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A Literary Lens Into Constitutional Interpretation and a Possible Synthesis of Natural and Positive Law: The Silmarillion

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A LITERARY LENS INTO CONSTITUTIONAL
INTERPRETATION AND A POSSIBLE SYNTHESIS OF
NATURAL AND POSITIVE LAW: THE SILMARILLION

*Charles Edward Andrew Lincoln IV**

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I. ABSTRACT

The nature of identity in the United States lies in the Constitution.¹ Perhaps this is due to “veneration” of the document.² It has also been argued that the Declaration of Independence holds a seminal role in the American identity.³

The rift seems to occur with the concept of a “living constitution,”⁴ whereby the concept of an ever-evolving jurisprudence allows for an evolving interpretation of the Constitution as society changes.⁵

1. Or Bassok, *The Court Cannot Hold*, 30 J. L. & POLITICS 1, 4. (2014). (“To a large extent, American national identity is currently dependent on the Constitution.”). *Id.*n. 7 (2014) (“See, e.g., Michel Rosenfeld, *The Identity of the Constitutional Subject* 76 (2010) (“In the U.S., the Constitution forms a centerpiece of national identity rather than a mere adjunct to it.”); Tracy B. Strong, *Is the Political Realm More Encompassing than the Economic Realm?*, 137 PUBLIC CHOICE 439, 448 (2008) (“We do know that the Constitution is the final arbiter of what it means to be an American, even if I may not always know, or agree with you, as to what that means in any particular instance.”)).

2. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 11 (1988) (“‘Veneration’ of the Constitution has become a central, even if sometimes challenged, aspect of the American political tradition.”).

3. Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107, 138 (1998) (“The concept of a constitutional authority of national ethos suggests that the Declaration of Independence, as a defining symbol of that ethos, has bearing on constitutional interpretation. As our understanding of the Declaration evolves, it rightly shapes the way in which we read our living Constitution. Among contemporary constitutional interpreters who appear to hold some version of this view are Charles Black, Justice William Brennan, and Justice Ruth Bader Ginsburg.”).

4. See generally Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319 (2008) (discussing the “living constitution” doctrine).

5. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1811–12 (2007) (“At this point, the separation of powers makes it possible for the Supreme Court to remember the achievements of the recent past, and integrate them into our evolving constitutional legacy.”) “The idea of a living constitution is premised upon the idea that constitutions are, in their barest form, organisms. Lawyers, judges and political scientists alike have long described constitutions in organic terms. More explicitly, the United States Constitution has been “born,” it has been “nurtured,” and it has the ability to “grow” with society. If constitutions have these characteristics, then there must be some process that drives them to change. Professor Scott Dodson has argued that the metaphor of a living constitution--which includes many allusions to biological theories of evolution--may not be entirely accurate, at least not when described in terms of Darwinian natural selection. In natural selection based change, evolution occurs in a two-step process. First, genetic variation occurs, with neither direction nor purpose, within individual organisms. In

This rift can be demonstrated by the world of J.R.R. Tolkien. In *The Lord of the Rings* and *Silmarillion*, the various languages of groups of Middle Earth represent and have distinct portrayals of attributes.⁶ The elves speaking Sindarin and Quenya seek beautiful things,⁷ the orcs are former elves that have been corrupted in their language, the dwarves are logical in their Khuzdul language, etc. However, the natures of the languages are subject to change. This is exemplified when Melkor, one of the original beings, created by Eru Ilúvatar (the original being), turns dark when the original singing—

the second step, the natural environment exerts pressures on the variants, and those with traits best designed to withstand those pressures survive and reproduce more copies of their traits." Eliot T. Tracz, *Doctrinal Evolution and The Living Constitution*, 42 DAYTON L. REV. 257, 259 (2017).

See Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2043 (2012) (reviewing JACK. M. BALKIN, *LIVING ORIGINALISM* 267 (2011)) ("Instead [living constitutionalism] describes the processes by which constitutional change occurs in all of the different branches of government and in civil society, and it explains why these processes, in the long run, promote the democratic legitimacy of the system as a whole. Rather than identifying the living Constitution with common-law decision making, I argue that the living Constitution is the product of constitutional construction by all branches of government over time. Some of this construction might be described as common-law decision making - by federal and state courts, by administrative agencies, and by executive officials. But this account does not tell us very much, for it simply describes change by analogy to the ancient practices of British courts without attempting to explain the engines of change in the various institutions of government and civil society. Jack M. Balkin, Symposium, *Originalism and Living Constitutionalism: A Symposium on Jack Balkin's Living Originalism and David Strauss's The Living Constitution: Panelist Papers: The Roots of The Living Constitution*, 92 B.U.L. REV. 1129, 1155 (2012)").

