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INTRODUCTION

Judge Frank M. Johnson Jr.'s decision in *Williams v. Wallace*,[1] in which he issued an opinion permitting the Selma March to proceed despite unremitting opposition from local and state authorities, is now a settled part of American history. Furthermore, today few people would question the underlying correctness of the decision. But seen in the wider context of modern First Amendment jurisprudence, Judge Johnson's decision was remarkable. Just how remarkable it was becomes apparent when it is contrasted with a decision of the United States Supreme Court just a year later, *Adderley v. Florida*, in which the Court upheld the trespass convictions of participants in a civil rights protest on the grounds of a county jail.[2] *Adderley*, authored by that most vociferous defender of civil rights, Justice Hugo Black, demonstrates that the modern First Amendment has rarely been interpreted to require access by protestors to public property when that access might interfere with its regular uses. Yet in *Williams*, Judge Johnson authorized a fifty-four-mile-long march by 25,000 protestors along a public highway! That two preeminent federal judges, both strong supporters of constitutional liberties and both, of course, graduates of The University of Alabama School of Law, could reach such different results in similar cases is startling.

In this Essay, I explore the question of why Judge Johnson ruled the way he did, despite precedent and judicial norms. I conclude that while part of the answer lies in the unique history of the Selma March, there was an important and insightful legal aspect to Judge Johnson's reasoning, as well. Judge Johnson recognized a truth that many of his contemporaries had, and most people today

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1. Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).
2. Adderley v. Florida, 385 U.S. 39, 46 (1966).

have, forgotten: that the First Amendment protects many critical political rights, not just freedom of speech, and that the Selma March implicated many of those rights. He also recognized that the democratic rights of the First Amendment are distinct, though related, and cumulative and that it was the cumulative nature of those rights in Selma that made the Selma marchers' claims so powerful. In other words, Judge Johnson recognized the kaleidoscopic nature of the democratic First Amendment.

In Part I of this Essay, I provide a brief description of the events leading up to the Selma March and of Judge Johnson's opinion permitting the March to proceed. In Parts II through IV, I explore, in turn, each of the key rights at issue at Selma: speech, assembly, and petition. Finally, in Part V, I note how, at Selma, these rights interacted with each other and strengthened one another, and I contrast Judge Johnson's awareness of these interactions with Justice Black's apparent blindness in *Adderley*. I conclude by briefly considering the lessons for today that we might derive from Selma and Judge Johnson's opinion in *Williams*.

I. SELMA AND *WILLIAMS V. WALLACE*

The facts leading up to the Selma March and the decision in *Williams v. Wallace* are recounted in detail in Judge Johnson's opinion and elsewhere, and I will briefly summarize them in this Part. The background to the Selma March was ongoing efforts, starting in 1964, by civil rights groups to register African-American voters in several counties in central Alabama.[3] All of these counties had African-American-majority populations, but almost no African-Americans of voter age had been permitted to register to vote (and therefore, *a fortiori*, to vote) in the past.[4] These registration efforts were met with violent and sometimes deadly resistance by state authorities, including, notably, Alabama state troopers under the ultimate control and command of Governor George Wallace.[5] The registration drive climaxed with an effort on March 7, 1965, by a group of 650 African-Americans to walk from their church in Selma to Montgomery (the state capital) in order to present a petition to Governor Wallace seeking a redress of grievances regarding voter registration and interference with past demonstrations.[6] They were met by a group of state and local law enforcement officers, including auxiliary deputies of the local county sheriff's office known as "possemen," who proceeded to attack the marchers with brutal violence.[7] As Judge Johnson noted in his opinion, this attack had no valid law

3. *See Williams*, 240 F. Supp. at 103–04.

4. *Id.*

5. *Id.* at 104.

6. *Id.*

7. *Id.* at 104–05; *see also* Jeff Wallenfeldt, *Selma March*, ENCYC. BRITANNICA, https://www.britannica.com/event/Selma-March (last visited Feb. 17, 2020).

enforcement purpose but rather was designed to thwart the marchers' efforts to exercise their constitutional rights "to assemble peaceably and to petition one's government for the redress of grievances."[8] The latter right, the opinion noted in a key passage, "may be exercised in large groups."[9]

The violence on March 7, which became known as "Bloody Sunday," galvanized a national response. In response to an invitation from Dr. Martin Luther King Jr., thousands of supporters of civil rights descended on Selma, planning to renew the Selma March on March 9.[10] Lawyers representing leaders of the Southern Christian Leadership Conference (SCLC) and the Student Nonviolent Coordinating Committee (SNCC) also filed a lawsuit before Judge Johnson, seeking an injunction to prevent a repeat of Bloody Sunday.[11] On March 9, Judge Johnson issued a Temporary Restraining Order (TRO) to prevent the March from going forward until he had had time to consider the legal issues.[12] In response, Dr. King led marchers as far as the bridge out of Selma where the Bloody Sunday attacks had occurred, and then he and the marchers turned around to avoid violating the TRO.[13] On March 15, partly in response to these events, President Lyndon Johnson introduced legislation into Congress that ultimately became the Voting Rights Act of 1965.[14]

