoing more than offset this opportunity cost.

If application of the proportionality principle is limited to protests involving colorable allegations of serious legal wrongdoing by a government official or agency, it is difficult to see how it could serve as a vehicle for permitting judges to implement their arbitrary or narrow ideological policy preferences. *Williams* certainly does not invite such behavior, nor is it necessary to construe the proportionality principle so as to provide cover for such unscrupulous conduct. In sum, the proportionality principle is not, and need not be, hopelessly subjective.

IV. CONCLUSION

Judge Johnson’s theory that the right to protest should, in limited circumstances, be commensurate with the legal wrongs being protested is both justifiable and necessary. The body politic should be constitutionally required to make adequate public space available for protest activities by an individual or group if the individual or group intends to protest legal wrongdoing by the government. The strict rule of content neutrality currently in vogue—which the federal courts observe when apportioning access to public forums—undoubtedly deprives some speakers of adequate public space in which to make their voices heard. The proportionality principle provides a needed remedy for the limited situations in which a protest of official wrongdoing in a generally available public forum is simply insufficient to achieve the manifold policies embodied by the First Amendment.

Although *Williams* may be novel as a matter of First Amendment law, it is not novel in a more fundamental sense. The civil rights activists in Selma had a right to vote, and they also had a right to protest the state’s denial of that right. The question was not the existence of the right, but the proper

150. In this regard, *Williams* is an easy case. Because the government’s wrongdoing was so blatant and pervasive, and given the fundamental nature of the rights involved, the court’s decision to permit a march on a massive scale was reasonable. Obviously, more difficult cases may arise. Such cases would necessarily require courts to engage in delicate balancing acts.

151. Johnson, *In Defense of Judicial Activism*, *supra* note 94, at 910. Courts have undertaken this task in a number of disparate areas, notably including reform of prisons, *see Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff’d sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), mental institutions, *see Wyatt v. Stickney*, 344 F. Supp. 373 & 344 F. Supp. 387 (M.D. Ala. 1972), *aff’d in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), and primary and secondary public education, *see Missouri v. Jenkins*, 495 U.S. 33, 50–58 (1990); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 209–15 (Ky. 1989); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 496–98 (Tex. 1991).

remedy for the violation of it. And in fashioning a remedy, Judge Johnson took into account the totality of the circumstances and determined that extraordinary wrongs called for extraordinary remedies.

Thirty years after the great march, it is clear that Judge Johnson decided *Williams* correctly, with respect to both the means and the ultimate result. Despite the academy's failure to recognize the power of Judge Johnson's constitutional logic, the proportionality principle is essential to ensuring that courts will be able to afford a full measure of relief to individuals or groups wishing to protest official government wrongdoing.¹⁵²

On the thirtieth anniversary of the Selma march and the *Williams* decision, it is appropriate once again to give Judge Johnson the last word:

From the moment I issued the order permitting that march, I had been certain that I had done what was right according to the laws of this nation. As I watched those people—and some were mere children—I was absolutely convinced I had been right. I had never watched a march or demonstration before, but there was something special about the Selma-to-Montgomery march. I think the people demonstrated something about democracy: that it can never be taken for granted; they also showed that there is a way in this system to gain human rights. They had followed the channel prescribed within the framework of the law. . . . [C]omplaints can be addressed within the system, according to the Constitution, and can be addressed without resorting to violence.¹⁵³

152. See Johnson, *In Defense of Judicial Activism*, *supra* note 94, at 910–12; see also George, *supra* note 145, at 1573–75.

153. SIKORA, *supra* note 55, at 231–33.