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TRANSFORMATIVE CONSTITUTIONALISM AND IMPLIED RIGHTS

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ABSTRACT:

To many, a Constitution is a living, ever-evolving, dynamic document that keeps changing alongside the moral atmosphere of its people.[1] Yet, this was not always the case. Apartheid South Africa, Latin America, and colonised India are all witnesses to the law of the privileged; a fortress of formalism where rigid proceduralism served as a shield for state-sponsored injustice.[2] Transformative Constitutionalism is a progressive, liberal interpretation of law, specifically of the Constitution, in order to ensure equitable justice. This paper examines the evolution of transformative constitutionalism and how India uses the concept to justify precedents where implied rights are invented by the judges. Further, the paper analyses the two conflicting opinions of jurists where one proposes the utilisation of transformative constitutionalism to ensure justice while the other proponent's critic its jurisprudence as judge made law lacks standing in a world where authority to make law is vested solely with the Legislature.

INTRODUCTION:

It is a widely known principle that law is not always an assertion of morals for if it was that way slavery and apartheid would never have existed. Under apartheid, South Africa operated under a strict Parliamentary Sovereignty. If the legislature passed a law the courts were largely powerless to stop it or amend it, no matter how morally repugnant or exclusionary the law was. This, palpably, was a regime where the law was not a moral compass, but a blunt instrument of protocol followed by the White Parliament. If a statute was passed following due process,

[1] The Hon. Michael D. Kirby, Andrew Inglis Clark and the High Court of Australia, 2001, Centre for Tasmanian Historical Studies (Hobart)

[2] Supra Note 2

the courts were structurally prohibited from questioning the immoral undertone of the law.[3] This created a wicked legal system where judges upheld the most egregious violations of human dignity while maintaining a straight face and a clean textualist conscience.[4] When the Interim Constitution (1993) and the Final Constitution (1996) were drafted, the goal was to flip this hierarchy and place the Constitution at the apex position in the legal system.

This gave rise to the idea of Transformative Constitutionalism. According to Klare, "transformative constitutionalism" is the long-term effort to create, interpret, and uphold a constitution in order to change the power dynamics within a nation's social and political institutions for the better so that democracy, equality, and participation can flourish.[5] Under this mandate, silence based on absence of law is not a sign of restraint, but an implied mandate for the judiciary to read in rights like dignity and livelihood to fill the gaps of justice.

TRANSFORMATIVE CONSTITUTIONALISM AS A NECESSITY IN MODERN SOCIETY:

Historically, constitutionalism broke with the traditional paternalistic state and associated itself with liberalism.[6] In the wake of institutionalised injustice, a traditional constitution, which focuses mainly on limiting the power of the state and its adversaries, presents itself to be insufficient. For a document to maintain its legitimacy in a scarred society, it must be status-quo shattering and poverty eradicating as observed by Justice Dikgang Moseneke.[7] It is here that we see a shift to a rather liberal interpretation of law from a legal theory of survival mechanism for the social contract, thereby utilizing a specific alchemy of interpretative doctrines to address the emptiness of the law. This move of active reconstruction roots from moving away from the dead letter of the law toward a proactive living force. The idea is to embed into judges that the constitution be read with contemporary eyes to ensure that the essence remains relevant to the person.

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[3] John Dugard, *Human Rights and the South African Legal Order* 36-40 (1978)
[4] David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991)
[5] Dharmesh, An Analysis of Transformative Constitutionalism in India and the Role Played by the Judiciary in Shaping the Constitution, International Journal of Law, Policy and Social Review, Volume 5, Issue 1, 2023
[6] Dieter Grimm, Constitutionalism: Past - Present - Future, https://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2018/09/Grimm.-conv-11.05.pdf
[7] Justice Dikgang Moseneke, *The Fourth Bram Fischer Memorial Lecture: A Draft Constitution for a New South Africa*, 14 S. Afr. J. on Hum. Rts. 1, 4 (1998).

