THE METHOD OF TEXT AND ?: JACK BALKIN'S ORIGINALISM WITH NO REGRETS

*Larry Alexander**

In this Article on Professor Jack Balkin's Living Originalism*, I analyze his method of "text and principle." I have no quarrel with Professor Balkin's claim that some of the constitutional norms are rules and some are standards. His claim, however, that some of the norms are "principles"—principles that do most of the work in his attempt to reconcile originalism and living constitutionalism—is the claim I find doubtful. I examine three conceptions of what such principles might be, and I conclude that one of them is possible but highly unlikely, while the others are not merely unlikely but impossible of realization.*

In the modern era of constitutional theorizing, there is no shortage of Panglossian theories to offer, theories in which constitutional constraints on the theorist's normative preferences are as flimsy as a negligee's on carnal appetites. Despite Professor Henry Monaghan's sardonic invocation of "Our Perfect Constitution,"[1] the list of those who believe the Constitution—the actual one—is no more than a hair's breadth from normative perfection continues to grow. This assertion of perfection is easy for nonoriginalists. After all, for them, the Constitution is *not* a historical artifact, a document that is the repository of norms promulgated by real people at specific historical moments and whose promulgated norms mean no more or less than what those promulgators meant by them. Rather, for nonoriginalists, the Constitution is a gauzy idea of good and just government, the specific content of which is up for grabs. Professor Larry Sager, a nonoriginalist, calls it the "justice-seeking Constitution"[2]—though why it is "justice-seeking" rather than "justice-realizing" I do not fully understand, given that original meanings do not

* Warren Distinguished Professor, University of San Diego School of Law. I wish to thank all the participants at the conference on Jack Balkin's *Living Originalism* for their comments and criticisms.

1. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

2. LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 194–221 (2004).

stand in the way.[3] (Judicial supremacy coupled with strong precedential constraint could stand in the way, however; although why nonoriginalists would feel more strongly bound by mistaken precedents than by the original meaning of the historical Constitution is not clear.)

For originalists, however, constitutional *imperfection* is not only a possibility, but is, for many, an unhappy reality. Those who wrote and ratified the Constitution and its amendments may have been wise, just, and fully engaged at their "constitutional moments," but they were nevertheless imperfect beings made of the same crooked timber as all of us. Although originalists range from the optimists, who either find the processes of ratification and amendment to be reassuring with respect to substantively good content[4] or have examined the content on its own terms and pronounced at least most of it to be excellent,[5] to the pessimists, who find the content to be either deplorable or mainly irrelevant to modern concerns,[6] all originalists believe the Constitution to consist of those norms promulgated by actual humans and that mean what their promulgators intended them to mean—for better (say the optimists) or for worse (say the pessimists).

The advantage originalists hold over nonoriginalists is that for the former, the actual historical document and its promulgators are front and center. Nonoriginalists have difficulty explaining what they even mean by "the Constitution." They express allegiance to the parchment in the National Archives with its various markings. But those markings only count as a text, much less a text in a particular language, if we assume they were made by actual people who meant something *by* them. Any set of symbols detached from their author(s) can mean anything—because they could have been made by anyone intending to communicate an indefinite number of meanings by them—or nothing at all, as when the "symbols" are produced mindlessly and thus are not really symbols at all.[7] The advantage nonoriginalists hold over originalists is that they can slip the bonds of the actual Constitution's intended meaning and, depending on the occasion, impose their preferred normative theories on the rest of us through the courts, or free us as legislators from asserted limitations on our power to achieve what we consider desirable.

3. Sager eschews originalism. *Id.* at 30–41.

4. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1702 (2010).

5. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 84–86 (2004).

6. *See, e.g.*, CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 1–10 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

7. Larry Alexander, *Of Living Trees and Dead Hands: The Interpretation of Constitutions and Constitutional Rights*, 22 CAN. J.L. & JURIS. 227, 233 (2009) [hereinafter Alexander, *Of Living Trees*]; Larry Alexander, *Simple-Minded Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 87, 91–93 (Grant Huscroft & Bradley W. Miller eds., 2011); Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139, 139 (2010).

