

THE MOVEMENT FOR BLACK LIVES: A CASE STUDY OF CONSTITUTIONAL UNDERSTANDINGS OF QUALIFIED IMMUNITY AND THE ARGUMENT FOR A LEGISLATED CONSTITUTION

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I. INTRODUCTION

In 2013, three Black organizers, Alicia Garza, Patrisse Cullors, and Opal Tometi started the Black Lives Matter movement in reaction to the acquittal of George Zimmerman, who murdered Trayvon Martin.¹ Eight years later in 2021, the organized Movement for Black Lives (“M4BL”) has become a globally recognized coalition of more than fifty organizations.² In 2016, the Movement crafted the Vision for Black Lives, relaunched in 2020, that lists six demands: (1) end the war on Black people; (2) divest from the police and invest in making communities safer by providing affordable housing, living wage employment, education, and health care; (3) provide reparations to Black people for past and continuing harms; (4) ensure economic justice; (5) community control; and (6) political power.³ Through its first two prongs, end the war on Black people and “invest-divest,” the Movement emphasizes the urgency of ending police violence against Black communities. In 2020, two-thirds of Americans affirmed that Black Lives Matter and supported the protests following the police killing of George

¹ *HerStory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory> [<https://perma.cc/8CVY-3CZN>] (last visited Feb. 5, 2023).

² *Vision for Black Lives*, MOVEMENT FOR BLACK LIVES [hereinafter *Vision*], <https://m4bl.org/policy-platforms> [<https://perma.cc/7CNM-STPS>]. Moving forward, when I refer to the “Movement,” I am referencing the Movement for Black Lives and their vision, demands, and public releases of information. I center the Movement to remain consistent and thank Amna Akbar for modelling this framework in her work. See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018).

³ *Vision*, *supra* note 2.

Floyd.⁴ However, public opinion continues to vary as to how and to what extent we should seek reform.⁵

Conversations about police reform after George Floyd’s murder centered around defunding the police. In a parallel vein, legal commentary focused on ending the doctrine of qualified immunity.⁶ Although there has long been debate about the constitutionality of qualified immunity, the Movement’s prominence has coincided with increasing critiques of the doctrine.⁷ Interestingly, the public also began to engage in discussions about qualified immunity reform. For example, 74% of respondents to one poll supported citizens’ ability to bring private lawsuits against police officers who use excessive force.⁸ As of July 2020, two-thirds of Americans supported holding police officers civilly liable for their actions generally.⁹

In this paper, I analyze the Movement’s role in reforming qualified immunity. First, I outline the M4BL’s history, demands, and stance on qualified immunity. Next, I discuss Jack Balkin’s, Reva Siegel’s, and Robin West’s respective theories of social movements’ influence on constitutional change. I then apply their theories to see which, if any, best captures the ways in which BLM interacts with qualified immunity jurisprudence and potential reform. Throughout the essay, I draw heavily upon Amna Akbar’s explanation of the M4BL’s abolitionist, “imaginative” understanding of

⁴ *The Movement for Black Lives Celebrates BREATHE Act Anniversary*, MOVEMENT FOR BLACK LIVES (July 7, 2021), <https://m4bl.org/press/the-movement-for-black-lives-celebrates-breathe-act-anniversary> [<https://perma.cc/43M9-BUGX>]; Grace Sparks, *Polls Show Widespread Support of Black Lives Matters Protests and Varied Views on How to Reform Police*, CNN (June 18, 2020, 4:23 AM), <https://www.cnn.com/2020/06/18/politics/protests-polling-support-movement-policies-kaiser-quinnipiac/index.html> [<https://perma.cc/TVE2-M49K>].

⁵ See, e.g., Stephanie Murray, *Suburban Dems Flee from ‘Defund the Police,’* POLITICO (Oct. 14, 2021, 4:30 AM), <https://www.politico.com/news/2021/10/14/democrats-suburbs-lets-fund-the-police-515966> [<https://perma.cc/UZ85-NRP8>].

⁶ *Demand Congress End Qualified Immunity*, BLACK LIVES MATTER (Feb. 10, 2022), <https://blacklivesmatter.com/demand-congress-end-qualified-immunity> [<https://perma.cc/T9KE-ZN6M>].

⁷ The Editorial Board, *End the Court Doctrine that Enables Police Brutality*, N.Y. TIMES, <https://www.nytimes.com/2021/05/22/opinion/qualified-immunity-police-brutality-misconduct.html> [<https://perma.cc/39NZ-ZFK7>]; See generally William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018); see, e.g., Ed Yohnka et al., *Ending Qualified Immunity Once and for All Is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), <https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable> [<https://perma.cc/9SST-UQNC>].

⁸ Sparks, *supra* note 4.

⁹ *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR., (July 9, 2020), <https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct> [<https://perma.cc/LFP3-CPUF>].

law.¹⁰ I hypothesize that Balkin’s and Siegel’s theories limit the importance of social movements in reimagining the law and the Constitution’s role in society. I assert that West’s expansive theory of constitutional jurisprudence allows for the kind of transformative understanding of law that the Movement demands. Thus, her theory is in line with reimagining the law as a mode of creating equitable social and political systems that are rooted in the power of Black people and communities of color. Throughout this paper, I also highlight how qualified immunity corrodes the development of social movements that we need to progress as a society. Whereas the Civil Rights, women’s suffrage, and LGBTQ rights movements have depended on civil disobedience and civil lawsuits to challenge existing laws under the Constitution, qualified immunity operates to stifle this opportunity altogether. Qualified immunity bars social movements such as M4BL from engaging in legal reform through the judicial process.

I began this essay with the biased expectation that I would find that the Movement had not been successful in achieving qualified immunity reform. To this day, we have not seen federal judicial decisions or legislation that even begin to substantially abolish the doctrine.¹¹ However, interpreting social movements’ effects on constitutional change in this way misses the point of radical social movements. For the Movement, qualified immunity reform is not enough; the M4BL does not place emphasis on qualified immunity as a primary demand. Instead, the Movement’s focus on divestment from the police, legislative agendas that would empower Black political voices, and reinvestment in community-led social care demands a different kind of constitutional understanding.¹² Abolishing qualified immunity is only the first step in the Movement’s Vision of restructured political power and resources. As legal scholars, then, we must co-create a framework and understanding of constitutional change that can encompass social movements’ transformative visions of the future.¹³ Perhaps that future includes legal scholarship on the ways that social movements start conversations about ending the status quo of violent systems as well as

¹⁰ Akbar, *supra* note 2, at 408.

¹¹ Below, I outline recent court cases and ongoing legislation. However, it is notable that the more conservative Justice in Policing Act has still not been able to pass even after the protests during the summer of 2020 in response to George Floyd’s murder. *See, e.g.*, Press Release, Legal Defense Fund, LDF Issues Statement on the Failure to Advance the George Floyd Justice in Policing Act of 2021 (Sept. 22, 2021), <https://www.naacpldf.org/press-release/ldf-issues-statement-on-the-failure-to-advance-the-george-floyd-justice-in-policing-act-of-2021> [https://perma.cc/88SR-WNRS].

¹² Akbar, *supra* note 2, at 425.

¹³ *Id.* at 412.

transform the next generation of voters to legislate a new system; but I will leave that question for another paper.

II. A BRIEF HISTORY OF QUALIFIED IMMUNITY JURISPRUDENCE AND RECENT CALLS FOR ITS END

After the Civil War ended, Congress passed 42 U.S.C. 1983 to establish civil liability for public officials.¹⁴ Congress passed this Act to ensure that public officials could be held accountable for violent actions, particularly against Black people. The text of the statute clearly states that “every person who . . . [causes] . . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.”¹⁵ However, between 1967 and 1982, the Supreme Court’s opinions began to shape the doctrine of qualified immunity that we know today.¹⁶ In 1982, the Court first established the defense of qualified immunity for public officials in *Harlow v. Fitzgerald*.¹⁷ The Court held that government officials will not be held liable for civil damages when their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁸ In doing so, the Court effectively stripped the Act’s power to hold public officials, and police officers in particular, responsible for their actions. Today, a plaintiff can only recover civil damages when government officials violate their “clearly established” constitutional rights.¹⁹ The standard is an objective test, meaning that the judicial inquiry focuses on whether a reasonable official in the defendant’s position would have known that they were

¹⁴ The Act states that “every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.” 42 U.S.C. § 1983 (LexisNexis).

¹⁵ *Id.*

¹⁶ BEN COHEN, ABOVE THE LAW: HOW “QUALIFIED IMMUNITY” PROTECTS VIOLENT POLICE (2021).

¹⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982).

¹⁸ *Id.* at 818.

¹⁹ Robert McNamara, *A Misguided Experiment*, in ABOVE THE LAW: HOW “QUALIFIED IMMUNITY” PROTECTS VIOLENT POLICE (2021).

violating the law.²⁰ In practice, this doctrine denies victims any remedy, “effectively creating a category of injuries without repair.”²¹

Scholar William Baude argues that qualified immunity is not justified by any of its commonly-articulated defenses.²² He contends that qualified immunity is not justified as a common law good faith defense or as a fair warning to government officials.²³ Thus, Baude suggests that the Court can overturn the doctrine because it is not legally justified.²⁴ Baude asserts that the Court’s continued review of qualified immunity cases signals to lower courts that they should continue to protect the doctrine strongly.²⁵ Indeed, lower courts upheld the use of qualified immunity when police shot a victim in the back from more than sixteen feet away,²⁶ and when police stunned a victim 19 times before crushing him underneath an officer’s weight.²⁷ In both cases, the courts held that there was no “clearly established law” that made either of these egregious actions unconstitutional.²⁸

Increasingly, judges, scholars, and activist groups have made stronger claims against qualified immunity. Justice Sotomayor first called out the Court’s “disturbing trend” in reviewing lower court cases to uphold officials’ immunity in 2017.²⁹ However, the Court rarely hears cases that

²⁰ *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014).