6. "Other constructed languages are artistic in nature, intended to exist only in an imaginary space. These constructed languages can provide unique depth and richness to a fictional world. Author John Ronald Reuel ("J.R.R.") Tolkien developed multiple detailed languages for the races (elves, dwarves, ents, orcs, etc.) of Middle Earth in his fantasy novels." Michael Adelman, *Constructed Languages and Copyright: A Brief History and Proposal for Divorce*, 27 HARV. J.L. & TECH. 543, 547-548 (2014).

Indeed, the art as a whole of Tolkien's works seems most representative of the rifts in constitutional interpretation. "As one reader described, '[r]eading Tolkien's major works is like looking at a painting in which a beautiful garden is glimpsed in the background, and then discovering that the garden actually exists, having been planted by the artist before the picture was painted.'" *Id.*

7. "After Tolkien laid out the initial vocabulary and structure of Elvish languages such as Quenya and Sindarin, fans studied and expanded the languages in order to write their own works in Tolkien's constructed tongues." Rachel Scall, *Emoji as Language and Their Place Outside American Copyright Law*, 5 N.Y.U. J. OF INTELL. PROP. & ENT. LAW 381, 399 (2016).

evidently before the creation of language—of the Ainur⁸ becomes dissonant with Melkor's choice to sing differently.⁹

Natural law has been compared to originalism in the sense that the two have overlapping elements.¹⁰ Again, it may be fair to compare natural law to the musical order set by Eru Ilúvatar. If this premise is accepted that natural law is originalism,¹¹ the order set by Eru Ilúvatar, then the dissonance caused by Melkor can arguably be the concept of a living constitution—or at least that the two have overlapping elements.¹²

This is not a critique of living constitutionalism and similar theories of constitutional interpretation. But, rather, an interpretation of how the two theories could be metaphors of how constitutional

8. "In writing *The Lord of the Rings* and *The Silmarillion*, J. R. R. Tolkien created Middle-earth: its geography, peoples, languages, histories, and myths. Among the tales of patriarchs and the legends of great heroes, Tolkien has included a complex creation myth, 'Ainulindalë: The Music of the Ainur,' which develops through three separate stages: the Great Music, the Vision, and Eä.'" Elizabeth A. Whittingham, *The Mythology of the "Ainulindalë": Tolkien's Creation of Hope*, 9 J. FANTASTIC ARTS 212, 212-13 (1998).

Cf. "His symphonists, the Ainur, are clearly individual avatars of the various aspects of his own aesthetic fecundity. As composer/director, Ilúvatar allows each musician room to improvise, reserving to himself the final touches which render the whole harmonious within the composer's conception. The resulting image of the nature of being exploits the natural tension between form and invention which Igor Stravinsky has hailed as the matrix of creative art, and which reflects at the same time an essential paradox of Western theology: 'free will' versus the deity's 'foreknowledge,' or 'freedom versus necessity' in Chaucer's terms (B 4426-4440)." Robert A. Collins, *"Ainulindale": Tolkien's Commitment to an Aesthetic Ontology*, 11 J. FANTASTIC ARTS 257 (2000).

See J.R.R. Tolken, 17 PARMA ELDALAMBERON WORDS, PHRASES AND PASSAGES (for a definition, "The Ainur only used of the Spirits before Creation, or of those unnamed who are not concerned with it.").

9. Matthew R. Bardowell, *J.R.R. Tolkien's Creative Ethic and Its Finnish Analogues*, 20 J. FANTASTIC ARTS 91, 98-100 (2009).

10. Douglas W. Kmiec, *Natural-Law Originalism-or Why Justice Scalia (Almost) Gets It Right*, 20 HARV. J.L. & PUB. POL'Y 627, 649 (1997) ("Natural law is an inescapable and important element of originalism, and no sincere originalist can omit the inquiry.").

11. However, this may not be true. Cf. André Leduc, *The Ontological Foundations of the Debate Over Originalism*, 7 WASH. U. JURIS. REV. 263, 288 (2015). ("Natural law originalism warrants a brief separate analysis of its ontology and philosophy of language. Natural law originalism carries its philosophical commitments openly. Justice Thomas and Randy Barnett provide perhaps the clearest statements of natural law originalism. Natural law originalism appears paradoxical.").