But would it not be wonderful if we could have our cake and eat it, too—if we could pledge fidelity to the originalist's Constitution and at the same time find ourselves free from all obstacles in the pursuit of normative perfection, both in the courts and in the legislatures? Would not this be the best of all possible worlds?

According to Professor Jack Balkin, this is indeed the world we live in.[8] Balkin claims to be an originalist and faithful to the original meanings found in the historical Constitution.[9] But Balkin also claims that those meanings for the most part either mandate the courts and Congress to do what is right or free Congress to do so.[10] There are perhaps some tiny imperfections in the originalist's Constitution. Maybe thirty-five is the wrong minimum age for presidents.[11] And then there is the favorite whipping boy of the originalist's Constitution, the U.S. Senate. (But wait! Perhaps the Senate, if an imperfection, can be eliminated. Balkin probably endorses the Supreme Court's view that equal protection requires even the upper houses of state legislatures to be apportioned in accord with "one person, one vote."[12] And he endorses the Court's magical reading of the 1868 equal protection clause's principle into the 1791 due process clause in *Bolling v. Sharp*.[13] And since a 1791 amendment trumps the original Constitution, voilà—no more two senators per state!) Still, any such imperfections are minor. If the Constitution is not perfect, it is damned near perfect![14]

How does Balkin arrive at his marvelous conclusion that originalism can give nonoriginalists all they want? He claims it follows from originalism's own methodology, a methodology that he calls "text and principle."

According to Balkin, the original meanings of the norms expressed by the constitutional text reveal that some of those norms are rules, some are standards, and some are principles. The method of "text and principle" is thus just a shorthand for the method of "text rule, standard, and principle."[15] The most consequential of the Constitution's norms, however, are the principles rather than the rules or standards.

When we interpret, says Balkin, we seek the original meanings of the norms in the constitutional text.[16] Is the norm we are considering a rule, and if so, what rule? Is it a standard? Or is it a principle, and if so, what principle? If it is a principle, we must give it the best meaning we

8. JACK M. BALKIN, LIVING ORIGINALISM 3 (2011).
9. *See id.*
10. Balkin's entire book is devoted to establishing these claims. *See generally id.*
11. *See* U.S. CONST. art. II, § 1, cl.5.
12. *See* Reynolds v. Sims, 377 U.S. 533, 558–68 (1964).
13. *See* 347 U.S. 497, 499 (1954).
14. At least, in Balkin's view it is. *See generally* BALKIN, *supra* note 8.
15. *Id.* at 6.
16. *Id.* at 35–36.

can, consulting history, precedent, consequences, and so on; and the argument over the best meaning of a principle is an ongoing one, always open for reconsideration, and one conducted not only in the courts but also in the legislatures and through social and political movements.[17]

Consider me quite skeptical of the method of text and principle and the conclusions Balkin claims that method delivers. Text and rule, and text and standard, I have no quarrel with, nor do I have a quarrel with Balkin's differentiation of original meanings from originally intended applications. Balkin is correct that originalism requires hewing to the Constitution's original meanings but not to how its promulgators thought it would apply. (In fact, I know of no originalist who thinks otherwise—although every originalist should take authorially expected applications to be *evidence*, and often strong evidence, of the authorially intended meaning.)[18] What I am skeptical of is Balkin's claim that the original meaning of freedom of speech, free exercise of religion, due process of law, equal protection of the laws, and privileges or immunities is that these clauses promulgate "principles" rather than rules or standards. In what follows, I explain the sources of my skepticism.