²¹ *Qualified Immunity*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/qualified-immunity/> [<https://perma.cc/YP5W-RWQV>] (last visited Feb. 5, 2023).

²² Baude, *supra* note 7, at 49–80.

²³ *Id.* Baude also rejects the idea that qualified immunity is justified by the Court’s mistake in interpreting the original statute to be broader than Congress originally wanted. Scalia reasons that qualified immunity is unreasonable now but is the only way to reign in the superfluous amount of civil suits brought against government officials because of the Court’s interpretation of the statute in a prior case. *Id.* at 62.

²⁴ *Id.* at 80.

²⁵ *Id.* at 83–86.

²⁶ *Collie v. Barron*, 747 F.App’x 950 (5th Cir. 2018); *Now Paralyzed, Fort Worth Man Shot by Police Speaks Out for First Time*, CBS DFW (Feb. 14, 2017, 8:40 PM), <https://www.cbsnews.com/dfw/news/now-paralyzed-fort-worth-man-shot-by-police-speaks-out-for-first-time/> [<https://perma.cc/Q3AT-Q9B5>]; *Callwood v. Jones*, 727 Fex. App’x 552 (2018), *cert denied*.

²⁷ Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> [<https://perma.cc/DA2E-H4V7>]; *Callwood v. Jones*, 727 Fed App’x 552 (2018), *cert denied*.

²⁸ *Collie v. Barron*, 747 F.App’x 950, 953-54 (5th Cir. 2018); *Callwood v. Jones*, 727 Fed. App’x 552, 559-60 (2018), *cert denied*.

²⁹ *Salazar-Limon v. City of Houston*, 581 U.S. 946, 954 (2017) (Sotomayor, J., dissenting) (noting that the Court has “not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force . . . [.] But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases. The erroneous grant of summary judgment in qualified-immunity cases imposes no less harm on “society as a whole.”).

would recognize an abuse of the doctrine.³⁰ Justice Thomas expressed his “growing concern” that the doctrine today expresses the Court’s “policy preferences” rather than being grounded in Congress’ common law understandings of immunity.³¹ In *Kisela v. Hughes*, decided in 2018, Justice Sotomayor again vehemently called out the Court’s nearly “one-sided” application of the qualified immunity doctrine that effectively “tells officers that they can shoot first and think later.”³² Even lower courts that adhere to the Court’s standard have noted the harm “done to the nation by this manufactured doctrine” when an “officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal” can walk away without liability.³³

After George Floyd’s murder and a summer of protests, it seemed that the Court might have an opportunity to seriously review the doctrine. While in 2014 Darren Wilson was acquitted for the murder of Michael Brown, in 2020 Derek Chauvin was convicted of all three counts of murder for George Floyd’s death.³⁴ Professor Joanna Schwartz observes that the Supreme Court might also be changing its tune with regard to qualified immunity.³⁵

³⁰ *Id.*

³¹ Thomas goes so far as to call for a reconsideration of the doctrine altogether: “Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870-72 (2017) (Thomas, J., concurring) (explaining that the Court’s earlier precedents were in line with common law defense doctrine but that the Court has since significantly diverged from that background).

³² *Kisela v. Hughes*, 138 S. Ct. 1148, 1155, 1162 (2018) (Sotomayor, J., dissenting) (arguing that the Court’s application of the doctrine in this case acts as an “absolute shield” against liability, given the officer’s unreasonable conduct).

³³ Daniel Villarreal, *Federal Judge Slams Supreme Court While Granting Cop ‘Qualified Immunity’*, NEWSWEEK (Aug. 4, 2020, 10:45 PM), <https://www.newsweek.com/federal-judge-slams-supreme-court-while-granting-cop-qualified-immunity-1522847#:~:text=Jamison%20filed%20a%20lawsuit%20against,for%20damages%20and%20psychological%20suffering> [https://perma.cc/V9NV-54WB].

³⁴ Emily Bazelon, *Chauvin Received Three Guilty Verdicts for One Crime. Here’s Why and What It Means for His Sentence*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/chauvin-guilty-verdict-sentencing.html> [https://perma.cc/GW3P-QKQV]; see, e.g. Rachel Treisman, *Where The Chauvin Verdict Fits in the Recent History of High-Profile Police Killings*, NPR (Apr. 20, 2021, 6:26 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/989292294/where-the-chauvin-verdict-fits-in-the-recent-history-of-high-profile-police-kill> [https://perma.cc/7H4Z-TNUW].

³⁵ Joanna Schwartz, *The Supreme Court Is Giving Lower Courts A Subtle Hint to Rein In Police Misconduct*, THE ATLANTIC (Mar. 4, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/the-supreme-courts-message-on-police-misconduct-is-changing/618193/> [https://perma.cc/E7VV-TB7P].

In November 2020, the Court reversed a lower court’s decision to grant qualified immunity to officers who kept a prisoner in a cell “covered, nearly floor to ceiling, in ‘massive amounts’ of feces.”³⁶ The Court held in *Taylor v. Riojas* that “any reasonable officer should have realized that [the plaintiff’s] conditions of confinement offended the Constitution.”³⁷ This opinion indicated that qualified immunity can be denied when there is a clear constitutional violation, even if the fact pattern is distinct from any brought before.³⁸ The Court later relied on *Taylor* in *McCoy v. Alamu*, in which a corrections officer allegedly sprayed the plaintiff in the face with mace “for no reason at all.”³⁹ While a lower court held that the officer’s conduct did not clearly violate established law, the Court remanded the case in light of *Taylor*. Schwartz optimistically suggests that in these two cases, the Court is “sending a message that lower courts can deny qualified immunity for clear misconduct, even without a case with identical facts.”⁴⁰ Some suggest that although these are not landslide victories, advocates might be hopeful that “the Court is paying attention to public opinion.”⁴¹

Other scholars, though, do not believe that the Court is actually abandoning the qualified immunity doctrine. In July 2021, the Court denied certiorari for a case involving university officials who prevented a student from placing a small table near the student union to promote a student organization.⁴² Justice Thomas noted that “qualified immunity jurisprudence stands on shaky ground” and the “one-size-fits-all” doctrine should not necessarily apply to university officials.⁴³ Yet just a few months later, in October 2021, the Court underscored that qualified immunity “protects ‘all but the plainly incompetent or those who knowingly violate

³⁶ *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020).

³⁷ *Id.* at 54.

³⁸ Erwin Chemerinsky, *Chemerinsky: SCOTUS Hands Down a Rare Civil Rights Victory on Qualified Immunity*, ABA J., (Feb. 1, 2021, 9:11 AM), <https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity> [<https://perma.cc/8U5Z-LQWN>].

³⁹ Schwartz, *supra* note 35; *McCoy v. Alamu*, 950 F.3d 226, 229 (5th Cir. 2020), *vacated*, 141 S. Ct. 1364 (2021), *cert. granted* (“Judgment vacated, and case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Taylor v. Riojas*.”).

⁴⁰ Schwartz, *supra* note 35.

⁴¹ *In the Shadows: McCoy v. Alamu*, HARV. L. REV. BLOG (Mar. 13, 2021), https://blog.harvardlawreview.org/in-the-shadows-_mccoy-v-alamu/ [<https://perma.cc/4VWJ-WF3J>].

⁴² *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421-22 (2021), *cert. denied* (Thomas, J., concurring) (noting that the Court’s “qualified immunity jurisprudence stands on shaky ground”).

⁴³ *Id.* at 2421.

the law.”⁴⁴ In *Rivas-Villegas v. Cortesluna*, the Court held that even if the Circuit precedent clearly established the law, the official did not have “fair notice” that they violated the law, given the different set of facts in this case.⁴⁵ The Court noted that the plaintiff had not “identified any Supreme Court case that addresses facts like the ones at issue here,” and thus the officer was entitled to qualified immunity.⁴⁶ Friedman and Ponomarenko go so far as to say that the justices are “thumb[ing] their noses at the Black and brown communities” who face the burden of police violence and therefore suffer the most from the continued use of this doctrine.⁴⁷ More importantly, these cases indicate the Court’s deliberate unwillingness to change the qualified immunity doctrine.

Others urge that we must end qualified immunity in order to “hold bad cops accountable.”⁴⁸ They argue that holding officials liable for their conduct is the first step in saving the next life from police brutality.⁴⁹ Ending qualified immunity, however, is not the M4BL’s only item on the agenda. Below, I unpack how the M4BL has pushed the conversation around qualified immunity toward abolition of the qualified immunity doctrine, and then far beyond. In addition to ending qualified immunity, the Movement advocates for investments in community care that emphasize positive social welfare rights. This vision demands that the Constitution encompass the conditions in which Black communities are safe, prosperous, and equitably engaging in the political system.

III. AN OVERVIEW OF BLM AS A SOCIAL MOVEMENT AND POSITION ON QUALIFIED IMMUNITY

Before analyzing the M4BL’s role in constitutional changemaking, I must define my own positionality. While I identify as a queer woman of mixed Japanese and White heritage and act in solidarity with the Movement, I do not speak with the perspective of being Black in the United States. Below, I try my best to be explicit about the language that M4BL uses in its demands and analyze those demands in the context of existing theories of

⁴⁴ Barry Friedman & Maria Ponomarenko, *To Rein in Abuse by the Police, Lawmakers Must Do What the Supreme Court Will Not*, N.Y. TIMES (Oct. 27, 2021), <https://www.nytimes.com/2021/10/27/opinion/supreme-court-police-reform.html> [<https://perma.cc/9DQB-8KJY>].