12. However, it is arguable that they were created by Eru Ilúvatar at the same time men were created.

interpretation as seen through literary—that is myths existing in an inception of literature, such as, the myth of *The Silmarillion* set within the works of Tolkien—lenses.¹³ Indeed, for purposes of this analysis: living constitutionalism and originalism could be flipped, arguably.

This deviation from Eru Ilúvatar’s original plan does not have to necessarily result negatively. There are others who fall out of line with the original conception of Eru Ilúvatar, such as “men” who are endowed with the gift of a short life and thus are industrious and creative. Arguably, it could also be extended to the world of Hobbits who are evidently related to men—but their origin story is never clearly delineated in any of Tolkien’s writings.

Thus, this shows that the story of the *Silmarillion* primarily and in part *The Lord of the Rings* exemplifies rifts of originalism and living constitution doctrines. These perhaps are not just relevant for Constitutional interpretation purposes.

II. NATURAL LAW

Legal theorist John Finnis describes the basis of natural law as being a “complete community.”¹⁴ This complete community transcends all jurisdictions.¹⁵ Finnis identifies freedom and equality as a key element to natural law.¹⁶ Natural theories argue that moral

13. Such myths exist in the backdrop of other stories, such as *Harry Potter* through Grindelwald or even Tom Marvolo Riddle’s history can be seen as a myth analogous to the stories set forth in *The Silmarillion*.

14. Barry E. Moscovitz, *Natural Law and Land Use Regulation: A Case Analysis*, N.J. LAW., Oct. 2000, at 39, 44 n.17 (“Finnis identifies four unifying relationships (or ‘orders’) of human community: (1) physical and biological unity; (2) unity of intelligence in its capacities, its workings, and its product, knowledge; (3) cultural unity of shared language, common technology, common technique, common capital stock, and so on; and (4) unity of common action. J. Finnis, *Natural Law and Natural Rights* 136-138 (1980). Finnis’s analysis, however, primarily concerns community in the fourth order — unity of common action. *Id.* at 138.”).

15. *Id.* at 44 n.22 (The concept of a total community transcending all jurisdictions comes from Finnis’s term of a *poelis*. “Finnis defines a *poelis* as the territorial state, ‘political community’ or ‘body politic’ that today claims to be complete and self-sufficient, and which Aristotle declared was the paradigmatic form of complete and self-sufficient community for securing the all-around good of its members.”).

16. Christopher Tollefsen, *Freedom and Equality in Market Exchange: Some Natural Law Reflections*, 33 HARV. J.L. & PUB. POL’Y 487 (2010) (“Both freedom and equality, properly understood, are essential to the natural law account of the market as presented by its greatest proponent, St. Thomas Aquinas.”), See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 127 n.V.1 (2nd ed. 2011).

truths—leading to the creation of laws—can not only come from divine revelation, but also from reasoned reflection.¹⁷

There have been key critiques to natural law—especially from H.L.A. Hart—that argued that natural law has a paradoxical basis in sociological principles of society.¹⁸ Finnis and other natural law theorists have argued that application of Hart's method is misguided because it is not social norms that drive laws, but rather laws are present—in a natural law paradigm—“to serve the common good.”¹⁹

III. ORIGINALISM

Originalism is the concept of gaining an understanding of the law from the time it was passed into law.²⁰

17. Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL'Y 171, 181 (2008) (“They assert, with St. Paul, that there is a law ‘written [on the] hearts’ even of the Gentiles who did not know the law of Moses—a law the knowledge of which is sufficient for moral accountability.”), *See Romans 2:15* (New International Version).

18. George, *supra*, note 7, at 196 n.41 (“Even before the appearance of *The Concept of Law*, Hart had sternly repudiated natural law theory, arguing that ‘in all its protean guises’ natural law theory relies on the implausible descriptive sociological claim ‘that human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) other than that of survival.’ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 623 (1958). Of course, Hart was correct that such a claim is utterly implausible. The trouble is that no natural law theorist (or anyone else, so far as I am aware) has ever asserted any such thing. As John Finnis has remarked in criticizing Hart's attribution of the claim to natural law theorists, ‘[c]ertainly the classical theorists of natural law all took for granted, and often enough bluntly asserted, that human beings are not all equally devoted to the pursuit of knowledge or justice, and are far from united in their conception of what constitutes worthwhile knowledge or a demand of justice.’ Finnis, *supra* note 12, at 29.”).