Meanwhile, the drama in Selma continued. After a lengthy hearing, on March 17, Judge Johnson issued an injunction in favor of the marchers,[15] and on March 19, he rejected an application by Governor Wallace to reconsider his decision.[16] In his opinion, Judge Johnson acknowledged that there could, of course, be no absolute right to march along a highway, given the state's legitimate interest in keeping it open for traffic.[17] He concluded, however, that it was the court's job to draw the "constitutional boundary line" between the plaintiffs' rights and the government's interests.[18] He also emphasized that, in drawing the boundary, the court must take into account "the enormity of the wrongs" that triggered the exercise of rights, and "[i]n this case," he recognized, "the wrongs are enormous."[19] He also noted two further critical points. First, under Alabama law, the highway along which the marchers planned to travel (U.S. Highway 80) was open to pedestrian traffic along the shoulders.[20] And

8. *Williams*, 240 F. Supp. at 105.
9. *Id.* at 106.
10. Wallenfeldt, *supra* note 7.
11. *See id.*
12. *Williams,* 240 F. Supp. at 103.
13. Wallenfeldt, *supra* note 7.
14. *Id.*
15. *Id.*
16. *Williams*, 240 F. Supp. at 110–11.
17. *Id.* at 106.
18. *Id.*
19. *Id.*
20. *Id.* at 107.

second, the plaintiffs had proposed a careful plan for the March that was designed to minimize the risks of disruption or disorder and that the defendants did not deny was reasonable.[21] He conceded that the event planned by the plaintiffs "reaches . . . to the outer limits of what is constitutionally allowed" but determined that the March should still proceed because "the wrongs and injustices inflicted upon these plaintiffs . . . have clearly exceeded—and continue to exceed—the outer limits of what is constitutionally permissible."[22] Finally, Judge Johnson concluded that the marchers were legally entitled to police protection from the State of Alabama and issued an injunction to that effect.[23]

The rest is history. On March 21, Dr. King led several thousand marchers out of Selma under federal military protection (Governor Wallace having failed to deliver the police protection that Judge Johnson's injunction required).[24] Thousands more joined the March along the way, increasing their numbers to 25,000.[25] And five days later, the marchers arrived in Montgomery, where Dr. King delivered his famous "Our God is Marching On!" speech (perhaps second in fame only to "I Have a Dream").[26] Finally, in an often-ignored but significant denouement, a few days after these events, civil rights leaders did indeed deliver a written petition to Governor Wallace, which he received.[27]

II. FREE SPEECH

The underlying grievance that drove the events in Selma was denial of the right to vote and, in particular, enforcement of the Fifteenth Amendment's prohibition on racial discrimination in granting the vote. But the actual legal conflicts that arose in Selma, as well as in the *Williams v. Wallace* litigation, centered not on the Fifteenth but rather on the First Amendment. And in particular, they focused on the expressive (i.e., the nonreligious) rights of the First Amendment. That much is clear.

Selma, however, represented an unusual First Amendment conflict, in contemporary terms. The reason is that in the modern era, when one mentions the First Amendment, what immediately comes to mind is free speech. Indeed, the modern Supreme Court's First Amendment jurisprudence, aside from cases involving the Religion Clauses, focuses almost exclusively on freedom of speech. The other three expressive rights—freedom of the press, assembly, and petition—have essentially vanished. Regarding the Press Clause, many scholars

21. *Id.* at 107–08.

22. *Id.* at 108.

23. *Id.* at 110.

24. Wallenfeldt, *supra* note 7.

25. *Id.*

26. *See* Ronald J. Krotoszynski, Jr., *Equal Justice Under Law: The Jurisprudential Legacy of Judge Frank M. Johnson, Jr.*, 109 YALE L. J. 1237, 1237 n.2 (2000) (explaining how Judge Johnson's injunction "facilitated" King's "Our God is Marching On!" speech).

27. RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE 188–89 (2012).

have noted that the Supreme Court has interpreted it to give no additional rights to the institutional media and so has essentially folded it into the Speech Clause.[28] The Assembly Clause has suffered an even worse fate, not having been cited by the Court since 1983,[29] even in cases where the very issue is the right of groups to gather on public property.[30] And while the Petition Clause still occasionally appears in Supreme Court cases, its scope has been reduced to the point where it, too, is essentially coterminous with the Speech Clause.[31] In recent decades, at least in the judiciary, the First Amendment means either religion or speech.

But not at Selma. The truth is that during the Selma conflicts, free speech was barely at issue. Bloody Sunday was not triggered by an effort to silence a speaker, the plaintiffs in *Williams* were not primarily seeking the right to speak, and while Dr. King did ultimately give a speech in Montgomery, that was *after* the March had concluded. Of course, free speech was a necessary and integral part of the Selma March in the sense that one cannot organize 25,000 people and keep them on the road for five days without a lot of talking. But at its heart, Selma was not a dispute over free speech.