⁴⁵ *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 5 (2021) (per curiam).

⁴⁶ *Id.* at 7.

⁴⁷ Friedman & Ponomarenko, *supra* note 44.

⁴⁸ Michael Render, *Foreword* in ABOVE THE LAW: HOW “QUALIFIED IMMUNITY” PROTECTS VIOLENT POLICE (2021).

⁴⁹ *Id.*

constitutional change. In the spirit of Amna Akbar’s call for legal scholarship to “imagine” the law more expansively with social movements, this essay recognizes and honors the M4BL’s abolitionist and transformative agenda.⁵⁰ In putting M4BL’s demands in dialogue with existing constitutional theory, I hope to further unpack how the Movement can help legal scholarship to reframe conversations about constitutional and political change to center Black voices and the Movement’s Vision.

The M4BL first launched the “Vision for Black Lives” in 2016, following the Ferguson protests.⁵¹ In 2020, the Movement re-released a new policy agenda, prior to the pandemic and George Floyd’s murder, outlining six central demands: (1) end the war on Black people, (2) invest-divest, (3) economic justice, (4) reparations, (5) community control and, (6) political power.⁵² The “Preamble” explicitly centers marginalized identities in its policy agenda, emphasizing the Vision’s goal of collective liberation.⁵³ Moreover, the Vision recognizes that the state has historically inflicted violence against Black communities.⁵⁴ Thus, the Movement seeks solutions outside of the institutions that inflict violence, and are instead rooted in “self-governance and mutual commitment and responsibility to each other’s safety and well-being.”⁵⁵ The Movement states that now is the time for a “new covenant” that will articulate the Vision of a “fundamentally different world.”⁵⁶ Although these policy demands might sometimes be incremental within the current system, they are part of the process of creating that alternative reality.⁵⁷

⁵⁰ Akbar, *supra* note 2, at 413.

⁵¹ *Vision*, *supra* note 2.

⁵² The Preamble states: “Together, we demand an end to the wars against Black people. We demand repair for the harms that have been done to Black communities, in the form of reparations and targeted long-term investments. We demand economic justice. We demand defunding and dismantling of the systems and institutions that criminalize, control, and cage us. We demand divestment from ideologies, laws, policies, and practices that harm us, and investment in our communities and movements. We demand political power and community control over the institutions which govern our lives.” *The Preamble*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/the-preamble/> [<https://perma.cc/MEN8-A67A>].

⁵³ The Movement is “intentional about amplifying the particular experiences of racial, economic, and gender-based state and interpersonal violence that Black women, queer, trans, gender nonconforming, intersex, and disabled people face. Cisheteropatriarchy and ableism are central and instrumental to anti-Blackness and racial capitalism and have been internalized within our communities and movements.” *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ “We are dreamers and doers. This document articulates our vision of a fundamentally different world. And it recognizes the need to fight for policies that address the immediate suffering of Black people. These policies, while less transformational, are necessary to address the current material conditions of our people and will better equip us to win the world we demand and deserve.

The M4BL has interacted with qualified immunity reform most formally in response to the proposed George Floyd Justice in Policing Act (“JPA”). Section 102 of the bill would eliminate qualified immunity as a defense for local law enforcement officers.⁵⁸ The bill would require the implementation of accreditation standards for police agencies including trainings on de-escalation tactics and investigations of officer misconduct.⁵⁹ It also includes provisions on recruitment and hiring of police officers, improving police presence in schools, and creating a taskforce on law enforcement oversight.⁶⁰ From the Movement’s perspective, the JPA centers police reform in a way that is incompatible with the M4BL’s demands for divestment from the carceral system and reinvestment in systems of community care.⁶¹ The JPA only ends qualified immunity for federal officers serving law-enforcement functions, meaning other federal officers could still use the defense.⁶² In a letter to the authors of the JPA, the Movement states “[a] no knock warrant ban would not have saved Breonna Taylor’s life, just like a ban on chokeholds did not save Eric Garner’s life. The JPA fails to address the root causes and realities of policing in this country.”⁶³ For the Movement, the JPA continues to act within the existing frameworks of policing without including the “bold, forward-looking policies that could meet the scale and scope of this moment.”⁶⁴

Instead of endorsing the JPA, the Movement supports the Ending Qualified Immunity Act, and more importantly, the BREATHE Act, which “takes a holistic approach to community safety” by investing money in schools and healthcare, instead of another police training program.⁶⁵ In its text, the Ending Qualified Immunity Act (“EQIA”) outlines the history of Congress’ passage of the Ku Klux Klan Act in 1871, that was meant to enforce the Fourteenth Amendment and secure citizens’ ability to hold public officials liable in the wake of violence against newly freed slaves and Black people across the country. The bill notes how the Court’s subsequent

We recognize that not all of our collective needs and visions can be translated into policy, and we understand that policy change is one of many strategies necessary to move us toward the world we envision.” *Id.*

⁵⁸ H.R. 7120, 116th Cong. (2020).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Letter from The Movement for Black Lives to Chairman Nadler, Chairwoman Lee, Representative Bass, and Senator Booker, <https://breatheact.org/wp-content/uploads/2021/03/M4BL-JPA-Letter-of-Opposition.pdf> [<https://perma.cc/QHC3-W2W2>].

⁶² *Id.* at 7.

⁶³ *Id.* at 5.

⁶⁴ “The way in which an issue is framed determines the solutions that are put forth.” *Id.* at 2.

⁶⁵ *Id.* at 3.

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construction of the qualified immunity doctrine, as described above, has “frustrated” Congress’ intent in passing the Ku Klux Klan Act, and “Americans’ rights secured by the Constitution have not been appropriately protected.”⁶⁶

The BREATHE Act would end qualified immunity for all government actors by incorporating the EQIA.⁶⁷ Moreover, BREATHE also aims to reduce overall interactions between police and communities by investing in “violence prevention, harm reduction, and the other services, supports, and infrastructure able to prevent issues before they arise.”⁶⁸ The Movement states that:

[T]he BREATHE Act invests billions of dollars not only in non-911 crisis response, violence interruption, transformative justice, health clinics, treatment, and other non-carceral safety interventions, but also in education justice, health and family justice, environmental justice, economic justice, and housing justice. This holistic approach reflects a crucial message that the JPA lacks: real safety is rooted in meeting our communities’ fundamental needs, not funneling resources into institutions that are causing and exacerbating harm.

While JPA focuses on individual accountability through ending qualified immunity, the BREATHE Act prevents the need for qualified immunity in the first place.⁶⁹ None of the three bills, the JPA, the EQIA, or the BREATHE Act, have passed to date. As discussed further below, most progress towards the abolishment of qualified immunity has come at the state legislative level. However, the framework of the EQIA and BREATHE demonstrate the transformative level of change that the M4BL demands: not merely reforming the policing system, or increasing police trainings, but divesting from the carceral system and reinvesting in community care.

⁶⁶ *Id.*

⁶⁷ The BREATHE ACT would include a provision that would “guarantee a private right of action (PRA) for recovering damages for all constitutional violations by all federal officials” and “incorporate the Ending Qualified Immunity Act [Pressley/Amash] to end qualified immunity.” *The Breathe Act: Federal Bill Proposal*, THE BREATHE ACT, https://breatheact.org/wp-content/uploads/2020/09/The-BREATHE-Act-V.16_.pdf [https://perma.cc/EMT9-ZKZA] (last visited Feb. 5, 2023). *See also* Summary of *The BREATHE Act*, https://breatheact.org/wp-content/uploads/2020/07/The-BREATHE-Act-PDF_FINAL3-1.pdf [https://perma.cc/D2M5-8AM5] (last visited Feb. 5, 2023).

⁶⁸ Letter from the Movement for Black Lives, *supra* note 61, at 7-8.

⁶⁹ According to the Movement, the BREATHE Act “creates a path to true safety.” *Id.* at 8.

IV. EXISTING THEORIES OF SOCIAL MOVEMENTS' INFLUENCE
ON THE CONSTITUTIONA. FRAMEWORKS TO HELP GUIDE AN UNDERSTANDING OF THE
MOVEMENT'S SIGNIFICANCE

How do we understand the Movement for Black Lives in the context of constitutional changemaking? Below, I outline two emergent frameworks that will guide my later analysis of existing constitutional change theories. David McNamee argues that Black Lives Matter is a claim of an aspirational Constitution that includes ending structural racism.⁷⁰ Amna Akbar explains how the Movement's reimagining of policing is transformational, and not just reformist, in nature.⁷¹ Together, these two frameworks, and Akbar's in particular, require that we focus on constitutional change outside of the courts.

David B. McNamee outlines how the Black Lives Matter movement is Black people's claim to the Constitution.⁷² He understands Black Lives Matter as a claim of fundamental law, which is constitutional law that citizens interpret.⁷³ This claim is a mediating principle that helps guide interpretation of the Constitution, particularly in the legal system.⁷⁴ Black Lives Matter as a phrase and a movement means that Black people identify themselves as inherently part of "We the People."⁷⁵ This call is to ensure that Black people are included and valued as part of the political community. As a part of this political community, Black Lives Matter recognizes an aspirational Constitution that has the capacity to end structural racism.⁷⁶ By using Black Lives Matter as a claim of fundamental

⁷⁰ David B. McNamee, "*Black Lives Matter*" as a Claim of Fundamental Law, 14 U. MASS. L. REV. 2, 10.