I. TEXT AND RULE

Balkin and I agree that a text can express a norm that is a rule. And we agree that the Constitution does contain rules. A rule is a norm that gives determinate guidance and thus requires no controversial evaluative judgments in its application. A rule can be very narrow, such as the rule requiring the President to be thirty-five, or the rule requiring two senators per state. Or a rule can be quite broad so long as it can be applied algorithmically without controversial evaluation. So the "principle" that Balkin locates in the commerce clause and, more generally, in all of Article I, Section 8, that Congress has the power to legislate on all matters that require national solutions—those where state laws produce externalities that collective action problems preclude the states from handling[19]—is really just a very broad rule, highly technical and complex perhaps, but with only marginal evaluative issues. (Balkin is not the first to assert that the principle—really, rule—of subsidiarity should govern Congress's constitutional powers. Professor Don Regan, several years ago, and Professors Robert Cooter and Neil Siegel more recently, have made the same assertion.[20] Unlike Balkin, however, they do not claim subsidiarity to be

17. *Id.* at 3–20.

18. *See* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, & THE DILEMMAS OF LAW 98–100 (2001).

19. BALKIN, *supra* note 8, at 33, 139–41.

20. *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 118 (2010); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 555–59 (1995).

the original meaning of Article I, Section 8 generally or of the commerce clause specifically. And although it is irrelevant to my concerns in this Article, let me say that I am unconvinced that the original meaning of Congress's powers is a broad rule of subsidiarity.)

Rules in the Constitution are just determinate algorithms promulgated by the Constitution's authors. They mean no more or less than what those authors intended them to mean. The originalist's Constitution definitely contains rules. On that point, Balkin and I are in agreement, even if we disagree about which norms are rules and what the content of the rules is.

II. TEXT AND STANDARDS

What is a standard? In my view, a standard is a norm requiring its applier to engage in first-order practical reasoning within a domain bounded by rules.[21] In other words, in contradistinction to rules, standards require their appliers to make potentially controversial evaluative judgments. Put simply, a standard tells one to "do the right thing" within a limited domain. If the standard's promulgator tells one to "consider *X*, *Y*, and *Z*" in applying the standard, that does not constrain the first-order practical reasoning involved, since the standard's applier will give *X*, *Y*, and *Z* whatever weight he or she would have given in the absence of that instruction. If, however, the promulgator tells one to "*only* consider *X*, *Y*, and *Z*," then the applier applies his or her first-order practical reasoning on the assumption (mandated by a *rule*) that all other relevant factors are in equipoise.[22] But in every case, a standard calls for first-order practical reasoning.

Balkin cites the Constitution's injunction against "unreasonable searches and seizures" and its mandate of speedy trials as examples of constitutional standards.[23] I have no quarrel with Balkin here. These constitutional norms do apparently call for first-order practical reasoning within limited domains.

III. TEXT AND PRINCIPLES

For Balkin, rules and standards do not exhaust the supply of constitutional norms. Indeed, for him, "principles," which are different from rules and standards, are where the principal action is. Although he invokes the term "principle" throughout his book, just what kind of norm a principle is remains virtually unexplained. So what are the possibilities? What can a principle, a norm that is not a rule nor a standard, *be*?

21. Larry Alexander, *What Are Constitutions, and What Should (and Can) They Do?*, 28 SOC. PHIL. & POL'Y 1, 3, 14 n.41 (2011).

22. *See id.* at 14 n.41.

23. BALKIN, *supra* note 8, at 6.

As far as I can discern, there is only one place in *Living Originalism* where Balkin describes principles:

> Principles are norms that are normally indeterminate in reach, that do not determine the scope of their own extension, that may apply differently given changing circumstances, and that can be balanced against other competing considerations. Although the persuasive power of principles may originate from how we expect they will apply when we argue for them, their jurisdiction, their scope, their weight, and the kinds of practices they regulate can shift over time.[24]

Balkin's description appears to be very similar to Professor Ronald Dworkin's description of principles in *Taking Rights Seriously*: norms that have no canonical formulation, are always potentially applicable, and have the dimension of weight.[25] I shall take up the Dworkinian interpretation of Balkin's principles, but first I shall consider other possible accounts.

A. Principles As Moral Principles

Perhaps the principles that are, according to Balkin, referred to by the text are moral principles. On this view, various clauses in the Constitution instruct the relevant decision maker to look in the cupboard of moral principles for the specific principles to which those clauses refer and then apply those principles to the case at hand.