III. ASSEMBLY

If the right to freedom of speech was largely tangential to Selma, the right of assembly most assuredly was not. To the contrary, the right of citizens "peaceably to assemble"[32] lay at the heart of the conduct that the marchers at Selma were seeking to engage in. In modern usage (whose development was driven in significant part by the civil rights movement), the word *assembly* is largely synonymous with a protest rally, and the Selma March was one of the most significant such protests in American history.

Of course, the constitutional right of assembly is not unlimited. The Supreme Court has long held that restrictions on the time, place, and manner of speech and assembly on public property are inevitable,[33] and indeed the Court

28. *See* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 258 n.29 (2004) (first citing David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430, 448–50 (2002); and then citing 3 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 22:6, Westlaw (database updated 2019)).

29. *See* JOHN D. INAZU, LIBERTY'S REFUGE 7, 191 n.15 (2012).

30. *See, e.g.*, Thomas v. Chi. Park Dist., 534 U.S. 316, 317–20 (2002) (addressing the constitutionality of a Chicago Park District requirement of a permit for public assemblies of over fifty people but discussing only the Free Speech Clause, not the Assembly Clause).

31. *See* Borough of Duryea v. Guarnieri, 564 U.S. 379, 386–92 (2011); McDonald v. Smith, 472 U.S. 479, 482–85 (1985).

32. U.S. CONST. amend. I.

33. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 481–82 (1988) (upholding a ban on targeted residential picketing); Kovacs v. Cooper, 336 U.S. 77, 85–86 (1949) (upholding a ban on the use of sound trucks within city limits).

has even upheld licensing requirements for such events.[34] Professor Tabatha Abu El-Haj has convincingly demonstrated that many of the Court's holdings in this regard are ahistorical, especially insofar as they uphold licensing requirements.[35] Nevertheless, since the mid-twentieth century, such restrictions have been widely accepted. In the case of the Selma March, as we noted above, Judge Johnson explicitly acknowledged these limitations on assembly but then concluded that, given the strength of the plaintiffs' constitutional interests, the rights of the marchers clearly outweighed concerns on the part of the Alabama authorities regarding order or disruption.[36]

The other major, and even less controversial, limit on assemblies is that they must be peaceable—as indeed the text of the First Amendment acknowledges. Of course, drawing the line between peaceable and unlawful assemblies is a complicated matter, and again Professor Abu El-Haj has demonstrated that historically (i.e., prior to about 1880) the law and government officials were far more tolerant of disruptive assemblies than modern practice.[37] In any event, in Selma, the violence was all on the part of the public officials themselves, not the citizens who were assembled. And going forward, Judge Johnson also repeatedly emphasized in *Williams* that the plaintiffs' plan for the March was designed to ensure that the protest remained peaceful and thus within constitutional protection.[38]

All of this supports the view that the key right at stake in Selma was the right to assemble in public. But in fact, matters are somewhat more complicated. For one thing, as the next Part discusses, the petition right was as central to the goals of the Selma March as assembly. But more fundamentally, the nature of the assembly right invoked in Selma was a complex one.

This complexity is rooted in history. In modern times, as noted above, the concept of assembly has been treated as identical to protest. But a look at the roots of the right suggests something more nuanced. Starting with the text, the relevant portion of the First Amendment protects "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[39] The close juxtaposition of assembly and petition has convinced some that the right protected is the unitary right of assembling to petition, but it is

34. *Thomas*, 534 U.S. at 325; Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

35. Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. PA. J. CONST. L. 949, 970–71 (2014) [hereinafter Abu El-Haj, *All Assemble*]; Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 40–42 (2011) [hereinafter Abu El-Haj, *Changing the People*].

36. Williams v. Wallace, 240 F. Supp. 100, 106–07 (M.D. Ala. 1965).

37. Abu El-Haj, *All Assemble*, *supra* note 35, at 969–70; Abu El-Haj, *Changing the People*, *supra* note 35, at 42–44.

38. *Williams*, 240 F. Supp. at 108, 110.

39. U.S. CONST. amend. I.

quite clear that the drafting history of the First Amendment is entirely inconsistent with this view.[40] What is protected are two distinct rights, one of assembly and the other of petition. More specifically, when James Madison introduced what became the Bill of Rights into Congress on June 8, 1789, the specific language he proposed read as follows:

> The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.[41]

Madison's language was in turn based on proposals for amendments submitted by the various state ratification conventions. Typical is the language of the Virginia proposal drafted by George Mason (which was adopted almost verbatim by New York, North Carolina, and Rhode Island), which stated:

> That the people have a right peaceably to assemble together to consult for the common good, or to instruct their Representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.[42]

Several points emerge from this brief drafting history. The first is that, given Madison's and Mason's wording, there can be no doubt that they considered the rights of assembly, instruction (in Mason's case), and petition to be distinct, albeit related, rights. Second, there is not even a hint that Madison's decision to drop the right of instruction from his proposal was based on a desire to merge the assembly and petition rights; rather, Madison's and others' comments make it clear that the decision was grounded in their views regarding the nature of representative, deliberative democracy.[43]

But it is the third point that is crucial. The right of assembly was seen primarily not as a general right to gather or even to protest; it was rather an opportunity for sovereign citizens "to consult for the common good" (and, for Mason, also "to instruct their Representatives"). It was a political right, but its function was not a primarily negative or critical one (as protest often is). Rather, it was a chance for the sovereign collective to formulate their views. These views, when settled upon, may then become the basis for voting, or may then (through petition or, again in Mason's case, instruction) be conveyed directly to the citizens' representatives with the intent of eliciting legislative action.