1.1 THE TRANSFORMATIVE IMPERATIVE: FROM STATIC TEXT TO THE ETHICS OF SUFFERING

Transformative Constitutionalism is best understood through the metaphor of "Historic Bridge." Here, the law acts as a stretch across the abyss of a divided past, facilitating a transition from a culture of a mayhem toward a future of substantive equality.[8] To cross this bridge, the judiciary relies on the concept of *Constitutional Morality*. In contemporary usage, constitutional morality has come to refer to the substantive content of a constitution such as the entitlement to equality and to unwritten conventions of the Constitution.[9] it is a compass that directs the court to prioritize core egalitarian values over existing prejudices or majoritarian whims and fancies. When the text of law is silent in the face of suffering, this morality dictates that silence is compliance, and such compliance to inequality must be broken by the implied mandate by intervention and interpretation of courts.

In 1857, the Supreme Court of the United States was asked a seemingly simple question: could a black man who had lived in a "free" territory claim his freedom, or was he forever reduced to being the property of another. The court's answer in Dred Scott v. Sandford[10] remains a disturbing example of strict construction of law in history. The majority viewed that the Constitution was not a vessel of values- a pot of morals, but it was a dead letter frozen in existence from 1787. When the American Constitution was made, the term 'citizens' explicitly excluded black people, and it was believed that no amount of progressiveness or residency in a place for however long could change when the ink has long dried.[11] It was not for the courts to change what a century-old document originally intended, thus, this refusal to allow the Constitution to breathe proved that a dead constitution is never neutral; it is a document that weaponizes the prejudices of the past to effectively paralyse the justice of the future.

This global legacy of anarchy is precisely why a transformative approach to law became a survival necessity for modern states. Whether it was post-war America, post-apartheid South Africa, or post-colonial India, the law could no longer afford to be stagnant. It had to become a living force, a live document read through the eyes of the living to ensure its contemporary

[8] *Legal Culture and Transformative Constitutionalism*, 14 S. Afr. J. on Hum. Rts. 146, 150 (1998)
[9] Mahendra Pal Singh, Observing Constitutional Morality, https://aud.delhi.gov.in/sites/default/files/2024-01/slgr-readings/mp_singh_observing_constitutional_morality.pdf
[10] Dred Scott v. Sandford, 60 U.S. 393
[11] Ibid

relevance and to protect the essence of justice.[12] In 1998, the former South-African Deputy Chief Justice Dikgang Moseneke delivered his landmark speech for the Fourth Bram Fischer Memorial Lecture. It had just been 4 years that South Africa was fresh out of the apartheid slammer, the nation was neck-deep in poverty and the legal system was still reeling from decades of systemic arbitrariness. In this fragile moment, Moseneke law in its pure essence could not be a neutral bystander. It had to be an active participant in the nation's healing. He famously declared, "The Constitution is a blueprint for a future society… it is not a neutral document".[13] The transition was not about who sat at the highest seat with power in his hands; it was about changing the fundamentals of the legal culture.

If law remains a cold, mechanical exercise of reading text, it would simply protect the wealthy and powerful who benefited from the old regime. To prevent this, he insisted that commitment to transformative constitutionalism means that the world cannot afford the luxury of a neutral or passive judiciary.[14] The law is a tool for large-scale, egalitarian, social reform. The core of Moseneke's argument lies in his challenge to the traditional concept of neutrality. He argued that in a society still wounded by instilled prejudice, treating everyone with perfunctory, procedural equality is not an act of fairness- it is an act of legal gaslighting. When the law ignores that one person starts with inherited abundance while another starts with nothing, it effectively grants a legal permit to the persistence of inequality. This rejection of "blind" law is substantiated by a broader shift toward an *'Ethics Suffering'*.[15] transformative constitutionalism is a post-modern legal project that centres itself on the pain of the individual and not the state power. Under this, a judge is not a detached referee but a co-adventurer with the marginalized.