⁷¹ Akbar, *supra* note 2, at 410.

⁷² McNamee explains that "[t]he fundamental law of the Constitution belongs to its citizens, and by invoking its principles, they perform an act of radical self-inclusion. Our Constitution—the Constitution of today . . . is the precipitate of an ongoing project whereby citizens imbue the principles of their fundamental law with their conception of justice, and *that* Constitution is capacious enough to take aim at the structures of White Supremacy." McNamee, *supra* note 70, at 9.

⁷³ He claims that fundamental law "consists of shared principles, which are beyond the power of institutions to alter, that are efficacious in spite of disagreement over controversial application." *Id.* at 14.

⁷⁴ He further argues that competing mediating principles drive constitutional disagreement, which leads to challenging status quo understandings of constitutional interpretations, and thus leads to change. *Id.* at 25.

⁷⁵ *Id.* at 46.

⁷⁶ However, BLM recognizes difference and rejects a colorblind Constitution. BLM knows that the Constitution has explicitly included provisions about race from its early clause surrounding

law, advocates “imbue the Constitution with justice” and ground their claims as equal citizens in the eyes of the law.⁷⁷ Importantly, though, there is contention over this fundamental claim of law by white supremacists who also “claim” the Constitution as their own.⁷⁸ McNamee concludes that any gaps between the Constitution’s promise of equity and reality can be addressed by the Movement’s (1) restoration of constitutional bases of respect for each other as citizens (2) reclamation of abstract provisions of the Constitution with a lens of equity and (3) implementation of the mediating principle “Black Lives Matter.”⁷⁹

Amna Akbar outlines how the M4BL engages in a “radical imagination of law.”⁸⁰ In order for us to engage with social movements imagining a better future, Akbar claims that we must acknowledge how social movements effect change outside of the courts.⁸¹ She articulates how the Movement’s Vision focuses on changes that “address the material realities of Black life,” and go beyond police reform.⁸² The Vision does not solely focus on the “hemorrhaging brought about by police and state violence” with reactive policies, but instead imagines a world where “Black and other communities of color can thrive.”⁸³ Generally, the Movement recognizes the inherent violence and inequity of existing laws and state structures: the Court’s support of the qualified immunity doctrine means that even “constitutional policing” continues to be incredibly violent, and disproportionately impacts communities of color.⁸⁴ The solution for the Movement is to minimize police interactions with communities of color altogether.⁸⁵

Akbar notes how legal scholarship that focuses on community policing or enforcement of constitutional rights misses the point of the Movement’s Vision.⁸⁶ The M4BL focuses on shifting away from “adherence to law and

slavery to the provision of rights to formerly enslaved people after the Civil War in the 13th, 14th, and 15th amendments. *Id.* at 27–32.

⁷⁷ *Id.* at 41.

⁷⁸ *Id.* at 53.

⁷⁹ *Id.* at 52.

⁸⁰ Akbar, *supra* note 2, at 407-08 (building on Akbar’s claim that the M4BL advocates for a radical imagination of the law to frame the discussion on limitations of existing constitutional theories).

⁸¹ *Id.* at 414.

⁸² *Id.* at 424. *See also* *Vision*, *supra* note 2 (drawing attention to historical systemic violence to advocate for structural changes to the law).

⁸³ Akbar, *supra* note 2, at 425.

⁸⁴ *Id.* at 441 (the above-mentioned cases describing scenarios, in which victims were shot in the back or hit with a stun gun 19 times).

⁸⁵ *Id.* at 447.

⁸⁶ *Id.* at 472, 479 (describing that the Movement “wants more than a few less police killings It wants those killings to end”).

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accountability” and toward “lesser reliance on criminal law enforcement” generally.⁸⁷ She argues that constitutional jurisprudence tends to focus only on changes that turn into legislation, or on constitutional norms that change our understanding of the Constitution.⁸⁸ Akbar urges us to go beyond measuring social movements’ successes or failures based on formal changes in the law and instead recognize social movements as crucial to our imaginations of society.⁸⁹ Indeed, legal institutions might fail to address harms that are “so pervasive, structural, or intersectional” that they cannot be fully encompassed in a single statute or Court decision.⁹⁰ Social movements are important to create a new “benchmark” for social change that is different than the status quo, or the law’s existing commitments.⁹¹

Below, these two frameworks inform my analysis and critique of the following three theories of social movements’ influence on constitutional change.

B. BALKIN: HOW SOCIAL MOVEMENTS CHANGE (OR FAIL TO CHANGE)
THE CONSTITUTION

Jack Balkin focuses on how social movements shape public opinion and judges’ understandings of constitutional principles to drive Constitutional change.⁹² According to Balkin, social movements shape legal interpretations over time primarily through influencing (1) the party system and (2) public opinion, especially elite public opinion.⁹³ Successful social movements, Balkin argues, try to influence the two major political parties, and in turn control judicial appointments, which makes it “easier for the social movement’s constitutional claims to be taken seriously.”⁹⁴ Eventually, newer judges appointed by politicians influenced by social movements will replace older judges; and thus, social movements effect Constitutional change by influencing who sits on the bench.⁹⁵ Second, Balkin claims that successful social movements appeal to the values of

⁸⁷ *Id.* at 460, 463, 465 (pointing out that traditional legal reforms have the potential to create even more harm for Black and communities of color and that transformational change would “address the material harms of white supremacy, capitalism, and patriarchy, and at the same time undermine these structures” in a way that legal scholarship does not generally discuss).

⁸⁸ *Id.* at 475-76.

⁸⁹ *Id.* at 476.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 30 (2005).

⁹³ *Id.*

⁹⁴ *Id.* at 31.

⁹⁵ *Id.* at 32.

national elites.⁹⁶ Balkin asserts that while social movements generally aim to shape public opinion, elite opinion matters the most when attempting to change legal doctrine.⁹⁷ Social movements help make legal change by shaping “values, assumptions, and social meanings” that are used when judges interpret facts in the cases before them.⁹⁸

Balkin emphasizes that for a social movement to be successful, it must win both elite and popular opinion.⁹⁹ Balkin applies his analysis to the case of the New Departure, which encompasses the legal strategy of women suffragists from 1869 to 1875.¹⁰⁰ He argues that the New Departure was unsuccessful because there was no popular or elite consensus on women’s suffrage at that time. Further, because women were unable to vote, women could not use the party system to shape the federal judiciary.¹⁰¹ Balkin asserts that social movements are most powerful when they can leverage power within the party system. By contrast, social movements are not successful when they work outside of traditional politics. For Balkin, while social movements can “generate new and innovative constitutional arguments,” social movements must frame constitutional changes within the framework of existing traditions and principles.¹⁰² Social movements must persuade institutional actors that they have the best interpretation of a constitutional issue.¹⁰³ Thus, social movements that have friends in high places, and on the bench, will be able to push forward their preferred constitutional interpretation by crossing party lines and influencing judicial opinions.¹⁰⁴

C. SIEGEL: THE JURISGENERATIVE ROLE OF SOCIAL MOVEMENTS

Reva Siegel explores when and how social movements drive constitutional change by examining constitutional culture and the relationship between citizens and officials in guiding constitutional change.¹⁰⁵ Siegel notes, like Balkin, that social movements can change the

⁹⁶ *Id.* at 34.

⁹⁷ *Id.* (Balkin describes that justices “tend to see themselves as reacting appropriately and wisely to long term societal trends”).

⁹⁸ *Id.* at 34–35.

⁹⁹ *Id.* at 36.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 56.

¹⁰² *Id.* at 49–50.

¹⁰³ *Id.* at 53.

¹⁰⁴ *Id.* at 56, 58.

¹⁰⁵ Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1325 (2006) (defining constitutional culture

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Constitution by influencing officials who enforce the Constitution and make laws.¹⁰⁶ Since Constitutional amendments are rare, Siegel explains that citizens play a crucial role in guiding widespread debate over constitutional meaning.¹⁰⁷ However, social movements are also constrained in how they can successfully change constitutional norms.

First, similar to Balkin, Siegel claims that social movements must persuade others that their interpretation of a Constitutional issue is the best without using coercion; she calls this constraint the “consent condition.”¹⁰⁸ Social movements must appeal to the Constitution, its existing principles and values in order to successfully advance their Constitutional interpretation.¹⁰⁹ While social movements can “express disagreement within a shared tradition,” they cannot completely abandon the Constitution.¹¹⁰ Second, Siegel argues that social movements must justify new constitutional understandings by appealing to older constitutional understandings that are shared and recognized within the community (this is the “public value condition”).¹¹¹ Social movements are thus limited because they can only express controversial constitutional understandings in the language of uncontested constitutional understandings.¹¹² If social movements threaten the institutions that enforce the Constitution, then they will be unsuccessful in effecting constitutional change.¹¹³ In adhering to both of these limitations, social movements will engage in critical conversations with opponents. The struggle to win public confidence over a particular constitutional understanding tends to moderate a social movement’s position, but ultimately allows for some constitutional reform.¹¹⁴

as the “understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution’s meaning”) [hereinafter *Constitutional Culture*]; Reva B. Siegel, *The Jurisgenerative Role of Social Movements in United States Constitutional Law*, Seminario en Latino América de Teoría Constitucional y Política (SELA), (June 10-12, 2004, Oaxaca, México) [hereinafter *Jurisgenerative Role of Social Movements*].

¹⁰⁶ *Constitutional Culture*, *supra* note 105, at 1327.

¹⁰⁷ *Id.* at 1343.