19. *Id.* at 196.

20. “The term ‘originalism’ has been most commonly used since the middle 1980s and was apparently coined by Paul Brest in *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980). Earlier discussions often used the term ‘interpretivism’ to denote theories that sought to derive meaning from the constitutional text alone (‘textualism’), or from the intentions of the originators (‘intentionalism’). *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980) (‘interpretivism’); Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) (‘interpretive model’); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (‘intentionalism’). Current discussions have tended to reject the labels ‘interpretivism,’ which often embraces nonoriginalist textualism, and ‘intentionalism,’ which suggests reliance on subjective intentions rather than objective meaning. *See* GREGORY BASSHAM, *ORIGINAL INTENT AND THE*

Originalism encompasses two terms: original meaning and original intent.²¹ Original meaning invokes the concept of what a reasonable speaker of English would have understood the terms to mean at the time the law was adopted.²² Original intent invokes the concept of the goals, objectives, or purposes at the time.²³ Ronald Dworkin points out that the main difference between the two is that original meaning is “[W]hat some officials intended to say in enacting the language they used, and what they intended—or expected or hoped—would be the consequences of their saying it.”²⁴ The sources for originalism includes the text of the law, contemporary dictionaries, legislative records, subsequent interpretations by courts of the law, and comparison of the meaning in different circumstances.²⁵

The roots and premises of originalism come from the assumption that the Constitution grants the government the right to govern:

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken,

CONSTITUTION 146 n.3 (1992); Richard B. Saphire, *Enough About Originalism*, 15 N. KY. L. REV. 513, 515 n.7 (1988).” Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 1034 n.1 (1998).

21. “Strong originalism, as I will use the term, comprises two distinct subsets. Probably the most immediately recognizable originalist thesis holds that, whatever may be put forth as the proper focus of interpretive inquiry (framers’ intent, ratifiers’ understanding, or public meaning), that object should be the sole interpretive target or touchstone. Call this subtype of strong originalism “exclusive originalism.” It can be distinguished from a sibling view that is a shade less strong - viz., that interpreters must accord original meaning (or intent or understanding) lexical priority when interpreting the Constitution but may search for other forms of meaning (contemporary meaning, best meaning, etc.) when the original meaning cannot be ascertained with sufficient confidence. Call this marginally more modest variant of strong originalism “lexical originalism.”” Mitchel N. Berman, *Originalism Is Bunk*, 84 N.Y.U.L. Rev. 1, 10 (2009).

22. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. Rev. 101, 105 (2001).

23. *Id.*

24. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 116 (Amy Gutmann ed., Princeton 1997).

25. See Barnett, *supra* note 11, at 110-46.

or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.²⁶

This is the basis of jurisprudence and ability for the judicial department to say what the law is within the context of the other branches of government.²⁷

IV. CONNECTION OF NATURAL LAW AND ORIGINALISM

Justice Scalia wrote “The prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation . . . that judges merely ‘discovered’ rather than created.”²⁸ This comes from the concept that natural law and written law were the same.²⁹ Even “[T]he Federalists had expressly argued that the entire Bill of Rights was redundant” because “natural and customary rights [existed] independent of any textual enumeration.”³⁰

Today, the “Legal Positivist and Legal Realist movements that Justice Holmes helped shape one hundred years ago fundamentally reoriented things,” to lead us away from the idea that natural law and the written law are the same.³¹

26. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803).

27. See generally, Charles Edward Andrew Lincoln IV, *A Structural Etiology of the U.S. Constitution*, 43 J. LEGIS. 122 (2016). Cf. Charles Edward Andrew Lincoln IV, *Hegelian Dialectical Analysis of U.S. Voting Laws*, 42 U. DAYTON L. REV. 87, 91 (2017).

28. SCALIA, *supra* note 13, at 10.

29. Brian T. Fitzpatrick, *Originalism and Natural Law*, 79 FORDHAM L. REV. 1541 (2011).

30. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 667 (2009).

31. Fitzpatrick, *supra* note 30, at 1542.

Arguably originalism is based on the concept of a social contract whereby the basis of natural law is presumed.³² The substantial similarity between natural law and originalism has been raised questions of the choice between natural law and positive law.³³ Although originalism can come in the form of positive law originalism and natural law originalism.³⁴ Still, the premise is that originalism is based in natural law—the nature of human activity.