1.2 THE JURISPRUDENTIAL TOOLKIT: PENUMBRAS, IMPLICATION, AND THE LIVING FORCE

This forces the judge to realise that the Constitution was not written to create a perfect philosophical system; it was written to close the wounds of their past struggles. However, to step outside the clearly defined boundaries of law would be the overstep of the judiciary. This

[12] Justice Michael Kirby, *The Australian Constitution: A Living Force*, 34 Univ. W. Austl. L. Rev. 1, 12 (2009)
[13] Justice Dikgang Moseneke, *The Fourth Bram Fischer Memorial Lecture*, 14 S. Afr. J. on Hum. Rts. 1, 4 (1998).
[14] *Id.* at 11.
[15] Upendra Baxi, *Preliminary Notes on Transformative Constitutionalism*, in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013).

is where the narrative shifts to the interpretative insurrection of Micheal Kirby. If the ethics of suffering provided the 'why', Kirby's theory provides the 'how'.

When a baby is born, the moment it enters the world the doctor snips the umbilical cord for an ultimate clean break and a fresh beginning. From that second on, the baby is its own person, and has its own autonomy. Just like the biological umbilical cord needs to be cut for a new start, Kirby argues that a Constitution must undergo the exact same surgical separation from its drafters. His living force doctrine is the ultimate restraining order against the ghosts of the past. He exposes the traditional obsession with the 'founder's intent' as a search for a ghost.[16] Before 1978, the Indian Judiciary also was stuck in the dilemma of the literal text of the Constitution. But in *Maneka Gandhi v. Union of India*,[17] the Supreme Court finally picked the scalpel. By introducing the Golden Triangle- Article 14, 19 & 21, the court effectively gave the Constitution room to breathe. We moved from a culture of authority where the state is always right to a living document that demands the state be just, fair, and reasonable.

Once the golden triangle was established as the new heartbeat of the Constitution, the judiciary began to explore the silences within the text and what would be open to interpretation. The doctrine of penumbra posits that specific constitutional guarantees have peripheral zones created by emanations from those guarantees that help give them life and substance. This doctrine suggests that fundamental rights are not static; they possess emanations or peripheral zones that create a protective atmosphere for human dignity.[18] It was through this shadow hunting that eventually the Supreme Court of India identified the right to privacy in *Justice K.S. Puttaswamy (Retd.) v. Union of India*,[19] arguing that the written guarantees of liberty would be hollow and transparent if they did not implicitly protect the intimate, written spaces of an individual's life.

However, this is just one step towards expanding the realm of human rights through judiciary. This logical expansion continues through the Doctrine of Implication, which serves as the functional gearbox of the transformative project. While the makers of the constitution could only think so far and the text may appear finite, this doctrine suggests that every enumerated

[16] Justice Michael Kirby, *The Australian Constitution: A Living Force*, 34 Univ. W. Austl. L. Rev. 1, 12 (2009)
[17] 1978 AIR 597
[18] Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 12 Univ. of Penn. J. of Const. Law 1327 (2010)
[19] AIR 2018 SC (SUPP) 1841

right carry within itself a set of "implied rights" that are ontologically necessary for the primary right to exist in a meaningful sense. It pushes forward the agenda that rights are structural promises that demand the presence of supporting gear. Rights are not mere static declarations but are expandable depending on the circumstances and necessity. The judiciary is frontline to act as the social-interpretative engineer to recognize the secondary rights that are required to sustain the primary rights. This is why, under the lens of transformative constitutionalism, the right to education, a clean environment, sleep, and privacy are not new legal inventions per se but they are logical paths uncovered.

1.3 THE BOUNDARY OF TRANSFORMATION: CONSTITUTIONAL MORALITY AND THE OVERREACH DILEMMA

Justice Misra and Justice Nariman famously articulated *in Navtej Singh Johar v. Union of India*[20] that the purpose of having a Constitution is to transform society. The constitution is a social-directive that aims to dismantle entrenched social hierarchies and to limit it to the literal meaning would be to deny justice to the people. While interpreting the provisions of the Constitution, the safe and most sound approach for the constitutional courts to adopt is to read the words of the Constitution in the light of the spirit of the Constitution so that the quintessential democratic nature of our Constitution and the paradigm of representative participation by way of citizenry engagement are not annihilated.[21] The necessity of transformative constitutionalism is deeply interlinked with the preservation of constitutional morality.