At heart, then, the assembly right was seen as a deliberative right intended to help inform public opinion. And public opinion, in turn, has always been understood to be at the heart of a democracy based on popular sovereignty. As

40. *See* INAZU, *supra* note 29, at 22–24.

41. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 129 (Neil H. Cogan ed., 1997).

42. *Id.* at 140.

43. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 242–43 (1993).

James Madison put it in 1791, "Public opinion sets bounds to every government, and is the real sovereign in every free one."[44] Finally, when seen through the lens of the technology available in 1789 (or for that matter 1868), the significance of the assembly right in a democratic system of government becomes clear. After all, in those times, physical assembly was the only practical means for a significant number of citizens to actually communicate with one another. As such, without a right of assembly, control over public opinion would be restricted entirely to those with access to the press, which would automatically exclude most citizens—a system surely antithetical to a functioning democracy.

Assembly, then, is a crucial element of the democratic rights protected by the First Amendment because of its role in enabling public deliberation. Protest, while also surely important, was, in early understandings, a secondary aspect of assembly at best. But now consider Selma. Whatever the goals of the Selma March (and they were complex), deliberation was surely not a major element of them. For one thing, deliberation and consultation among 25,000 participants is not practical. But more fundamentally, participants in the Selma March were not there to consider and debate the legitimacy or morality of the disenfranchisement of African-American voters in Alabama. They knew it was immoral, and indeed they knew it was unconstitutional as well. The purpose of the March was to communicate the breadth and strength of public support for that position to Alabama officials and (perhaps more so) to the nation as a whole. It also aimed to make clear to Alabama officials that the grotesque violence that predated the March would not silence dissent, as well as to embarrass those officials before the eyes of the nation. In other words, the function of the Selma assembly was not truly deliberative but rather primarily communicative. And the audience for that message was a complex one, consisting in part of state officials (more on which in the next Part) but more so a broader, national audience that in turn would put pressure on Congress to enact voting-rights legislation. Finally, while it is unlikely that the Selma March changed hearts and minds in the Alabama state government, at a national level, it appears to have accomplished exactly that.[45]

IV. PETITION

Let us now turn to the Selma marchers' purported primary audience: state and local officials in Alabama. The original, stated purpose of the march that ended on Bloody Sunday, remember, was to deliver a petition regarding voting rights in Montgomery. And the ultimate Selma March that did occur concluded with the delivery of a petition to Governor Wallace.[46] For that reason, just as

44. James Madison, *Public Opinion*, NAT'L GAZETTE, Dec. 19, 1791, *reprinted in* 14 PAPERS OF JAMES MADISON 170 (Robert A. Rutland et al. eds., 1983).

45. *See supra* notes 10–14 and accompanying text.

46. KROTOSZYNSKI, *supra* note 27, at 188–89.

the assembly right was central to the events at Selma, so too was the right to petition. But as with assembly, the role of the petition right at Selma was a complex, and in some ways ironic, one.

Let us begin with the basics. The right protected by the First Amendment is the right "to petition the Government for a redress of grievances."[47] As the language of the Constitution suggests, the petition right was created with a specific purpose: to enable citizens to inform their representatives of their complaints or problems and seek redress (presumably a solution or compensation) for the alleged wrongs done to them. Indeed, the right is not one limited to citizens and representatives—it has its roots in pre-Norman England as a means for individuals to seek resolution of private disputes,[48] and the Magna Carta recognizes such a right on the part of barons to bring complaints about official misbehavior to the king.[49] Throughout the Middle Ages, petitioning—first to the king but later to Parliament as well—remained an important part of English legal and political culture.

The key period in the evolution of the petition right in England was the seventeenth century. As that century progressed, petitioning evolved from being purely a means of private dispute resolution into a means to propose legislation and policy as well;[50] at the same time, it became increasingly common for petitions to be presented by associations of citizens and subjects rather than merely individuals.[51] As such, the petition right was transformed from a quasi-judicial right to a political one, culminating with the inclusion of an absolute right on the part of the English to petition the king in the English Bill of Rights of 1689.