¹⁰⁸ *Jurisgenerative Role of Social Movements*, *supra* note 105, at 9.

¹⁰⁹ *Constitutional Culture*, *supra* note 105, at 1352.

¹¹⁰ *Id.* at 1353.

¹¹¹ *Jurisgenerative Role of Social Movements*, *supra* note 105, at 11.

¹¹² *Constitutional Culture*, *supra* note 105, at 1356.

¹¹³ *Id.* at 1359.

¹¹⁴ *Id.* at 1364.

D. WEST: TOWARD A LEGISLATED CONSTITUTION

Robin West takes a different approach to social movements' relation to the Constitution and argues that courts should not be the ultimate arbiters of constitutional questions.¹¹⁵ Currently, we understand Constitutional jurisprudence to be decided solely by judges.¹¹⁶ West contends that turning moral questions into constitutional questions can be limiting, because social movements must wait for the judiciary to adjudicate the issue.¹¹⁷ Further, while we might accept the Constitution as law, she focuses on how the Constitution might be a form of law best interpreted and changed through legislative processes.¹¹⁸ West asserts that social movements should instead focus on legislators' responsibility and ability to interpret the Constitution.¹¹⁹ By doing so, social movements such as the campaign for welfare rights can advance a non-judicially-adjudicated Constitution, and thus better enforce the rights of the poor.¹²⁰ For West, influencing legislators and creating progressive legislation can generate guarantees for social rights and equality that the Court would never independently find.¹²¹

West concludes that a Constitutional "legisprudence" would support such a legislated Constitution.¹²² This legisprudence would require four parts. First, it would demand an understanding of the idea of "law" to include a set of moral imperatives that should guide legislation.¹²³ Second, we would need to understand Constitutional law as part of that law.¹²⁴ Third, it would require an understanding of the state as having a moral, legal, and Constitutional duty to act in the interest of all people, not just particular interests.¹²⁵ Finally, this legisprudence needs an understanding of law's purpose as being more than just protecting an individual against the state, but also "as being the protection of people from the oppressions of each

¹¹⁵ Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127 (understanding constitutional change through the lens of guaranteeing welfare rights as extendable to social movements more broadly).

¹¹⁶ *Id.* at 1167 (laying out existing constitutional jurisprudence reliance on three propositions: (1) law is some combination of courts' holdings, reasoning, and conclusions, (2) law is part of the adjudicative, not the legislative process, and (3) the Constitution is law. Thus, the constitution should only be "interpreted and produced" by courts.

¹¹⁷ *Id.* at 1147.

¹¹⁸ *Id.* at 1163.

¹¹⁹ *Id.* at 1165.

¹²⁰ *Id.* at 1171-72.

¹²¹ *Id.* at 1134.

¹²² *Id.* at 1171.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

other.”¹²⁶ Overall, this theory prioritizes the legislative process and product rather than encouraging social movements to focus their efforts on judicial action.¹²⁷

V. APPLICATION OF BALKIN, SIEGEL, AND WEST’S THEORIES TO THE MOVEMENT AND QUALIFIED IMMUNITY REFORM

Below, I explain how West’s theory best aligns with the Movement’s Vision and methods of changemaking. West’s focus on the legislature as the best means to guarantee social welfare rights, and by extension for progressive social movements to effect change, shifts conversations around constitutional change toward centering the Movement’s transformative understanding of the law when combined with Akbar and McNamee’s frameworks. While Balkin’s and Siegel’s theories of constitutional change focus on descriptive accounts of social movements’ influence on judicial opinion and Constitutional jurisprudence, they fail to account for social movements’ broader legal reimaginations. Balkin’s and Siegel’s mechanisms for constitutional changemaking emphasize change through the courts or existing constructs of constitutional culture, respectively. In the context of the Movement, their discussion of how social movements can best fit within existing political structures or Constitutional interpretations undermines social movements’ agency and power in constructing alternative realities. Balkin insists on the importance of influencing political parties to elect judges that share values with a particular social movement. Given the Court’s current makeup, this strategy seems unlikely and fruitless for the Movement for the next decade at least.¹²⁸ Siegel argues that social movements must persuade the general public that the movement’s values are shared and in line with existing constitutional principles.¹²⁹ But as I explain further below, this process of persuasion heavily relies on the premise that the status quo is acceptable.

The Movement does not use the Vision to call for constitutional overhaul through the courts or pure persuasion of the public. To start, the Movement does not assume that the Constitution is neutral or establishes values that will ensure life and liberty for Black people and other people of color.¹³⁰ Instead, as mentioned above, the Movement has recognized that the United States was founded on state violence and continues to enact that

¹²⁶ *Id.* at 1170.

¹²⁷ *Id.* at 1172.

¹²⁸ Balkin, *supra* note 92, at 31.

¹²⁹ *Jurisgenerative Role of Social Movements*, *supra* note 105, at 9.

¹³⁰ *Vision*, *supra* note 2.

violence through existing legal principles. Thus, the Movement sets out an agenda that is grounded in community power and local policy reform.¹³¹ I argue that West’s theory of constitutional legisprudence best aligns with the M4BL’s Vision and methods. She asserts that legislators have a moral responsibility to ensure positive welfare rights; this same argument could be extended to the Vision’s demand for comprehensive social welfare.¹³² The Movement has focused its attention on legislative reform precisely because of West’s claim that legislators are in the best position to overturn the status quo.¹³³ If we apply Akbar’s claim that the Movement demands an expansive reimagining of our society, West’s theory is broad enough to encompass such a vision.¹³⁴ A legislated Constitution would allow for radical progressive social movements such as the M4BL to define the positive rights that the Constitution should protect. A legisprudence also provides room for short and long-term legislative reform that can reconstruct the distributions of power and resources in our existing political systems. West’s theory of constitutional change is thus aligned with the Movement’s claims that our society should provide people with positive welfare rights, and that such a movement can best seek these changes through legislation.

A. BALKIN’S DESCRIPTIVE ACCOUNT OF SOCIAL MOVEMENTS’ NEED FOR ACCESS TO ELITE AND JUDICIAL OPINION FAILS TO ENCOMPASS THE MOVEMENT’S NORMATIVE AND MORAL CLAIMS

Balkin focuses on how social movements effect constitutional change through the court system.¹³⁵ Balkin argues that social movements propose radical legal arguments that are initially considered “off-the-wall,” but are successful when they eventually bring these ideas into mainstream jurisprudence.¹³⁶ Social movements influence Constitutional interpretation by first, influencing political parties which in turn appoint judges and second, by altering public opinion, particularly elite public opinion.¹³⁷ Balkin might argue that the Movement for Black Lives, similar to the New

¹³¹ *Id.*

¹³² West, *supra* note 115, at 1171.

¹³³ *Id.* at 1165.

¹³⁴ Akbar stresses that the Movement does not give up on the law, but instead uses the law as a way to “reimagine the state.” Akbar, *supra* note 2, at 409.

¹³⁵ Balkin, *supra* note 92, at 65.

¹³⁶ *Id.* at 28.

¹³⁷ Balkin contends that constitutional norms change “because public opinion changes, national political parties get behind particular ideas, and the judiciary eventually responds to this change.” *Id.* at 65.

Departure, has been unsuccessful because it has not utilized either of these methods of change.¹³⁸

It is perhaps too soon to pass judgment on whether or not the Movement could gain access to political parties and therefore influence judicial appointments. Balkin makes the point that social movements often become successful only when old judges are replaced by new ones.¹³⁹ In the seven years since the start of the Movement, we likely have not had enough time to see if this might be true. Descriptively, then, Balkin might be right to say that we have not seen any progress on qualified immunity jurisprudence because the Movement has not yet been able to secure political power in the party system, and influence judicial appointments.¹⁴⁰ But here, Balkin's theory misses the Movement's urgency to effect change and its deliberate focus on reforms outside of the courts. Because police continue to kill people daily, there is not much relief in knowing that somewhere down the line, old justices may retire or to change their reasoning with regard to qualified immunity.¹⁴¹ The Movement endorsed the BREATHE Act to abolish qualified immunity directly through Congressional action, sidestepping the judicial process altogether.¹⁴² Moreover, the Movement focuses its attention on building a new political system that actually gives Black people and people of color access to power.¹⁴³ As it stands, 90% of elected leaders are White, whereas people of color make up 37% of the national population.¹⁴⁴ Importantly, this means that Black voices are likely not fully represented in policymaking.¹⁴⁵

¹³⁸ *Id.* at 56.

¹³⁹ *Id.* at 32.

¹⁴⁰ Indeed, we might say that white supremacists have been more successful in winning access to the political process through efforts such as restricting access to voting and maintaining power throughout America's history. However, I leave that claim and the analysis of white supremacist movements for future development outside of this paper.

¹⁴¹ *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/WK62-AUV3>] (last updated Aug. 11, 2022).

¹⁴² *The Breathe Act*, MOVEMENT FOR BLACK LIVES, <https://breatheact.org> [<https://perma.cc/H9YM-QK6K>].

¹⁴³ "We demand independent Black political power and Black self-determination in all areas of society. We envision a remaking of the current U.S. political system in order to create a real democracy where Black people and all marginalized people can effectively exercise full political power." *Political Power*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/political-power/>. [<https://perma.cc/S7FP-EUKB>].

¹⁴⁴ *End Money in Politics*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/wp-content/uploads/2020/05/EndMoneyinPolitics-OnePager.pdf> [<https://perma.cc/SE8W-8BBT>].