Constitutional morality, though not explicitly mentioned in the constitution, is an ideology followed by the judiciary to protect the values enshrined in the Constitution like liberty, equality, fraternity, dignity, and that these values must always take precedence over the shifting whims and fancies of the majority. Constitutional morality means to bow down to the norms of the constitution and not act in a manner which would become violative of the rule of law of action in an arbitrary manner.[22]

Building on this, the supreme court of India realized that the right to life was essentially a plot hole if it did not include the right to education. In 1992, Mohini, a student from Meerut, was

[20] AIR 2018 SC 4321
[21] Government of NCT of Delhi v. Union of India, AIRONLINE 2018 SC 1029
[22] Manoj Narula v. Union of India, Writ Petition (Civil) No. 289 of 2005

essentially told by the Karnataka government that her "Right to Life" had a price tag. The state had issued a notification allowing private medical colleges to charge astronomical "capitation fees" for out-of-state students.[23] This was the ultimate plot hole: The Constitution promised "Life" and "Dignity," but the state was gatekeeping the very education needed to achieve them. The judiciary had to decide if Article 21 was just about "animal survival" or if it required the supporting gear of an educated mind to actually function. By using the Doctrine of Implication, the Court pulled the "Right to Education" out of the shadows and made it a mandatory part of Article 21. It was a massive win for Transformative Constitutionalism, proving the law could evolve to meet the material needs of the people.

But this is where things get complicated. While implying education felt like a logical necessity, the Court later pushed this same logic into a territory that many see as a stretch. In the *Ramlila Maidan Incident (2012)*,[24] the Court used Article 21 to imply a *Right to Sleep* to condemn a midnight police raid. Critics argue this is where the "Living Force" of the law goes off the rails—moving from structural necessities like education to subjective biological comforts. This fuels the primary criticism: Judicial Overreach. When the Court starts "discovering" rights like sleep, are they still interpreting the Constitution, or are they just acting as a Third Chamber of Parliament, manufacturing laws without a democratic mandate?

TRANSFORMATIVE CONSTITUTIONALISM AND IMPLIED RIGHTS AS INVENTED INTENTIONS:

While we dive deeper into the concept of transformative constitutionalism there reveals to be an unearthed narrative: if the judiciary can perpetually uncover implied rights from the silences of text, we eventually face the paradox of whether the law still functions as a stable anchor or has become a tool of judicial ventriloquism. His critique begins with the ontological challenge posed by *Justice Antonin Scalia*, who championed the Dead Constitution not as a relic of the past, but as a necessary safeguard for the future. Scalia’s textualism argues that for law to truly be law, it must be fixed and predictable; if the meaning of the Constitution is living and evolves with the judge's perception of societal needs, it ceases to be a legal document and becomes a vessel for judicial whim. From this perspective, the Living Force of the law is actually its

[23] Miss Mohini Jain v. State of Karnataka, 1992 AIR 1858
[24] In Re: Ramlila Maidan Incident Dt.4/5.06.2011 v. Home Secretary, Union of India & Ors., (2012) 5 SCC 1

greatest weakness, as it replaces the democratic certainty of the written word with a fluid, ever-shifting moral landscape that renders the original contract with the citizenry obsolete. [25]

2.1 TEXTUALISM, IMPLIED RIGHTS, AND THE MYTH OF INVENTED INTENTIONS:

This ontological shift effectively treats the Constitution not as a finished map, but as a vast, unexplored territory where judges act as forensic explorers. When the judiciary moves beyond the literal ink to uncover protections like education or privacy, they are performing what critics call Invented Inventions. By doing so, they cease to be map-readers of the law and instead become the cartographers of their own moral preferences. This replaces the collective grand narrative of the founders with the small stories of the presiding bench, creating a systemic instability where the Constitution stops being a set of predictable rules and becomes a blank check for judicial discovery. [26]

The forensic danger here is that by abandoning the literal meaning for the "spirit" of the text, the Court enters a state of legal nihilism. In this framework, rights are no longer created through the messy, public process of legislative deliberation but are "found" in the shadows of existing clauses, much like a scientist discovering a new element in a lab. However, as critics note, the law is a social contract, not a natural phenomenon; to "discover" a right like the Right to Sleep in the *Ramlila Maidan*[27] case is to engage in a form of gaslighting where the judiciary pretends a mandate was always there, despite decades of textual silence. This paradox of interpretation suggests that a document that can mean anything to meet the necessity of the hour eventually means nothing at all, as it provides no fixed boundaries to restrain state power. [28]