Given the significance of the right of petition in England, it comes as no surprise that the English residents of the American colonies brought this right to their new homes. Indeed, as Professor Ron Krotoszynski points out, colonial assemblies spent most of their time responding to petitions from the public, some of which were purely private while others were policy-oriented in nature.[52] By the time of the American Revolution, the petition right was so well established that the First Congress received approximately 600 petitions, even though it finished its term before the Petition Clause came into effect with the ratification of the First Amendment on December 15, 1791.[53] Finally, and importantly, it is noteworthy that the First and other early Congresses not only received and accepted petitions but also felt an obligation to respond to them

47. U.S. CONST. amend. I.

48. KROTOSZYNSKI, *supra* note 27, at 84.

49. *Id.* at 84–85.

50. *Id.* at 86–87 (citing WILLIAM R. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION: PART I, at 346 (Oxford, 2d ed., Clarendon Press 1892)).

51. Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 722–23 (2002).

52. KROTOSZYNSKI, *supra* note 27, at 104–06.

53. *Id.* at 110.

even if the subject matter was a controversial one, such as the abolition of slavery.[54] Indeed, this belief that Congress was required to respond to petitions was the source of major political controversies during the run-up to the Civil War, when the bitter divisions over slavery led to the decline and ultimate demise of responses to petitions.[55]

One final point about the petition right. Today we live in a world of e-petitions and a White House website designed to receive petitions.[56] But for most of history, for the petition right to work effectively, it implied not only a right to submit a paper petition to government officials without fear of retaliation but also a right to travel to the seat of government and physically deliver the petition.[57] In no other way (given the parlous state of the mails in eighteenth-century America) could speedy and effective delivery be ensured. Indeed, in recognition of this tradition, the British House of Commons still has a procedure for accepting paper petitions, including permitting members to place anonymous petitions in the petitions bag[58] (though—sadly, for this history buff—the U.K. also appears to be moving towards e-petitions[59]).

Given this history, the significance of petitioning to the Selma March is obvious. The original Bloody Sunday marchers, as well as the participants in the final March, were invoking a very old Anglo-American political right and tradition to bring a focus on their grievances. And by turning to petition, the marchers were able to make a plausible case for a constitutional right to travel to Montgomery to physically deliver the document. Judge Johnson's opinion in *Williams v. Wallace* recognized and relied on this point, repeatedly referring to plaintiffs' right to travel to Montgomery to petition state officials.[60]

But now notice an anomaly. As the historical description above demonstrates, in its origins, a petition was not seen as a symbolic or purely communicative gesture designed to bring attention to a problem. Rather, the purpose of a petition was to elicit action from the government in the form of actual redress. Indeed, in its roots as a private dispute-resolution mechanism, petition had *no* symbolic or broadly communicative role but rather a purely instrumental one. Of course, during the early republic, petitioning did gain an important symbolic

54. *Id.* at 111–12.

55. WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS 369–71 (1996).

56. *See Petition the White House on the Issues That Matter to You*, WHITEHOUSE.GOV, https://petitions.whitehouse.gov/ (last visited Feb. 17, 2020).

57. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872) (recognizing the right "to come to the seat of government" as one of the privileges and immunities of citizens of the United States) (quoting Crandall v. Nevada, 73 U.S. 35, 44 (1867)).

58. *Ask Your MP to Present a Petition*, WWW.PARLIAMENT.UK, https://www.parliament.uk/get-involved/sign-a-petition/paper-petitions/ (last visited Feb. 17, 2020).

59. *Petitions*, UK GOV. & PARLIAMENT, https://petition.parliament.uk/ (last visited Feb. 17, 2020).

60. Williams v. Wallace, 240 F. Supp. 100, 106–07 (M.D. Ala. 1965).

function, especially in the context of antislavery petitioning. But in general, petitions were intended to elicit practical action from the government.

In Selma, however, that surely was not the case. Not even the most wide-eyed optimist would have believed that Governor Wallace, the arch segregationist, was going to act upon a petition requesting that he permit African-American citizens to exercise their constitutional right to vote. If there were any doubts on this point previously (and there were none), surely the events of Bloody Sunday demonstrated the point. Yet the March continued, and the petition was delivered. Why? Presumably because invoking ancient traditions does serve a very important communicative, symbolic function, even if that was not the original function of the tradition. And that function is served even if the formal recipients of the petition ignore it altogether. So as with the assembly right in Selma, the petition right was invoked for symbolic and communicative purposes, and the actual primary audience for the marchers' petition was not the officials to whom it was directed but rather the national public and, ultimately, the United States Congress.