V. LIVING CONSTITUTION

A. *The Story and Rifts in the Silmarillion*

The first chapter of the *Silmarillion* is The Silmarillion, Ainulindalë (Quenya for “Music of the Ainur”) recounts the creation story of Tolkien’s mythology. The story begins with Eru Ilúvatar creating the world of Eä (the pre-historical worlds to *The Lord of the Rings* Trilogy). The Ainur³⁵ were created by Ilúvatar as “children of Ilúvatar’s thought.” The Ainur are the immortal spirits that These immortal beings sing—either alone or in a group—leading to a “great” plan for them to sing in a harmonic symphony. A caveat is that although the Ainur are created by Ilúvatar and embody his thoughts, they have free will to help him with his great plan of “unfolding a history whose vastness and majesty had never been equaled.” Among these original fifteen Ainur, Ilúvatar created Melkor who had the “greatest power and knowledge” compared to the others. Melkor broke with the harmony of the other Ainur to develop his own music. Some of the other Ainur also joined Melkor. Melkor breaking off from

32. “As it turns out, however, the major forms of originalism are at worst unsuccessful or unnecessary in validating the constitutional text, and at best dependent upon rival contractualist views, which are in turn dependent upon rival natural law or natural rights views.” R. George Wright, *Dependence and Hierarchy Among Constitutional Theories*, 70 BROOK. L. REV. 141, 170 (2004). (footnote omitted)

33. André LeDuc, *Paradoxes of Positivism and Pragmatism in the Debate About Originalism*, 42 OHIO N.U. L. REV. 613, 616 (2016). See JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY, 125-26 (2001). (describing the opposition of natural law and positive law theory in the context of a contemporary defense of legal positivism).

34. See LeDuc, 42 OHIO N.U. L. REV. at 616.

35. Ainur is a Quenya name comes from the Elvish root ayan- "revere, treat with awe"; Quenya is a fictional language devised by J. R. R. Tolkien and used by the Elves in his legendarium. J.R.R. Tolkien, *Parma Eldalamberon 17: Words, Phrases & Passages in Various Tongues in The Lord of the Rings* (Christopher Gilson ed., 2007), at 149.

Ilúvatar causes rifts in Ainur. It should be noted that the themes Melkor proposed of vanity and selfishness become “evil” in the Tolkien legendarium.

Ultimately, Ilúvatar, realizing his plan has not succeeded, leaves the Ainur and Melkor. At the end of the Void,³⁶ Ilúvatar takes the Ainur to see the arrival of the Children of Ilúvatar—the Elves and Men. After Melkor’s disruption, Ilúvatar gives the Ainur a choice of either staying with him in the Timeless Halls or going to the world created by their music.

Many of the Ainur descended into Arda—the physical location of the world of the Silmarillion and Lord of the Rings—to live with the children of Ilúvatar. Among them was Melkor, who wished and desired to rule Arda. The Ainur were divided into two groups: the more powerful—Valar—and the less powerful—the Maiar.

In the physical creation of Arda, the followers of Eru Ilúvatar each dealt with Melkor warping Arda for his own purpose. However, the Valar were eventually successful in forcing Melkor out of Arda. At this point in the creation story in *The Silmarillion*, the world of Arda was initially flat and without light. The Ainur created two lamps out of the misty light found throughout Arda. One lamp was placed in the north and one in the south to illuminate Arda. Arda was surrounded by an encircling sea and beyond that was the “walls of night.” In the center of Arda was the Isle of Ormarin which is where the Ainur lived. With the help of several Maiar, Melkor catastrophically destroyed the two lamps of light substantially changing Arda.

The destruction of the lamps created four continents. Middle Earth was in the middle of these continents. The Ainur went to live on the western continent of Aman where Valinor was located. Valinor is the land in the west and is also known as the “undying lands.” However, subsequent to the movement of the Ainur into the western continent of Aman where the Valinor was located, Yavanna Kementári, the Queen of Earth—the Giver of Fruits—sang into existence two enormous light bearing trees: Telperion the Silver Tree and Laurelin the Golden Tree. However, these trees were only on Aman.