Before examining this possibility, let me pause to raise the question of just what a moral *principle* is. Presumably, a moral principle is some sort of moral norm that exists in whatever ontological realm moral norms inhabit. (The ontological status of moral norms is a deep and persistent problem in metaethics.) Is a moral principle merely just another term for a moral *rule*—an algorithm—such as "do not lie"? Moral rules can be quite broad and difficult to apply because of the complexity of the facts they must take into account. Standard utilitarian theories, for example, appear to consist of one such master rule, "maximize utility." Or morality may consist of a number of rules that are lexically ordered.

If moral principles are not moral rules, what are they? Borrowing from Dworkin's account of *legal* principles, perhaps moral principles are norms that have the dimension of *weight*.[26] Rules are algorithms, simple or complex, that either apply and dictate an outcome or are trumped by a higher order rule and do not apply at all. Principles, on the other hand, always apply, says Dworkin, though they can be *outweighed* by other principles.[27] They are not algorithms and do not have any canonical for-

24. *Id.* at 44.
25. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22–28 (1977).
26. *Id.* at 26.
27. *Id.*

mulation. They are normative considerations that are more or less weighty.

I shall return to Dworkin's account of legal principles below. For now, the question is, are moral principles like Dworkin's legal principles: norms that have no canonical algorithmic formulation but have the dimension of weight?

I confess to being skeptical of Dworkin's notion of weight, the notion that is supposed to distinguish principles from rules. Suppose God could comprehend all the possible circumstances in which two or more moral principles could interact and thus would know how every such case should be resolved. For God, then, moral principles could be reduced to a "weightless" though perhaps infinitely complex algorithm. In other words, what might look to us finite beings as a collection of separate moral principles with weight would look to God as one complex, weightless rule.

I shall put aside the ontological worries about moral principles and assume that they are moral norms of some kind. Could it be true that the original meaning of various clauses in the Constitution is an instruction to consult "moral reality" and apply the "principles" one finds there?

That *is*, indeed, a possibility. But just how probable is it? Consider, first, that by placing such instructions in the Constitution, the constitutional authors would be implying, as fundamental law that overrides the acts of democratic bodies, *judicial enforcement of the judiciary's conception of moral reality*.[28] Why else include the instruction to consult moral reality in the Constitution? Legislatures and executives already have an overriding obligation to conform their acts to the requirements of morality. Morality is, after all, supposed to be what we have most reason to do. So it is absurd to think that were this instruction to consult moral reality omitted from the Constitution, legislatures and executives would regard themselves as free to ignore morality. The conclusion, then, seems compelling that if the Constitution enjoins compliance with moral principles, its authors intended the courts to enforce those principles as they, the courts, understand those principles, and to enforce them as the supreme law of the land.

Assume that the constitutional authors did intend judicial enforcement of the judiciary's conceptions of moral principles. Why, then, did they not just instruct governments to "act morally," or to "do the right thing"? Would those not be much more felicitous formulations for telling those governed by the Constitution to consult moral reality than telling them not to abridge "the freedom of speech,"[29] deny "the free exercise [of religion],"[30] deprive persons of "due process of law"[31] and "equal

28. Alexander, *supra* note 21, at 18.
29. U.S. CONST. amend. I.
30. *Id.*
31. U.S. CONST. amend. XIV, § 1.

protection of the laws,"[32] or abridge citizens' "privileges or immunities"?[33]

Balkin, if he were to defend the moral principles position, might reply that the Constitution's authors might have wanted to constitutionalize and render as law only some of the moral principles in moral reality's cupboard of moral norms. But this view has problems of its own.

First, why would the Constitution's authors wish to constitutionalize only part of morality? Surely they did not intend for legislatures and executives to regard themselves at liberty to ignore moral constraints other than those mentioned in the Constitution. And as for the possibility that the moral norms mentioned are easier for the judiciary to comprehend and apply, does anyone believe that is true of an injunction to apply moral reality's notions of due process, equal protection, and so forth?