V. FREE SPEECH *AND* ASSEMBLY *AND* PETITION

To this point, we have seen that the Selma March and the events that followed the March in Montgomery implicated speech, assembly, and petition rights to a greater or lesser extent. We have also seen, however, that the ways in which those rights were exercised at Selma did not tend to implicate the core historical function of any of those rights. Furthermore, while the Selma March was probably best characterized as an assembly, even Judge Johnson acknowledged that the nature of the March, involving thousands of individuals walking on a public highway, reached the very limits of the assembly right. Why, then, did the plaintiffs in *Williams v. Wallace* prevail? Part of the answer must lie in the sympathetic nature of their cause—what Judge Johnson meant when he said that the wrongs that the marchers were protesting "are enormous."[61] But that is surely not enough to win a constitutional claim, absent a reasonable legal argument. Judge Johnson himself knew and acknowledged that First Amendment rights had limits, and he did not automatically support all claims even by sympathetic plaintiffs such as civil rights protestors. Indeed, soon after he decided *Williams*, Judge Johnson issued two opinions *denying* First Amendment claims by civil rights protestors on the grounds that the protestors' actions exceeded legal limits.[62]

What was distinctive from a legal perspective about the events in Selma, I would argue, is that the marchers very consciously and publicly *combined* their

61. *Id.* at 106.

62. Cochran v. City of Eufaula, 251 F. Supp. 981, 986 (M.D. Ala. 1966); Johnson v. City of Montgomery, 245 F. Supp. 25, 30 (M.D. Ala. 1965).

exercise of distinct First Amendment rights to create a whole that was greater than its parts. Thus, the events at Selma began with speech within a religious association (a church congregation) to organize the first march on March 7 that ended in violence, and then substantial associational speech in the aftermath of March 7 to organize what became the Selma March. It then proceeded to a major assembly, the March itself. But importantly, the March was not simply an assembly or protest, it was also an integral part of the petitioning process because it was intended to deliver a petition to Alabama officials in Montgomery. This fact led Judge Johnson to emphasize in *Williams* that "the right to petition one's government for the redress of grievances may be exercised in large groups. Indeed, where, as here, minorities have been harassed, coerced, and intimidated, group association may be the only realistic way of exercising such rights."[63] In other words, Judge Johnson was recognizing a hybrid right to associate, assemble, and petition in combination with one another. And it was precisely the hybrid nature of the rights being exercised in Selma—because of necessity and design—that made the plaintiffs' claims in *Williams* so powerful.

Indeed, a closer look at the events at Selma reveals just how thoroughly intertwined the First Amendment rights at issue were—and in what complicated ways. Consider, in this regard, the uses to which the organizers of Selma were putting their assembly and petition rights. As noted earlier, the original history and language of the assembly right suggests that assemblies were designed to be primarily deliberative, an opportunity for citizens to gather and develop their views on "the common good." Similarly, the petition right was designed to be instrumental—to actually convince the government to take specific actions: originally to resolve private grievances and, later, to alter public policy as well. But as also noted earlier, in Selma, neither of these functions were meaningfully in play. The Selma March was transformative but not truly deliberative. And the Selma marchers surely did not expect their petition to generate legislative or executive action from Alabama officials.

Instead, the March was first and foremost expressive. It was communicating a message, albeit not a message primarily in words. Instead, the participants were communicating through specific actions: gathering in associations, organizing an assembly, and delivering a petition. And this is an entirely appropriate use of these rights because of the intertwined and "cognate" (to quote the Supreme Court) nature of the political rights protected by the First Amendment.[64] These rights serve common democratic ends and operate separately but also in tandem. Assemblies might be deliberative, but they are also and always expressive as well. Gathering 25,000 people to march for five days sends a message that no words alone can express. Similarly, a petition makes crystal clear

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

64. Thomas v. Collins, 323 U.S. 516, 530 (1945); De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

that the problems the petitioners are calling upon officials to solve are not inevitable; they are, in fact, solvable through specific governmental actions. Again, speeches alone do not deliver that message with the same force and clarity that a petition requesting specific action does. For all of these reasons, what we saw at Selma was the ultimate example in American history of the cognate rights of the First Amendment in action.

The significance of the tandem operation of First Amendment rights at Selma—and of Judge Johnson's appreciation of this fact in *Williams*—becomes clear when one contrasts Johnson's analysis in *Williams* with the Supreme Court's First Amendment analysis just a year later in another case involving civil rights protestors, *Adderley v. Florida*.[65] In *Adderley*, students at Florida A&M University were challenging their trespass convictions for participating in a peaceful protest on the grounds of a county jail (the protest was targeted, ironically, at the arrest of other students the previous day).[66] Justice Hugo Black wrote an opinion for a 5–4 majority of the Court rejecting the students' First Amendment claims.[67] Furthermore, Justice Black's opinion can only be described as curt and dismissive. He began by quickly and flatly rejecting several (admittedly weak) arguments by the protestors and then turned to the key First Amendment issues. With respect to these, he concluded that the sheriff of Leon County, who operated the jail, had a perfect right to exercise control over government property to maintain its use as a jail.[68] He phrased the question raised in the case as whether "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."[69] And having stated the issue in such an exaggerated and inflammatory manner, Black easily rejected the claim with the famous statement that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[70]

How could Justice Black, one of the great lions of civil liberties on the Supreme Court and perhaps the strongest defender of First Amendment rights in the history of the Court, have been so unsympathetic to the serious First Amendment issues raised in *Adderley*? The reason, I think, is that Justice Black, by focusing exclusively on freedom of speech, missed the complex nature of the claims raised by the *Adderley* defendants. That Justice Black was focused on speech is clear from the opinion. As just noted, he characterized the protestors' claim as one to "propagandize." And elsewhere, he emphasized that given the neutral nature of trespass law, there were no grounds to believe that the sheriff had arrested the protestors "because the sheriff objected to what was being