Ultimately, the rejection of a dead Constitution in favour of a living force leads to the destruction of Legal Predictability, which is the bedrock of the Rule of Law. If the terms of the constitutional contract are constantly shifting under the guise of transformation, the citizenry can never truly know their legal standing until a judge speaks. This creates a suicide pact with flexibility: the same interpretive gearbox used to expand liberty today can be reversed tomorrow to imply limitations on freedom in the name of a different social morality.[29] By

[25] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997)
[26] Ibid
[27] Id at 24
[28] Christopher Wolfe, *The Rise of Modern Judicial Review* (Basic Books, 1986)
[29] Lon L. Fuller, *The Morality of Law* (Yale University Press, 1964)

prioritizing a judge-led Morality of the Text over the originalist anchor, the judiciary risks turning the historic bridge into a structure of shifting sand. Without the literal guardrails of the text, the Constitution no longer restrains the state; instead, it becomes a flexible tool that allows the judiciary to legislate from the bench, effectively erasing the line between interpreting the law and manufacturing it. [30]

James Allan, in his critique of inventing intentions, argues that when judges uncover freedoms within the structure of a document rather than its explicit text, they are bypassing the paradigm of representative participation.[31] He posits that the "Living Constitution" model essentially allows unelected judges to substitute their own moral epiphanies for the settled will of the legislature. This institutional overreach transforms the judiciary into what critics call a Third Chamber of Parliament—a body that manufactures policy mid-match without the burden of electoral accountability.[32] For Allan, this is a Recent, Radical and Regrettable slide toward Judicial Supremacy that treats the Constitution as a blank check for judicial desire rather than a stable anchor.

2.2 SCALIA'S ORIGINALISM AND THE PARADOX OF FLEXIBILITY

The forensic core of Scalia's argument in *A Matter of Interpretation* is a brutal rejection of "Legislative Intent." He argues that searching for what the founders *meant* to do is a "hand-off" to judicial desire. Instead, he insists on Originalism, which focuses on what the words actually meant to a reasonable person at the time they were written.[33] To Scalia, the Constitution is not a living organism that evolves; it is a "Dead Constitution"—a fixed legal anchor designed to prevent the very transformation that modern courts celebrate. He posits that if the document can be stretched to meet modern needs, it ceases to be a law and becomes a vessel for the judge's own moral preferences. In this view, the living force isn't a bridge to the future; it's a gearbox that allows the judiciary to legislate from the bench under the guise of interpretation.[34]

[30] William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976)
[31] James Allan, *Implied Rights and Federalism: Inventing Intentions While Ignoring Them*, University of Western Australia Law Review, 34 2: 228-237, 2009
[32] James Allan, *The Three R's: Recent, Radical and Regrettable—The Rise of Judicial Activism*, Melbourne University Law Review Vol. 36:743
[33] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*
[34] Antonin Scalia, *The Rule of Law as a Law of Rules*

Scalia's interpretation suggests that the moral hubris of the bench leads to a Paradox of Flexibility. If the Constitution is infinitely elastic, it provides no fixed boundaries to restrain state power. He warns that the same interpretive tools used to expand liberty today can be reversed tomorrow to imply limitations on freedom in the name of a different social morality. This is the forensic danger of Judicial Discovery: when the Court uncovers a right like the Right to Sleep in the *Ramlila Maidan*[35] case, it isn't finding law; it is performing an act of "Judicial Ventriloquism" (speaking for the people through a document that remained silent for a specific reason.) For Scalia, the only way to protect democracy is to keep the Constitution dead, ensuring that any transformation of society happens through the messy, public process of the legislature rather than the private epiphanies of a robed elite.

Furthermore, Scalia's text highlights that a living document inherently destroys Legal Predictability. If the rules of the constitutional contract are constantly shifting to meet the "spirit" of the age, the citizenry can never truly know their legal standing until a judge speaks. This creates a systemic instability where the law is no longer a stable anchor but a moving target. By abandoning the literal meaning for a judge-led "Morality of the Text," the judiciary risks turning the historic bridge into a structure of shifting sand, where the only thing that remains fundamental is the current bench's subjective perception of necessity.

