DESPERATELY SEEKING SERENITY

DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS. By Daniel A. Farber[1] and Suzanna Sherry.[2] University of Chicago Press. 2002. Pp. 208. $25.00

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It is a common complaint that constitutional argumentation (or what is sometimes euphemistically called "reasoned judgment"[4]), whether issuing from judges or law professors, has become pervasively unpersuasive, unedifying, often downright unseemly.[5] So, how do we come to find ourselves in this unhappy predicament? And is our plight truly desperate, or are the critics just overwrought nay-sayers?

In *Desperately Seeking Certainty,* two eminent constitutional scholars (well known to long-time readers of this journal) offer a sweeping but fairly simple—and ultimately upbeat—diagnosis: the deficiencies of modern constitutional discourse are largely the result of "foundationalism," or of a misconceived quest for "grand theory." Though broadly critical of many of the leading

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4. *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (Joint Opinion).

5. Elsewhere, for example, one of the present authors has described modern Supreme Court opinions as "increasingly arid, formalistic, and lacking in intellectual value"; they "almost seem designed to wear the reader into submission as much as actually to persuade." Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 Wm. & Mary L. Rev. 147, 147, 157 (1994). Another editor of this journal describes Supreme Court opinions as "arid, technical, unhelpful, boring, . . . unintelligible," "formulaic gobbledygook." But legal scholarship is, if possible, even worse: it is "incomprehensible, pretentious, pompous, turgid, revolting, jargonistic gibberish." Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constiutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 Albany L. Rev. 671, 674, 677 (1995).

constitutional thinkers of our time, this diagnosis is also at its core an optimistic one, because it suggests that what we basically need to do is . . . well, just relax. Taking a self-consciously therapeutic approach (the book begins and ends with a psychiatrist joke), Dan Farber and Suzanna Sherry suggest that we need to let go of our yearning for an elegant theory of the Constitution, or for a secure method of interpreting it, and instead return to the eclectic, tried-and-true tactics that lawyers and judges have been using for centuries. More specifically, we need to content ourselves with "legal pragmatism," or with the methods of the "common law" (approaches that the authors treat, surprisingly, as approximately equivalent).

The book's presentation of this cheerfully critical diagnosis is perceptive, good-natured, steadfastly (and even ostentatiously) commonsensical, sometimes entertaining, often insightful. Which is not to say, alas, that the diagnosis is right—or that the pragmatist therapy is what we need now.

ROUNDING UP THE USUAL SUSPECTS

Farber and Sherry started out, as they explain, to write a book criticizing some leading conservative constitutional theorists, but their project soon expanded to include major purveyors of "grand theory," both liberal and conservative. Sandwiched in between brief introductory and much longer concluding chapters, the book devotes a chapter each to the ideas of six constitutional theorists who are already widely admired and despised: Robert Bork, Antonin Scalia, Richard Epstein, Akhil Amar, Bruce Ackerman, and Ronald Dworkin. While praising these thinkers for their brilliance and imagination, Farber and Sherry find all of their positions seriously deficient.

Whether or not one agrees with this negative judgment, the book's treatment of these prominent thinkers is illuminating. To be sure, the presentations vary in depth and seriousness. The authors evidently view Bork as a lightweight and hence decline to offer any very serious presentation of his views, limiting themselves instead to rehearsing the standard criticisms. (While insisting on "originalism," Bork does not appreciate the difficulty of ascertaining original meaning. Bork is "too often sloppy, superficial, and sometimes inaccurate" in his own history, and he "repeatedly ignores or distorts history to reach his own conclusions." (p. 17) And so forth.) Other theorists receive more sustained and respectful treatment. Sometimes the authors at-

tribute greater subtlety to a theorist than critics typically do. Scalia, for example, comes across not so much as a dogmatic true believer in rules and "original understanding" as a nuanced and tacitly skeptical pragmatist who understands both the deficiencies of the doctrines he propounds and the inevitability of the doctrines he opposes (such as the "living Constitution"). Scalia nonetheless contends ferociously for his views—he *pretends*, with occasional lapses into candor, to be a dogmatic supporter—because he thinks "it is better for judges to adhere to certain myths despite their fictional nature, while maintaining a wise silence about the truth." (p. 38) Whether this portrayal is accurate is hard to tell: but at least it is interesting.