Subsequent to Yavanna’s creation, the children of Ilúvatar—the Elves—awoke on the shores of Middle Earth. Melkor quickly became

36. For non-readers of *The Silmarillion* but for those familiar with *The Lord of the Rings*, Tom Bombadil references the Void in the chapter ““Fog on the Barrow-downs.” He states, ““Lost and forgotten be, darker than the darkness, Where gates stand forever shut, till the World is mended.” In *The Silmarillion*, the Void is generally the place—or lack thereof—beyond Arda that existed before Ilúvatar’s creation.

aware of the Elves and sent evil spirits to corrupt them. As a result of Melkor's corruption of the Elves, one of the Valar, named Oromë, summoned and led a portion of elves to Valinor—this event was known as the Sundering of the Elves. Following Oromë's summoning of a portion of the elves, the elves were effectively divided into two groups at this point. Thus, this leading to the distinction of the two elvish languages, Quenya and Sindarin.

VI. HOW THE SILMARILLION CAN EXEMPLIFY RIFTS IN CONSTITUTIONAL INTERPRETATION

Assuming for argument that common law is the musical of harmony of Eru Ilúvatar which the Ainur manifested in various ways.³⁷ Ilúvatar's song created Arda, the Ainur, and Melkor. Arguably, even Tom Bombadil is a personification of the music harmony.³⁸ Means of interpretation—such as *stare decisis*—are the

37. Indeed, the idea of comparing common law to music and art is not a novel idea. “[T]he lawyer was best compared to the composer: ‘[P]erhaps, it may more justly be likened to a complicated piece of music, wherein a single false note may destroy the entire harmony of the performance.’ *Id.* Either way, as painter or composer, the lawyer was playing a critical role in the common-law proceedings, crafting them virtually from scratch in a solo performance that, at its best, could rise to virtuoso proportions.” John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903*, 77 TEX. L. REV. 825, 866 (1999).

See further for a discussion generally of common law being seen as a harmony like architecture even in Blackstone's writings, “When Blackstone talked about reforming the Common Law, he used two terms: ‘improvement’ and ‘perfection.’ To his eighteenth-century readers, both would be indicative of the idea that, through experience and observation, law makers could induce first principles that then could be referred to in order to ‘improve’ the Common Law over time. As the Common Law was improved, it would become more perfect; in other words, it would increasingly reflect the order, beauty, and harmony of the natural law. Blackstone articulated the improvement and perfection of the Common Law in terms of history and architecture.” Carli N. Conklin, *The Origins of The Pursuit of Happiness*, 7 WASH. U. JURIS. REV. 195, 217-218. (2015).

38. Such a statement is a conjecture. “Second, Tom's basic song is structurally related to Legolas' “Song of the Sea” (Rings, 3:234-35), suggesting the possibility that Tom's is a corruption of an original piece of music from the Uttermost West common to both. Third, Tom's songs, although seemingly comic and nonsensical, have power in them to control individual elements and things in the forest. When told that Old Man Willow is the cause of the Hobbits' problems, Tom replies, “That can soon be mended. I know the tune for him” (Ibid., 1:131), which I suggest means something like, “Don't worry. I have the plans for that thing and can fix it right away.” This is the kind of knowledge that a Vala, who sang the Music, would likely

ways of coming to decisions using what laws and statutes already exist.³⁹

The already laid down statutes, previously decided common law, and precedent can all be construed as analogous to the songs of Harmony, Creation, and Awakening, because common law is the basis for which future decisions are made. Likewise, the songs of Harmony, Creation, and Awakening are the beginning formulations for the rest of the stories in the Tolkien Legendarium from which the stories are built from.⁴⁰ These songs are the initial stepping stone in the creation of the world of Arda which in turn created the Elves, Men, Dwarves, etc.⁴¹ Following their creation, the various beings were allowed to do what they wished in the lands.

Likewise, the precedent, Constitution, and statutes laid down give us the choice of how to decide how to interpret law. Although some would argue that strict textualism—for example—does not give us a choice, we still have the options of which precedent to use.

Analogous to the interpretative practices of the Constitution, the original Ainur who were all united at once, the concept of natural law and positive law were united at the beginning of the nation. This was so much so that the Federalists argued the Bill of Rights would be redundant, because the rights were already enshrined even if not written.⁴² But as time progressed, Melkor caused dissonance and

have, and singing would be the natural way to apply it.” Hargrove, Gene, *Who is Tom Bombadil? Mythlore: A Journal of JRR Tolkien, CS Lewis, Charles Williams, and Mythopoeic Literature* 13.1 (1986): 3.
<https://dc.swosu.edu/cgi/viewcontent.cgi?article=1604&context=mythlore>

39. As a casual argument against the harmony of common law stare decisis, “Judge Shahabuddeen’s struggle for harmony of opinions is also apparent when he addresses the relationship between stare decisis and the law-creating power of the Court.” Olav A. Haazen, Book Review, 38 HARV. INT’L L.J. 587, 596 (1997).