¹⁴⁵ It could be true that even white legislators could promote the Movement's agenda. That claim, though, is a bit different than Balkin's assertion that movements should focus their attention on gaining access to political parties. Likely, the Movement would argue that people of color are not allowed access to political parties due to voter restriction policies (such as not allowing people

Further, corporate and donor influences tend to drive politicians to focus less on issues that affect poor people and people of color, such as a minimum wage and increased sick leave, thereby continuing cycles of inequity.¹⁴⁶ In order to change this status quo of the political system, the Movement advocates for public election financing and a significant expansion of the right to vote.¹⁴⁷ These changes would ensure that the political system actually represents the voices of poor people and people of color. Balkin’s theory asserts that social movements must have friends in high places to effect constitutional change through the judiciary.¹⁴⁸ In contrast, the Movement aims to get people who are able to represent its values into power, so that these advocates will be able to protect and improve Black lives through policies that support working communities and people of color.¹⁴⁹

If waiting for judges to turn over is not the answer, then we can evaluate Balkin’s claim that social movements can influence current judges by changing popular opinion, then elite opinion, and ultimately, judicial opinion.¹⁵⁰ Social movements can “reshape the values, assumptions, and social meanings” used to interpret cases before the courts.¹⁵¹ We can draw on McNamee’s understanding of Black Lives Matter as a mediating principle in the context of Balkin’s framework. McNamee emphasizes that courts use mediating principles like BLM to make decisions.¹⁵² In addition, McNamee believes, as does Balkin, that citizens engage in constitutional interpretation. Here, McNamee claims, the Movement tries to appeal to citizens by urging them to “read our Constitution at its best and avoid constitutional injustice.”¹⁵³ Thus, McNamee asserts that the claim of BLM is to “renew” the Constitutional project and is a commitment to reading the

convicted of felonies or incarcerated people to vote) and the unequal distribution of wealth between Black and white people in America. *Id.*

¹⁴⁶ The Movement explains that “donor and corporate interests often diverge significantly from those of working families on economic policies such as minimum wage and paid sick leave, Black people are disproportionately harmed because a larger percentage are poor or working class.” *Id.* See generally Adam Lioz, *Stacked Deck: How the Racial Bias in Our Big Money Political System Undermines Our Democracy and Our Economy*, DEMOS (2015), <https://www.demos.org/research/stacked-deck-how-racial-bias-our-big-money-political-system-undermines-our-democracy-and> [<https://perma.cc/NF6K-ZGUR>].

¹⁴⁷ *The BREATHE Act: Federal Bill Proposal*, *supra* note 67.

¹⁴⁸ Balkin, *supra* note 92, at 57.

¹⁴⁹ Letter from the Movement for Black Lives, *supra* note 61.

¹⁵⁰ Balkin, *supra* note 92, at 65.

¹⁵¹ *Id.* at 35.

¹⁵² McNamee, *supra* note 70, at 18.

¹⁵³ *Id.* at 40.

document with “one’s own conception of justice.”¹⁵⁴ For Balkin, the next step would be to determine whether the mediating principle of BLM as the norm of constitutional interpretation has been accepted by public opinion. To what extent has BLM been successful in moving the plausibility of a claim like ending qualified immunity from “off the wall” to within the realm of Constitutional possibility? Arguably, the Movement has been successful in moving a majority of the public to agree that qualified immunity should be ended.¹⁵⁵ This is exactly the kind of shift in perception of “plausibility” that Balkin suggests social movements require to effect Constitutional change. Perhaps the Court’s opinion in *Taylor v. Riojas* is in line with this gradual shift: the Court’s decision suggested that qualified immunity might not be a defense when there is a clear constitutional violation, even if the fact pattern is distinct from any case brought before.¹⁵⁶ Indeed, the Movement has likely been successful in making its claim salient to the justices given the protests after George Floyd’s murder in the summer of 2020.¹⁵⁷

On the other hand, while the broader public might agree that qualified immunity should be ended, the Court has not completely abolished the doctrine. Balkin might suggest that the failure to pass the BREATHE Act and the JPA shows that the Movement has not been successful in transforming broader public support into elite support for its agenda. Thus, it would make sense that the mediating principle of BLM did not persuade the Court in *Rivas-Villegas v. Cortesluna* to abandon qualified immunity altogether.¹⁵⁸ Instead, the Court continued to uphold the second prong of the doctrine and rule that a clearly established violations of constitutional rights might not be enough to preclude the use of qualified immunity if the officer did not have “fair notice” that his behavior would constitute a violation.¹⁵⁹ Balkin might claim that elite opinion likely still protects the general idea that public officials, and police officers in general, are “good” institutions

¹⁵⁴ *Id.*

¹⁵⁵ According to a Pew Research poll, “[t]wo-thirds of Americans (66%) say that civilians need to have the power to sue police officers to hold them accountable for misconduct and excessive use of force, even if that makes the officers’ jobs more difficult.” PEW, *supra* note 9.

¹⁵⁶ *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020).

¹⁵⁷ McNamee, *supra* note 70, at 34. However, data shows that support for Black Lives Matter has been waning; and there has actually been growing opposition to the Movement since the summer of 2020. CIVIQS, *Do You Support or Oppose the Black Lives Matter Movement?*, https://civiqs.com/results/black_lives_matter?annotations=true&uncertainty=true&zoomIn=true&race=White&choice=Support (last updated Dec. 18, 2022).

¹⁵⁸ The Court held that the facts of a comparison case were “materially distinguishable” from the case before it, and therefore the officer was entitled to qualified immunity. *Rivas-Villegas v. Cortesluna*, 142 S.Ct. 4, 7 (U.S. 2021).

¹⁵⁹ *Id.*

that must be maintained.¹⁶⁰ Perhaps we might see changes in elite opinion going forward, as a majority of college-educated, young people attended BLM protests.¹⁶¹ Descriptively, then, Balkin has illustrated how the Movement might need to build greater elite support in order to influence judges' understanding of qualified immunity. However, as I discuss in greater detail below, Balkin's theory does not help radical social movements such as the M4BL to effect transformative change. For Balkin, social movements must be "politically strong" in order to have "one's rights protected and recognized by courts."¹⁶² Yet for the Movement, these rights could be protected outside of the courts. Further, the Movement's moral claim that Black lives matter goes further than acting as merely a mediating principle. The Movement's Vision urges a political system, and likely even a judicial system, in which people of color are well cared for and do not have to bring claims against public officials for inflicting violence in the first place.¹⁶³

B. SIEGEL'S PUBLIC VALUE AND CONSENT CONDITIONS UNDERMINE THE MOVEMENT'S RADICAL CLAIMS OF WORKING OUTSIDE OF THE CONSTITUTION'S EXISTING STRUCTURES

First, Siegel argues that social movements must use persuasive, and not coercive, means of convincing others that their vision of the Constitution is the best.¹⁶⁴ Siegel states that methods such as civil disobedience and violence can only be used as "part of an effort to communicate and persuade."¹⁶⁵ BLM protests communicated that Black lives matter and police brutality should be condemned.¹⁶⁶ However, Siegel's

¹⁶⁰ Balkin states that "[w]here popular and elite opinion diverge, the Supreme Court tends to reflect the values of elites . . ." Balkin, *supra* note 92, at 32.

¹⁶¹ A Quinnipiac poll found that "[a]round half (52%) of people between 18 and 29 years old report attending a protest in the past few months, with 53% of those with a college degree who say the same." Sparks, *supra* note 4.

¹⁶² Balkin, *supra* note 92, at 65.

¹⁶³ Perhaps, though, in the interim Balkin might be right that the Movement will be interested in and most successful in protecting people of color's rights by persuading judges that it is "common sense" to not allow public officials to use unreasonable force. *Id.* at 35. However, I am not certain how his theory applies to the unique position of the Movement as a racial and moral reckoning. The claim that "Black Lives Matter" is not just a political issue: it requires that elites, judges, and the public as a whole reckon with the fact that our society and political systems treat people of color as less than human and perpetuate violence against communities of color.

¹⁶⁴ *Jurisgenerative Role of Social Movements*, *supra* note 105, at 11.

¹⁶⁵ *Id.* at 10–11.

¹⁶⁶ Erica Chenoweth & Jeremy Pressman, *Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds*, SPOKESMAN-REV. (Oct. 20, 2020), <https://www.spokesman.com/stories/2020/oct/20/erica-chenoweth-and-jeremy-pressman-black->

consent condition does not fully recognize the role of the state and the Constitution as agents of violence against communities of color. Siegel argues that when Southern White people and officials used violence against Black people, that social movement was unsuccessful.¹⁶⁷ Instead, she says, these images of violence pushed civil rights legislation forward.¹⁶⁸ We might say that similarly, the video coverage of George Floyd and Ahmaud Arbery's murders has also served the Movement by convicting Derek Chauvin, Travis McMichael, Gregory McMichael, and William Bryan. Siegel might argue that the Movement has been successful in persuading others due to its nonviolence or that White nationalist movements have been less successful due to their coercive tactics.¹⁶⁹ Yet Siegel's consent condition does not recognize how the state already uses coercive measures to uphold the status quo.¹⁷⁰ Indeed, by requiring that social movements use only nonviolent means of convincing others, Siegel fails to recognize that the state and its actors might characterize social movements as "violent," in order to perpetuate systemic violence.¹⁷¹

Siegel contends that a social movement can only succeed in realizing its constitutional vision when it proposes this Vision as "the nation's."¹⁷² In line with an aspirational constitutional vision, the Movement could be viewed as reframing the Constitution as one that can encompass ending structural racism.¹⁷³ McNamee similarly claims that the Movement "tell[s] the broader political community that *their* Constitution and *our* Constitution are one and the same – that it is dedicated to uprooting and Reconstructing the institutions of White Supremacy."¹⁷⁴ But the Movement's Vision of a "fundamentally different world" implies that the M4BL does not claim itself

lives-ma/ [https://perma.cc/8LT2-RSL6]. It is also possible to interpret Siegel's theory as proposing that to the extent that these BLM protestors were violent or "coercive," the Movement might be unsuccessful in achieving constitutional change. Both of these points, though, are not particularly valuable in understanding the consent condition in relation to the M4BL.