Second, suppose the constitutional authors did intend for the courts to consult morality and apply a limited set of the moral norms found there. Do we have any confidence that there *are* discrete principles of due process, equal protection, freedom of speech, and so forth in moral reality's cupboard? Suppose we consult moral reality and conclude that some version of utilitarianism is the correct moral theory. Utilitarianism does not contain a free speech principle, or an equal protection principle, or any of the other principles to which Balkin claims the Constitution refers. It has only one principle, if you will.[34]

Even if we believe the correct moral theory is one with several distinct principles, why should we believe that the terms due process, equal protection, free speech, and the like pick out those principles—that moral reality can be carved up at due process, equal protection, et al. joints?[35] As I said, if we were utilitarians, we would not believe that. Nor would we if we were luck egalitarians or Nozickians. Even if we do believe in a plurality of distinct moral principles, it would be amazing if those principles were the ones picked out by the constitutional authors' terms. I devoted a book to demonstrating that there is no free speech principle,[36] and I believe the same approach could be deployed to debunk a free exercise principle.[37] And of course, Professor Peter Westen devoted a book and several articles to undermining any distinct normative principle of "equality,"[38] and I have expressed similar skepticism in discussing "equal-

32. *Id.*

33. *Id.*

34. *See* Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579, 1599–1601 (2007).

35. *Id.* at 1600.

36. LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005).

37. *See id.* at 148–49.

38. *See, e.g.*, PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF 'EQUALITY' IN MORAL AND LEGAL DISCOURSE (1990).

ity" reasons for following bad precedents and in criticizing Dworkin's integrity principle.[39]

If there are no moral principles in moral reality's cupboard that correspond to principles of freedom of speech, religion, equality, due process, and privileges or immunities, then those parts of the constitutional text cannot be referring to such principles. I conclude that "principles" in the method of text and principle cannot be referring to moral principles.

B. Legal Principles

Perhaps the principles in Balkin's method of text and principle are distinctly *legal* principles rather than moral ones. What would differentiate legal principles from rules and standards? The only accounts to offer are Dworkin's or ones quite similar to his. For Dworkin, a legal principle is a norm that has no precise canonical formulation but has weight.[40] Legal principles are always applicable but may be outweighed by competing legal principles. (Rules for Dworkin do have canonical formulations and are weightless algorithms that apply in an all or nothing manner.[41]) Professor Robert Alexy sees legal principles similarly.[42] Dworkin argues that legal principles are the most morally acceptable principles that "fit" most of the extant legal materials—the Constitution, statutes, administrative rules, and judicial decisions.[43] The fit dimension means that legal principles will not be moral principles but will deviate from them because of morally infelicitous legal materials with which they must cohere. So for Dworkin, legal principles are not themselves posited but arise from posited materials when filtered through a moral prism. For Alexy, on the other hand, legal principles can be directly posited.[44] Unlike moral principles, they owe their very existence to promulgation. And unlike legal rules, legal principles have weight and can be applicable but outweighed.[45]

In a series of articles spanning several years, I have expressed skepticism that there can be norms with weight that can be promulgated, ei-

39. *See, e.g.*, Larry Alexander & Ken Kress, *Against Legal Principles*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 279, 294–95 (Andrei Marmor ed., 1995), *reprinted in* 82 IOWA L. REV. 739 (1997).

40. *See supra* text accompanying note 25.

41. *See supra* text accompanying notes 26–27.

42. Larry Alexander, *Legal Objectivity and the Illusion of Legal Principles*, *in* INSTITUTIONALIZED REASON: THE JURISPRUDENCE OF ROBERT ALEXY 115 (Matthias Klatt ed., 2012).

43. *See* RONALD DWORKIN, LAW'S EMPIRE 247–50 (1986); DWORKIN, *supra* note 25, at 105–15 (1977).

44. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 60–61 (2002).