40. “A pre-history of the fantastic realm of Tolkien’s stories from before creation to the age in which the Lord of the Rings occurs. J.R.R. Tolkien, *The Silmarillion* (1977).” Donald R. McConnell, *The Nature in Natural Law*, 2 Liberty U.L. Rev. 797, 846 (2008).

41. “Eru, whom the Eldar call Ilúvatar, then gives the Ainur a more wonderful and complex theme than any they have imagined and wills them to make together a Great Music, the beginning of the creation process.” Elizabeth A. Wittingham, *The Mythology of the “Ainulindalë”: Tolkien’s Creation of Hope*, *Journal of the Fantastic in the Arts*, Vol. 9, No. 3 (35), The Tolkien Issue (1998), pp. 212-228.

42. Fitzpatrick, *supra* note 30, at 1541 n.5 (citing Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 667 (2009) (noting that “the Federalists had expressly argued that the entire Bill of Rights was redundant” because “natural and customary rights [existed] independent of any textual enumeration”)).

some of the Ainur split from the original goal of Eru Ilúvatar's symphony. Likewise, concepts of positive and natural law sprang up as dichotomies—yet with a uniquely similar origin.

A possible explanation for the dichotomies in constitutional interpretation exists by analogy to the different beings in *Lord of the Rings*:

A curious aspect of the Tolkien fantasy world is the coexistence of different kinds of intelligent beings. There are not only human beings like ourselves, but hobbits, elves, dwarves, orcs, and trolls, to name only the major groups. Each has their own set of defining characteristics. If you read Tolkien's *Silmarillion*, or the appendices to his books, you can learn more about the origins of the different peoples and their respective places in the created order. You could say each group has their own "nature." Orcs are odd in this regard, however. Their ancestors were once elves, bright beautiful beings capable of great art, creativity, and culture, but also susceptible to hubris, pride, despair, and other sins common to human beings. Nonetheless, despite some major instances of elvish misconduct, you could say that as a whole the elves are "on the side of the angels." At one point, however, the "dark powers" of Middle Earth captured some elves in the distant past and altered them, thorough some occult science, to produce the orcs. The orcs are a race of vicious implacable evil doers. They exhibit cruelty, lust of all kinds, hate, brutality, and recklessness. Physically and spiritually ugly, the orcs live only to destroy and subjugate. They do not even act honorably to each other, engaging in betrayal, cannibalism, and abuse of self and other orcs.⁴³ (footnotes omitted)

The story of the Lord of the Rings, as exhibited in the appendices, indicates that a group of beings fell from the status of the Elves to

43. Donald R. McConnell, *The Nature in Natural Law*, 2 LIBERTY U.L. REV.

Orcs.⁴⁴ The dichotomy in nature between Orcs and Elves—as well as the other beings: hobbits, humans, etc.—exists, because:

the orcs are very evil by nature that we feel comfortable with their utter defeat. When men and hobbits go bad, by contrast, we feel a pang of sympathy. Not because they succumbed to their inherited traits, but because we really expect better things of them. We judge all by a standard other than average or typical human behavior. We judge conduct, both human and orc, by the Natural Law.⁴⁵

44. J.R.R. TOLKIEN, *THE SILMARILLION* 50 (1977).

45. McConnell, *supra* note 41, at 801.

Perhaps the nature to examine is not the nature of the beings, but the teleological⁴⁶ goal of the creator of the beings.⁴⁷ This could have theological and ontological implications if taken to *a priori* logical conclusions; meaning, it is perhaps not important to look at the nature of the Elves or the Orcs but the nature of Eru Ilúvatar. By analogy, it is perhaps not relevant to always examine the teleological ends of each method of constitutional interpretation, but rather the teleological ends of the Constitution itself.