¹⁶⁷ *Jurisgenerative Role of Social Movements*, *supra* note 105, at 10.

¹⁶⁸ *Id.*

¹⁶⁹ See, e.g., NPR Staff, *The Capitol Siege: The Cases Behind the Biggest Criminal Investigation in U.S. History*,

NPR (Mar. 5, 2021, 5:57 PM), <https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories?t=1639723173640> [https://perma.cc/UK7N-XUHJ].

¹⁷⁰ Overwhelmingly, the BLM protests were nonviolent, while police made arrests and used chemical substances or tear gas against protestors. Chenoweth & Pressman, *supra* note 166.

¹⁷¹ "The claim that the protests are violent – even when the police started the violence – can help local, state and federal forces justify intentionally beating, gassing or kettling the people marching, or reinforces politicians' calls for 'law and order.'" *Id.*

¹⁷² This is her public value condition. *Jurisgenerative Role of Social Movements*, *supra* note 105, at 11–12.

¹⁷³ *Id.* at 10.

¹⁷⁴ McNamee, *supra* note 70, at 43.

as within existing constitutional tradition.¹⁷⁵ Instead of invoking the traditional constitutional “principles” and “memories,” the Movement makes “demands of a state which has consistently created conditions of violence, deprivation, and exclusion for Black people” and aims to “enter into a new covenant with each other.”¹⁷⁶ The Movement does not center on the Founding Fathers as the key framers of our society, but instead recognizes how enslaved people and Indigenous people forged the America that we live in today.¹⁷⁷ Thus, Siegel’s public value condition fails to recognize the Vision’s claim to sovereignty. As Akbar astutely notes, legal scholarship tends to focus on how social movements can influence Constitutional understandings and fit within “the promises of American democracy.”¹⁷⁸ Siegel’s entire argument focuses on how social movements serve democracy-enhancing ends.¹⁷⁹ Akbar, though, points out that the importance of the M4BL and other radical social movements is that they take us beyond the Constitution and law as we know it: even if social movements fail in legal reform, they are essential in “what they imagine and where they fail,” because they offer an alternative future and framework for how to get there.¹⁸⁰

Akbar’s framing, then, can help us better critique Siegel’s understanding of social movements and the Movement’s role in qualified immunity reform. For example, Siegel argues that movements must moderate their claims to win public confidence.¹⁸¹ In this context, the Movement has faced backlash from people who claim that “Blue lives matter” or that qualified immunity is needed to ensure that police are able to do their jobs. But the Movement has not backed down on its claims here.¹⁸² In the BREATHE Act, the Movement asks not just for an end to

¹⁷⁵ *The Preamble*, *supra* note 52.

¹⁷⁶ Instead of invoking the Preamble’s “We the People,” The Movement states that “[w]e seek solutions to violence within our communities that do not lie in the violence of a state and institutions created to destroy us, but in self-governance and mutual commitment and responsibility to each other’s safety and well-being. . . . We demand nothing short of liberation. We have come together now because we believe it is time to forge a new covenant.” *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Akbar, *supra* note 2, at 476.

¹⁷⁹ *Constitutional Culture*, *supra* note 105, at 2.

¹⁸⁰ Akbar, *supra* note 2, at 476.

¹⁸¹ *Constitutional Culture*, *supra* note 105, at 1364.

¹⁸² I do want to note that it might be more helpful to think of Siegel’s idea of compromise in the context of West’s legisprudence theory. For example, it still might be true that social movements’ claims do become moderated when legislators have to pass bills in the face of opposition from those in power. For instance, while in California, there have been efforts to end qualified immunity through legislation, strong opposition from law enforcement groups has stalled the passage of these policies. The Ed. Bd., *On Qualified Immunity Reform, States Are Leading on Policing Rogue Officers*, USA TODAY (Aug. 6, 2021, 8:00 AM),

qualified immunity for police officers, but for all public officials.¹⁸³ Akbar would not be surprised that the Movement has not moderated this claim, because even if the BREATHE Act fails, the Movement is committed to shifting the political agenda toward one that actually meets the needs of the Vision. Even if the Court continues to moderate the use of qualified immunity, the Movement has instead focused on ending the doctrine through the legislative system. Further, the Movement incorporates provisions in the BREATHE Act that go so far as to demand a Police Violence Reparations Program and the dissolution of police departments that have shown a pattern of police misconduct.¹⁸⁴

West critiques popular constitutionalists such as Siegel because their theories presume that we should turn all moral questions into constitutional ones.¹⁸⁵ Siegel discusses constitutional change as possible through social movements, and she admits that these conversations can happen outside of the court.¹⁸⁶ But both Siegel and Balkin still ground their analyses in how social movements talk about and frame constitutional interpretations. For West, when we focus too much on the “constitutional narrative,” we lose sight of “pure, ennobling political action” like going to the voting booth.¹⁸⁷ If the M4BL were solely focused on persuading people to think about the Constitution as an antiracist document that enshrines true equal protection for all people, we might lose track of the actual goals that the Movement advocates for and needs. Akbar would likely point to the fact that social movements, and the M4BL in particular, are much more concerned about that kind of urgent, political action, rather than just persuading society or judges to change their minds.¹⁸⁸ While the Movement advocates for the end of qualified immunity, which is a constitutional issue, it does so through a broader policy agenda and through direct legislation. Although the Movement could call for Black Lives Matter to be used as a mediating principle in interpreting the Equal Protection Clause to provide broader

<https://www.usatoday.com/story/opinion/todaysdebate/2021/08/06/police-qualified-immunity-states-leading/5460787001> [<https://perma.cc/N2R4-RWCK>].

¹⁸³ *The Breathe Act: Federal Bill Proposal*, *supra* note 67.

¹⁸⁴ *Id.*

¹⁸⁵ West, *supra* note 115, at 1154.

¹⁸⁶ *Jurisgenerative Role of Social Movements*, *supra* note 105, at 2.

¹⁸⁷ West, *supra* note 115, at 1155.

¹⁸⁸ Akbar also notes that the Movement uses the law in creative ways, like bailing out “Black mothers for Mother’s Day or as a theater for direct action.” Akbar, *supra* note 2, at 447.

social rights, the Movement cares more about adjusting local budgets and ensuring welfare through local policy initiatives right now.¹⁸⁹

West highlights that transforming moral or political questions into constitutional ones takes away from social movements' demands of those in power.¹⁹⁰ If we say something like "Black Lives Matter is a constitutional guarantee," then there might not be any pressure on local officials to think about defunding the police within their budget. Instead, both West and Akbar would suggest that the Movement calls for political action outside of existing constitutional traditions in the present moment.

C. WEST'S LEGISPRUDENCE ACTS AS A FRAMEWORK FOR
UNDERSTANDING THE MOVEMENT'S VISION AND HOW THE M4BL CAN
PURSUE A TRANSFORMATIVE AGENDA

West's theory of de-constitutionalizing the right to welfare best aligns with how the Movement has approached qualified immunity reform. Her proposal of a legislated Constitution fits well with Akbar's account of social movements as forces for radical reimaginations of the law. Together, these two frameworks also radically shift the scholarly discourse from focusing on social movements' influence on the Constitution, to emphasizing the importance of social movements' immediate political demands and long-term societal visions. West argues that legislators are uniquely positioned to consider moral obligations when enforcing equality for citizens through the Constitution.¹⁹¹ Advocates can seek to persuade legislators, not judges, that they should pay particular attention to provide "equal protection *of the law*" to all citizens.¹⁹² She contends that legislators should understand the Equal Protection Clause not just as a guarantee of protection from the state's discriminatory actions, but as legislators' affirmative duty to make laws that protect people from harm in the first place.¹⁹³ For West, legislators would then have the obligation to enforce positive rights such as access to welfare benefits and healthcare that we do not normally consider guaranteed by the Equal Protection Clause.¹⁹⁴ For the Movement, ending qualified immunity is just one small part of a broader policy agenda to end state violence against Black people and communities of color. The Movement instead focuses

¹⁸⁹ What a Day, *Voters Reject Police Overhaul in Minneapolis*, CROOKED MEDIA (Nov. 4, 2021), <https://crooked.com/podcast/voters-reject-police-overhaul-in-minneapolis> [<https://perma.cc/Q2FZ-7DMK>].

¹⁹⁰ West, *supra* note 115, at 1156.

¹⁹¹ *Id.* at 1164.

¹⁹² West, *supra* note 115, at 1165.

¹⁹³ *Id.* at 1166.

¹⁹⁴ *Id.* at 1134.

much of its vision and demand of “ending the war on Black people” to reallocating funds toward “making communities stronger and safer through quality, affordable housing, living wage employment, public transportation, education, and health care that includes voluntary, harm reduction and patient-driven, community-based mental health and substance abuse treatment.”¹⁹⁵ These are the same kind of welfare rights that West advocates for.