65. Adderley v. Florida, 385 U.S. 39 (1966).
66. *Id.* at 40.
67. *Id.* at 47–48.
68. *Id.*
69. *Id.* at 48.
70. *Id.* at 47.

sung or said by the demonstrators or because he disagreed with the objectives of their protest."[71] From that perspective, his easy rejection of the First Amendment claims in *Adderley* makes sense. After all, removal from the grounds of the jail did not meaningfully restrict the protestors' ability to communicate their message—they could just as easily have lined up across the street from the jail, outside of the curtilage. Or they could have protested in front of other government buildings that were not closed to the public. To use the modern jargon, there seems no doubt that closing the jail grounds to protests nevertheless left speakers with "ample alternative channels for communication."[72]

What Justice Black missed was that far more was at issue in *Adderley* than free speech. The defendants in *Adderley* explicitly claimed "rights of free speech, assembly, petition, due process of law and equal protection of the laws."[73] Leaving aside due process and equal protection, it is quite clear that the protestors in *Adderley* were invoking their cognate First Amendment rights as a whole, not just a right to speak. Once one recognizes this, however, Justice Black's analysis becomes unsupportable. Consider his statement that the government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[74] That perspective is perhaps (though probably not) defensible when speech alone is at issue. But if literally accepted, such a power on the part of the government would eviscerate the right of assembly. After all, given government ownership of public spaces, assemblies of any significant size *must* occur on government property. If the government chooses to "dedicate" parks to recreation and streets to traffic, as Justice Black suggests they might, then assembly would cease to exist as a meaningful right. As Professor Abu El-Haj has demonstrated, however, that is *not* our constitutional tradition.[75] To the contrary, historically, the government lacked the power to exclude assemblies of citizens from public spaces by fiat or to require the government's consent (via permitting schemes) for citizens' assemblies, and also was required to tolerate substantial amounts of disruption and disturbance in public assemblies, so long as they did not cross the line into violence.[76] Furthermore, these rules had good reasons behind them. Assembly is one of the crucial political rights of the First Amendment, and without it, democratic self-governance itself would be in grave danger. Democracy, in other words, is worth a little disruption.

Not only is Justice Black's analysis inconsistent with the very nature of an assembly right, it also threatens to significantly restrict the right to petition. As

71. *Id.*

72. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

73. *Adderley*, 385 U.S. at 41.

74. *Id.* at 47.

75. Abu El-Haj, *All Assemble*, *supra* note 35, at 968–71.

76. *Id.* at 990–91.

noted earlier, the right of petition is an extremely ancient one, predating Anglo-American democracy.[77] However, the Framers understood that a petition right is particularly essential in a representative democracy (what they would have called a republic[78]) because it provides a crucial means for citizens to communicate with and express their desires to representatives between elections—indeed, for noncitizens and for citizens who are denied the franchise (who were a majority of adults in the Framing Era), petitions were the *only* formal means to seek to influence legislators. But, especially in the days before the Internet or electronic communications more generally, delivering a petition required physical access to the representatives to whom the petition was directed.[79] If the government were truly free to exclude the public from locations where representatives work, then the petition right, too, would be rendered meaningless. And it is important to note in this regard that the sheriff of Leon County is an elected official (at least, he is elected today[80] and presumably was also elected when the events in *Adderley* took place, though I have been unable to verify that fact) to whom citizens have a clear, constitutional right to deliver petitions. After all, the petition right extends to executive as well as legislative officials—recall that the petition right protected in the 1689 English Bill of Rights was the right to petition the *king*.

None of this is to say, of course, that governments cannot place *any* limits on public access to elected officials or government property. Clearly Adderley and her companions had no right to protest in the sheriff's office any more than in the Oval Office. And if the sort of access that is being sought by members of the public cannot be reconciled with the property's functions, then access may also be limited. Indeed, Justice Black suggested that this might have been the situation in *Adderley*, but Justice Douglas's dissent convincingly refuted that argument by pointing out that the protestors were not blocking an entrance or driveway and that, if they were doing so, they could have simply been asked to move (as happened with an entrance).[81] Finally, in special circumstances such as the White House, where security concerns are paramount, entirely excluding the public at times may be permissible, but only so long as alternative means to assemble and petition specific officials are made available. To entirely exclude the public from the seat of an elected official and the curtilage around it, however, is extremely difficult to reconcile with the petition right absent such special circumstances (which did not appear to exist in *Adderley*).

77. *See supra* notes 48–49 and accompanying text.

78. *See generally* THE FEDERALIST NO. 10 (James Madison).

79. Professor Krotoszynski elaborates on this point extensively in his book-length treatment of the Petition Clause. *See generally* KROTOSZYNSKI, *supra* note 27, at 197–205.