46. Mark C. Modak-Truran, *Corrective Justice and the Revival of Judicial Virtue*, 12 YALE J.L. & HUMAN. 249, 298 fn. 19 (2000) (“By teleological, I mean an interpretation that emphasizes Aristotle’s tendency to explain things primarily with respect to a telos or final end (i.e., with respect to a state of affairs or characteristic of reality to be pursued). Cf. FRANKLIN I. GAMWELL, *THE DIVINE GOOD: MODERN MORAL THEORY AND THE NECESSITY OF GOD* 61 (1990) (“[A] teleological ethic is one in which the distinction between moral and immoral action as such is identified by reference to one or more states of affairs or characteristics of existence to be affirmed or pursued.”). For example, in the *Nicomachean Ethics*, Aristotle posits a normative ethic grounded on a teleological principle—a principle that grounds moral claims in a telos (end or goal). By contrast, Kant proposes a radically nonteleological or deontological principle—the categorical imperative. Rather than identifying a state of affairs that should be pursued (a telos), Kant claims that morality must be cleansed of everything empirical by pure practical reason. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 56 (H.J. Paton trans., Harper & Row 1964) (1785). Kant proposes the science of morality to purify ordinary practical reason (the will) of these empirical influences (ends) so that duty may become the ground of action. In addition, Kant argues that the ‘supreme moral principle’ is categorical or rationally necessary. Moreover, ‘if freedom of the will is presupposed, morality, together with its principle, follows by mere analysis of the concept of freedom.’ *Id.* at 115.”). See David Rochnik, *Michael Sandel’s Neo-Aristotelianism*, 91 B.U. L. REV. 1405, 1408 (2011). (“A brief digression: if the above is accurate, then the title of Sandel’s book, *The Case Against Perfection*, is misleading. For Aristotle the ‘perfect,’ which translates the Greek *teleion* (derived from telos) is synonymous with the ‘complete.’ This concept requires that of a limit, an end. As Aristotle puts it, ‘nothing is complete unless it has a telos. And a telos is a limit.’ A mature, healthy, flourishing animal, for example, is a complete (*teleion*) set of well-functioning and well-coordinated parts. But *teleion*, like the English ‘perfect,’ also has a second, normative, sense. What is ‘perfect’ is not only complete or that from which nothing is absent but it is also maximally good and ‘cannot be exceeded in its kind. For example, a perfect doctor or flutist are those who, according to the form of the excellence that belongs to them, lack nothing.’ In short, the very notion of Aristotelian perfection (in both its senses) requires a limit. A doctor can be perfect because ‘being a doctor’ is a determinate condition that can be attained. But limit is precisely what is missing in the Promethean project of genetic engineering, which Sandel characterizes as “a boundless bid for mastery and dominion.””).

47. See McConnell, *supra* note 41, at 844.

VII. CONCLUSION

Thus far, this article has attempted to show that the story of the *Silmarillion* primarily and in part *The Lord of the Rings* can exemplify rifts of originalism and living constitutional doctrines. These perhaps are not just relevant for U.S. constitutional interpretation purposes.

The nature of identity in the U.S. lies in the Constitution. Perhaps this is due to “veneration” of the document.⁴⁸ It has also been argued that the Declaration of Independence holds a seminal role in the American identity.

The rift seems to occur with the concept of a “living constitution,” whereby the concept of an ever-evolving jurisprudence allows for an evolving interpretation of the Constitution as society changes.⁴⁹

This rift is demonstrated by the world of J.R.R. Tolkien. In *The Lord of the Rings* and *Silmarillion*, the various beings of Middle Earth have distinct natures. The elves seek beautiful things, the orcs are former elves that have been corrupted, the dwarves are logical, etc. However, their natures are subject to change. This is exemplified when Melkor, one of the original beings created by Eru Ilúvatar (the original being), turns dark when the original singing of the Ainur becomes dissonant with Melkor’s choice to sing differently.

Natural law has been compared to originalism.⁵⁰ Again, it may be fair to compare natural law to the order set by Eru Ilúvatar. If this premise is accepted, that natural law is originalism, the order set by Eru Ilúvatar, then the dissonance caused by Melkor can arguably be the concept of a living constitution.

This deviation from Eru Ilúvatar’s original plan does not have to necessarily be negative. There are others who fall out of line with the original conception of Eru Ilúvatar, such as men who are endowed with the gift of a short life and thus are industrious and creative. Arguably, it could also be extended to the world of Hobbits who are evidently related to men—but their origin story is never clearly delineated in any of Tolkien’s writings.

48. See LEVINSON, *supra* note 2, at 11 (“‘Veneration’ of the Constitution has become a central, even if sometimes challenged, aspect of the American political tradition.”).

49. See Ackerman, *The Living Constitution*, *supra* note 3, at 1811–12 (“At this point, the separation of powers makes it possible for the Supreme Court to remember the achievements of the recent past, and integrate them into our evolving constitutional legacy.”).

50. Kmiec, *supra* note 11, at 649 (“Natural law is an inescapable and important element of originalism, and no sincere originalist can omit the inquiry.”).



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