2.3 THE SUPER-LEGISLATOR: GLOBAL MANIFESTATIONS OF JUDICIAL HEGEMONY

The institutional critique of transformative constitutionalism focuses on cases where the judiciary transitions from a neutral arbiter to a "Super-Legislator," effectively rewriting the social contract without a democratic mandate. In the NJAC Case (*Supreme Court Advocates-on-Record Assn. v. Union of India, 2016*)[36], we observe the ultimate manifestation of Judicial Self-Preservation. The Parliament, representing the collective will of the citizenry through a near-unanimous constitutional amendment, sought to reform the opaque process of judicial appointments. However, the Supreme Court utilized the "Basic Structure Doctrine" to strike down the amendment. Critics argue this move granted the judiciary a veto power over the constituent process, ensuring that the Historic Bridge of the Constitution facilitates judicial incursions into legislative territory while permanently barring the legislature from providing democratic oversight of the bench.

[35] Id at 24
[36] Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1

Similarly, the UK Supreme Court's decision in Miller II (*R (Miller) v The Prime Minister, 2019*)[37] represents a significant shift in the principle of Parliamentary Sovereignty. By "discovering" a new legal limit on the executive's political prerogative to suspend Parliament, the Court engaged in what Richard Bellamy characterizes as a form of Legal Constitutionalism overriding political process. This was not the application of settled law, but an act of Judicial Ventriloquism, where the judges projected a new constitutional rule onto a document that had remained silent for centuries. By seizing control of the steering wheel during a political crisis, the Court moved beyond law-finding and into high-stakes political management, bypassing the representative process.

The Australian High Court's decision in *Roach v. Electoral Commissioner* (2007)[38] further illustrates the phenomenon of inventing intentions that haunts skeptics like James Allan. Despite the Australian Constitution's lack of a formal Bill of Rights and its silence on the Right to Vote, the Court uncovered an implied protection for prisoner voting rights hidden within the structure of representative government. Allan critiques this as being "Recent, Radical, and Regrettable," positing that the judiciary treats the Constitution as a blank check for judicial desire. This forensic manoeuvre allows the robed elite to find rights that the democratic process had deliberately left to the discretion of the Parliament.

Finally, the primary warning in Scalia's textualist framework remains *Lochner v. New York* (1905).[39] In this instance, the US Supreme Court struck down basic labour protections by discovering a Right to Liberty of Contract that favoured corporate interests over the health of workers. This case proves that a Living Constitution is a double-edged sword; if the text can be stretched to meet modern needs, it can just as easily be manipulated to enforce the subjective economic theories of the current bench. This transformation turns the law into a structure of shifting sand, where the democratic process is hollowed out by the subjective moral fashions of the judiciary.

CONCLUSION:

[37] UKSC/2019/0192
[38] 2007 HCA 43
[39] 198 U.S. 45 (1905)

The functional requirement of transformative constitutionalism is to serve as a dynamic catalyst for human rights while upholding the essential Legal Certainty that anchors a stable society. The "discovery" of implied rights functions as a vital jurisprudential mechanism to bridge systemic gaps, yet its true power is realized when these rights are woven into the very fabric of the democratic process. Rather than seeing judicial intervention and legislative action as opposing forces, they should be viewed as a symbiotic synthesis. This approach ensures that the "Historic Bridge" to dignity is not merely a judicial construct but a reinforced structure where the court’s protective shield is backed by the enduring strength of public consensus and prospectively.

Ultimately, balancing the pursuit of fundamental dignities with the critiques of the Democratic Deficit leads to a more robust and sustainable human rights framework. By navigating away from "Judicial puppetism" toward a collaborative model of constitutional evolution, the judiciary empowers the citizenry to become active participants in their own liberation. The third chamber critique acts not as a barrier to progress, but as a safeguard that ensures new rights are rooted in the sovereign will. In this light, transformation becomes a shared journey where the court secures the pathway, and the representative process provides the legislative permanence, creating a constitutional heritage that is both morally progressive and democratically legitimate.