West points out that reliance on an adjudicated Constitution, or one that is articulated through court decisions about what legislatures cannot do, will not address the fact that many people go unprotected by the law.¹⁹⁶ Indeed, the M4BL identifies this same problem. Akbar points out that the law does exactly what it was meant to do: the law protects White people and criminalizes people of color.¹⁹⁷ She highlights that we currently ascribe power to the courts, who then enforce rights, and those rights are ultimately “used against the powerless more than for them.”¹⁹⁸ These adjudicated rights end up enforcing the status quo, and a Constitution that has historically favored people with privilege. Akbar highlights that theories of change that act through this lens will only “co-opt radical social movements seeking transformation” rather than bring about the kind of reimagination of the law that would actually protect marginalized citizens.¹⁹⁹ This is where the Movement stresses the importance of political power rooted in communities of color and prioritizes local changes.

West’s theory of change does not fall into the trap of co-opting radical social movements by suggesting that welfare rights should only be advanced through appealing to elite opinion or through compromising ideals in order to persuade the general public. She claims that the ruling jurisprudence of recent times has undermined our ability to focus on lawmakers’ ability to adhere to moral imperatives.²⁰⁰ If we bring the

¹⁹⁵ *End the War on Black Communities*, MOVEMENT FOR BLACK LIVES (M4BL), <https://m4bl.org/policy-platforms/end-the-war-on-black-communities/> [https://perma.cc/Q7JK-3Z8P].

¹⁹⁶ West points out that currently, many people and poor people in particular go “unprotected by law against unsafe workplaces, . . . against private violence, . . . avoidable disease, . . . unemployment, . . . risks of retirement . . .” West, *supra* note 115, at 1166.

¹⁹⁷ Akbar, *supra* note 2, at 444.

¹⁹⁸ *Id.* at 445.

¹⁹⁹ *Id.*

²⁰⁰ “There is no jurisprudential, expansive understanding of the moral imperatives that such a government must pursue as a matter of moral obligation. We have not articulated, elaborated, or even begun to imagine the content of a moral obligation on the part of an idealized governor—a governor whose duty it is to legislate in such a way as to promote the happiness, through the protective mantle of law, of his country’s peoples.” West, *supra* note 115, at 1169–70. To me, West’s language reads as “imaginative” of this new future, too. And I think that her concept of a

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Movement into this conversation, then Black Lives Matter should not be merely a mediating principle for adjudicated matters, but a moral claim for how lawmakers should legislate.²⁰¹ For West, legislators are best positioned to change the status quo.²⁰² The M4BL has focused its efforts on pursuing qualified immunity through the BREATHE Act, likely because its more radical agenda is better served through legislative, rather than the judicial process. Similarly, most comprehensive qualified immunity reform has occurred not through the courts, but through state and local legislatures.²⁰³ In April of 2021, New Mexico became the second state to ban qualified immunity altogether, following Colorado’s legislation in June 2020.²⁰⁴ Beyond qualified immunity, in November of 2021, the people in Austin, Texas rejected a proposal to hire hundreds of more police officers; in the same month, a Cleveland ballot initiative placed police department policies in the hands of a civil oversight board.²⁰⁵ These local changes are critical to the Movement’s Vision. As discussed above, the Movement has several blocks of its policy agenda: the abolition of qualified immunity is just one small point in the End the War on Black People demand, which is just one of six key prongs of the Vision. Akbar points out that this comprehensive agenda centers a “decarceral agenda rooted in an abolitionist imagination” that does not focus on improving the police or criminal law, but instead on “shifting resources – and therefore modes of governance – elsewhere.”²⁰⁶ Of course, the Movement wants these avenues to be available if and when state actors violate citizens’ rights. But by making qualified immunity reform such a small part of its agenda, the Vision shifts focus from

legisprudence is broad enough to allow for movements such as the M4BL to cocreate and dream of that alternative future and an understanding of the law (not the Constitution) that provides wholeness to all people.

²⁰¹ McNamee, *supra* note 70.

²⁰² West, *supra* note 115, at 1164.

²⁰³ Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021, 6:00 AM), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [https://perma.cc/VY6R-BTY4].

²⁰⁴ Daniele Selby, *New Mexico Is the Second State to Ban Qualified Immunity*, INNOCENCE PROJECT (Apr. 7, 2021), <https://innocenceproject.org/new-mexico-bans-qualified-immunity-police-accountability/> [https://perma.cc/DQ6P-LQTY].

²⁰⁵ Ryan Autullo, *Austin Voters Overwhelmingly Reject Prop A Police Staffing Plan*, AUSTIN AM.-STATESMAN (Nov. 2, 2021, 9:00 AM), <https://www.statesman.com/story/news/2021/11/02/austin-voters-setdecide-prop-police-staffingmeasure/8552522002/> [https://perma.cc/G834-R6W7]; *see, e.g.*, 19 News Digital Team & Sia Nyorkor, *Police Oversight Ballot Measure Approved; Union Promises to Fight It*, 19 NEWS (Nov. 2, 2021, 7:27 AM), <https://www.cleveland19.com/2021/11/02/how-will-cleveland-vote-issue-24-police-oversight/> [https://perma.cc/8KA4-S3K3].

²⁰⁶ Akbar, *supra* note 2, at 410, 426.

enforcement of civil actions against public officials to comprehensive legislative policies that would prevent these actions from being brought in the first place. The Movement asks us to move beyond a jurisprudence or constitutional culture where the only solution to hold public officials accountable for repeated violence against Black people is through judicial enforcement.

West's jurisprudence serves the means and ends that the Movement uses in order to shift resources from police toward social programs, with Black voices leading the changes and redistribution of power necessary for this Vision.²⁰⁷ Of course, we can recognize that the existing national legislature is not very representative and has acted to block the exact reforms that the Movement demands. Yet West's jurisprudence requires legislators to consider their moral obligation to ensure citizens enjoy true equal protection of the laws.²⁰⁸ Her point that legislators should advocate for positive welfare rights seems well aligned with the Movement's goal of advancing social programs for communities of color, primarily through legislation. Above all, West's theory seems to fit with Akbar's point that radical social movements' "primary commitment is not to law, its legitimacy, rationality, or stability: it is to people."²⁰⁹ The Vision centers the experiences of those most marginalized, and thus makes an ethical commitment to those who suffer most from inequality and violence.²¹⁰ Similarly, West views the lack of welfare rights as a "breach of our collective moral . . . obligations."²¹¹ Importantly, West asserts that by turning these ethical or moral questions into legal ones, we assume that these questions should be adjudicated by courts.²¹² If we instead consider these moral questions as ones to be interpreted through a legislated, aspirational Constitution, then we might be able to get different answers.²¹³ This legislated Constitution could in turn guarantee a kind of equality that provides for positive welfare rights, regardless of who is in power.²¹⁴ For the Movement's moral commitment to providing social care and rights to resources for marginalized people and people of color, the legislated

²⁰⁷ *Id.* at 460.

²⁰⁸ *Vision*, *supra* note 2.

²⁰⁹ Akbar, *supra* note 2, at 413.

²¹⁰ *Id.* at 425.

²¹¹ West, *supra* note 115, at 1129.

²¹² *Id.* at 1130–31.

²¹³ *Id.* at 1134.

²¹⁴ *Id.*

Constitution could provide for the healthcare, childcare, and abundance of social resources that the Movement calls for.²¹⁵

The Movement might go one step further than West and emphasize that the State might not be the right actor to implement or dole out welfare. Ultimately, the Movement might advocate for a transformed state, one in which legislatures and the Constitution do not exist as we know them. But West’s framework for legislated constitutional change acts well as a step “between where we are and . . . an abolitionist future.”²¹⁶ West’s theory allows social movements to focus on transforming the system through legislative agenda-setting. Traditional legal reform through Siegel’s, Balkin’s, or McNamee’s theories would suggest modifying qualified immunity or even abolishing it through judicial action. The Movement’s abolitionist agenda goes much further in its own Vision and through West’s framework: the Movement calls not only for a complete abolition of the doctrine for all public officials but also calls for redistributing resources through legislative action.

VII. CONCLUSION

The Court has not decided to gut the qualified immunity doctrine, and the Justice in Policing Act has not been passed. Yet the Movement has not failed, even in its efforts to end qualified immunity. As Akbar and West suggest, the Movement goes further than advocating for traditional jurisprudential constitutional change. In order to fully encompass the M4BL’s Vision for an equitable future, a legislated Constitution and jurisprudence is needed. While the Movement advocates for the abolition of qualified immunity, both for police and all public officials, it also goes much further. The Vision centers its abolitionist agenda in building power within local communities of color and redistributing resources from police into social programs so that people of color are not put in harm’s way from the start. Justice after the fact will still never be enough to recover the hundreds of Black lives lost at the hands of police or public officials generally. We instead should look at the ways that cities have started to defund the police and make progress toward investing in communities of color. Voters are coming out to reject traditional models of policing, and the

²¹⁵ *Vision*, *supra* note 2. Here, too, McNamee’s claims of an antiracist Constitution would be relevant, but only through the lens of having that aspirational Constitution enacted through primarily legislative reform. McNamee, *supra* note 70.

²¹⁶ Akbar, *supra* note 2, at 461 (citing Mariame Kaba). Indeed, the Movement itself calls for legislative reform as this intermediary step. Perhaps a theory moving beyond the legislated Constitution might be required at some point if social movements reject the constitution or existing law altogether; but we are not there yet.

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public as a whole is starting to understand what it would actually mean to shift resources away from police and into communities in response to the Movement's agenda-setting. These are the changes that Akbar and West highlight as essential to social movements' agendas: not just a gradual reform of the law, but truly transformative accounts of what our future society could be. Admittedly, we are not there yet. But if we allow radical social movements to guide the way, we might be able to start to dream with them.