45. *Id.* at 49–54.

ther directly (per Alexy) or indirectly (per Dworkin), for weight itself cannot be promulgated.[46]

To see this, consider what I said earlier about *moral* principles and weight. I said that in theory, the weight of moral principles could be reduced to a complex algorithm for how moral principles would interact in all conceivable circumstances. Of course, only God could comprehend an algorithm of that type, but what we finite beings call "weight" for God is merely the complexity of the algorithm of principle interaction.

If legal principles have weight, then they too could be reduced to a complex algorithm that describes all possible interactions of those principles. But there is no such algorithm. Legal principles owe their very existence to human promulgators. But the promulgators have left out the algorithm for interaction. For moral principles, there is in theory a truth maker for claims about how they interact, a truth maker found in the ontological realm of morality. For legal principles, however, which come into existence only through promulgation, there are no truth makers for claims about their weight. Weight itself cannot be posited. At best, complex algorithms—that is, *rules*—can be posited that might mimic weight. But with legal principles, their promulgators have left out the algorithms. I conclude that Balkin's "principles" cannot be Dworkinian or Alexyan legal principles, for there are no such things.

C. Concepts and Conceptions

There is one last possibility to explore. In places, Dworkin himself purports to be an originalist of the type Balkin now claims to be. For Dworkin, especially in his response to Justice Scalia, claims that one must of course be faithful to the semantic intentions of the Constitution's authors.[47] And again like Balkin, Dworkin sees this requirement of fidelity to the original meaning to be no obstacle to achieving Dworkin's vision of a good and just America as a matter of constitutional law. For Dworkin says that in the provisions mandating freedom of speech, the free exercise of religion, equal protection, and so forth, the Constitution's authors were constitutionalizing *concepts* rather than theirs or any other specific *conceptions* of those concepts.[48] Thus, we are being faithful to the authors' commands when we urge courts to adopt the best conceptions of those concepts rather than the authors' own conceptions of them. And the best conceptions of those concepts will get us everything a nonoriginalist could want.

I find this move quite unconvincing. If a concept is supposed to be an abstract idea, then there are good reasons to doubt that the Constitu-

46. *See* Alexander & Kress, *supra* note 39, at 741 n.6; Alexander, *Of Living Trees*, *supra* note 7, at 231–32.

47. Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 117 (1997).

48. DWORKIN, *supra* note 25, at 134.

tion's authors were referring to particular concepts in the clauses in question. In the absence of agreed-upon criteria for applying a term, how do we know that an author or authors are referring to the same abstract idea when they use a term that we are referring to when *we* use that term? And when we argue about what, say, the free exercise of religion requires, how do we distinguish an "essentially contested" single concept[49] from a multitude of different concepts that perhaps have some area of overlap? Indeed, for reasons I adduced when I addressed the relation of moral principles to terms in the Constitution, how do we know there *is* a concept of freedom of speech, free exercise of religion, and so forth?

I doubt that these questions can be satisfactorily answered. Until they are, however, the translation of "text and principle" into "text and concept" is unavailing.

IV. CONCLUSION

Balkin's method of text and principle can only be passed off as a version of originalism if one accepts at face value Balkin's assertions of how that method works. But the flaw in the methodology is in the assumption that the principles to which it refers can be distinguished from rules and standards. I have argued that the notion of moral principles is tenable, but it is highly unlikely that the Constitution's authors meant to constitutionalize the judiciary's views of morality. I also have expressed doubt that there is a one to one relation between clauses in the Constitution and discrete moral principles, and that morality carves at the joints to which those clauses might be said to refer. And if the "principles" in Balkin's methodology are not real moral principles but are norms created by promulgation, they can *only* be rules or standards. There are no *legal* principles. Finally, I expressed skepticism that the methodology can be salvaged by converting principles into "concepts."

I suspect all of us are prone to overpromising. But when a method is said to be originalist but capable of generating the same results as nonoriginalism, the overpromising is obvious. With text and principle, caveat emptor.

49. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 171–73 (1956).