80. *Meet the Sheriff*, LEON COUNTY SHERIFF'S OFF., http://www.leoncountyso.com/about-us/meet-the-sheriff (last visited Feb. 17, 2020).

81. Adderley v. Florida, 385 U.S. 39, 51–52 (1966) (Douglas, J., dissenting).

The truth is that it is difficult to understand how Justice Black and the *Adderley* majority, just a year after Selma, could have missed these points. This is especially so because Justice Douglas in his dissent explicitly drew the connection between assembly, petition, and the need for public access to seats of government.[82] But miss them the majority did, and the consequences have been highly problematic. *Adderley* represents the beginning of two trends on the Supreme Court—a myopic focus on freedom of speech at the expense of the rest of the democratic First Amendment[83] and a steady movement towards upholding ever more restrictive rules governing access to public property for expressive purposes[84]—which have been the banes of modern First Amendment jurisprudence. It is noteworthy in this respect that in the key modern case narrowing the scope of the public forum doctrine—and thus the right to use public property for expressive and assembly purposes—a concurring opinion explicitly quoted Justice Black's language in *Adderley* (albeit, oddly, without properly attributing it),[85] and the majority opinion embraced the spirit of *Adderley*.[86]

Which brings us to the present day. In *Williams*, Judge Johnson took a syncretic and strongly protective approach to First Amendment rights and thereby enabled one of the key events in modern American history. In *Adderley*, Justice Black and the Supreme Court took a narrow, free speech-focused, and skeptical approach to the First Amendment and so began a trend that to this day continues to hobble the rights of citizens to access public property in order to exercise their First Amendment rights. In that sense, *Adderley* is a key source from which such modern travesties as "free speech zones," onerous licensing requirements for assemblies on public property, and strict time, place, and manner rules governing speech and assembly emerged.

If we are to restore the democratic rights of the First Amendment to their preferred and central place in the practice of democratic self-governance, these developments must be reconsidered. Assembly and petition (and a free press and freedom of association) must be restored to their central place, alongside free speech, in the pantheon of First Amendment rights. A focus on speech alone suggests that fears of disruption may outweigh constitutional rights. When the assembly right is taken into account, however, it becomes clear that history rejects this calculus and, to the contrary, requires toleration of substantial disruption. Similarly, restricting First Amendment rights in the vicinity of

82. *Id.* at 54–55.

83. *See* discussion *supra* Part II.

84. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (upholding restrictive rules for airports); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (upholding restrictive rules for an inter-school mail system); Greer v. Spock, 424 U.S. 828 (1976) (upholding restrictive rules for portions of military bases open to the public).

85. *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 688 (O'Connor, J., concurring).

86. *Id.* at 678 (majority opinion) ("Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action[s] will not be subjected to the heightened review to which its actions as a lawmaker may be subject.").

public officials might be defensible when only speech rights are considered but becomes indefensible in light of the petition right. For these reasons, we must recover *all* of the rights of the First Amendment and remember the close relationships and interactions between them. Only then can the First Amendment properly fulfill its democratic functions.

CODA: RELIGION

The discussion above of the events and legal conflicts surrounding the Selma March demonstrates that the events at Selma implicated three of the key democratic rights of the First Amendment: speech, assembly, and petition. It also illustrates how these rights worked in tandem to complement and strengthen one another, which in turn strengthened the plaintiffs' legal claims. And while this Essay does not explore this in detail, Selma also implicated the other two key democratic rights of the First Amendment: freedom of the press and freedom of association.[87] The national press, after all, played a crucial role in reporting on the events at Selma to a national audience and so made the marchers' message effective. And associations such as SNCC and Dr. King's SCLC played a crucial role in organizing the March. For that reason, Selma—perhaps as much as any event in American history—implicated and involved the full spate of rights protected by the democratic First Amendment.

But there is an elephant in the room, and it is religion. For reasons I have explained in detail elsewhere, the Religion Clauses of the First Amendment do not properly belong in the democratic First Amendment because, unlike the latter part of the Amendment, the Religion Clauses were not designed to serve a primarily political function.[88] But as the name of the SCLC and the professional status of many of the March's leaders as pastors indicate, religion was certainly present in Selma, and in force. That personal rights of conscience should play an important role in triggering and motivating the exercise of collective political rights should come as no surprise to anyone familiar with the history of the civil rights movement (or the abolition movement, or the temperance movement, or many other movements for political change). But of course, secular groups like SNCC also played pivotal roles at Selma and elsewhere. The interaction between religious and secular associations in the political arena and, more fundamentally, the role of religious groups in political activities are extremely complex issues worthy of sustained attention. But they must be left to another day.

87. For a more detailed discussion of how and why these five rights constitute the democratic First Amendment, see generally Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097 (2016).

88. Ashutosh Bhagwat, *Religious Associations:* Hosanna-Tabor *and the Instrumental Value of Religious Groups*, 92 WASH. U. L. REV. 73, 92–93 (2014).