Beyond the individual appraisals, the book's format generates revealing and sometimes intriguing comparisons of the different theorists. For example, the authors point out that Epstein and Ackerman, though seemingly constitutional opposites, "actually have a good deal in common." (p. 74) Both scholars are obsessed with the New Deal, and both agree in viewing constitutional developments of that period as "a decisive break from the original constitutional understanding." (p. 74) Starting from this shared judgment, however, Epstein repudiates the New Deal while Ackerman struggles to constitutionalize it (mainly through his famous theory of the unwritten "Activist State" amendment that no one knew about until Ackerman discovered it a few years ago).[6] Indeed, in his dedication to the New Deal Ackerman reveals himself as a peculiar sort of conservative (the authors are too polite to say reactionary): "His appeal is ultimately conservative: we *must* retain the legacy of the New Deal—as interpreted and implemented by the Warren Court—not because it is right or because we agree with it, but because the depression generation told us to." (p. 100)

So if the New Deal is taken as a reference point, Ackerman and Epstein are alike (and also opposite), and are unlike the other theorists who do not fixate so fully on that episode in our history. But from a different vantage point—that is, respect for "populism" or majoritarianism—the affinities shift. Now Ackerman finds himself lumped in with Bork, Scalia, and Amar: all privilege majoritarian democracy over individual rights. (p. 143) Indeed, the authors suggest that in this respect Amar can be seen as a sort of extreme version of Bork. (p. 74) Conversely, "Ep-

6. See also (p. 99): "Ackerman is in this sense almost a mirror image of Richard Epstein, who regards the New Deal as the twilight of American constitutionalism."

stein and Dworkin—an odd couple if there ever was one"— are paired because they "give primacy to individual rights." (p. 143)

Beyond these provocative comparisons, however, Farber and Sherry argue that all of the theorists share a common—and fatal—feature: all are ostensibly committed to what the authors call "grand theory," or "foundationalism,"[7] and this commitment is their undoing. The overarching critical theme of the book is that the foundationalist project is "both fundamentally misguided and doomed to failure." (p. 140) Our constitutional history and system are simply too wildly messy—too beautifully, incongruously complicated—to be captured in any elegant theory. So the effort to perform this impossible task, whether by conservative or liberal theorists, predictably results in analytical contortions, distortions of the evidence, and embarrassing departures from old-fashioned common sense—which is just what we see, almost everywhere, in contemporary constitutional discourse.

It is an appealing, presumptively plausible depiction—*so* plausible, in fact, that one might wonder how so many bright scholars could have overlooked the obvious, and how so many other scholars and students and lawyers could have been sucked into such a patently misguided quest. How to account for the apparently irresistible attraction of "grand theory" over the past generation or so? Farber and Sherry are sensitive to this question, and they offer an answer—more than one answer, in fact.

THE WILL TO THEORIZE

The title already suggests one recurring and primarily psychological theme: the theorists and their followers have been driven by an overweening desire for *certainty*—about what courts should do, or about the meaning of the Constitution. Thus, "[g]rand theorists . . . yearn for certitude, for something more definite than the rather fuzzy process of reasoning by analogy and developing principles piecemeal." (p. 153) Or their

7. Farber and Sherry variously describe the target of their central criticism as "master theory," the quest for a "universal method of interpretation that will serve as a recipe for judges faced with any constitutional issue," (p. 140) theory which "seeks to ground all of constitutional law on a single foundation," (p. 1) and theory which "elevates a single value above all others." (p. 56) Whether they are correct to equate "grand theory" (if that is what the theorists discussed here are guilty of) with "foundationalism" is an interesting question, but one that cannot be pursued here.

theories reflect "a bitter longing for a world of stable values and social solidarity . . . ." (p. 165)

This explanation of modern theorizing latches onto and applies to constitutional scholars a familiar assessment of what is sometimes thought of as the "Cartesian" project: smitten with paralyzing doubt, thinkers like Descartes or Locke imagine—though vainly—that they can achieve intellectual security by devising just the right theory or articulating the infallible epistemic method.[8] In applying this received diagnosis to their contemporaries in the legal academy, Farber and Sherry *might be* right: *perhaps* Ackerman, Dworkin, Amar and company are afflicted with an unhealthy intellectual insecurity issuing in a compulsive need for certainty.[9] But in fact the authors produce very little evidence to confirm this hypothesis. Indeed, in trying to support it they at times appear to fall into the very error that they accuse their subjects of making—that is, distorting the evidence in an effort to force the material to fit a preconceived and relatively simplistic thesis.

For example, though Farber and Sherry argue that Robert Bork naively believes that historical research will yield clear, definite "original meanings," Bork in fact explicitly disavows this assumption.[10] And though the fundamental mistake the authors ascribe to these thinkers is their supposed penchant for *single*-value theories, it is not always easy to see how this description fits: by the authors' own account it would seem that at least some of their subjects in fact are committed, consciously and explicitly, to *multi*-value views of the law. Scalia, for example, believes in

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8. See, e.g., Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (Free Press, 1990); Richard J. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Pratis* (U. Penn. Press, 1983).

9. However, the authors also suggest other ways of viewing this central motivation—as a quest not for *certainty*, perhaps, but for intellectual *beauty*—see (p. 57) (describing desire for theories that are "intellectually elegant")—or perhaps *power* and *importance*. (p. 57) (theories seeking "intellectual grandeur"). In addition, the authors repeatedly suggest that all of these theorists use theory to advance political agendas.

10. Compare (p. 13) ("[Bork] assumes not only that the Constitution has a single, authoritative meaning, but also that modern interpreters can easily discern that meaning.") with Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 163 (Free Press, 1990):

> We must not expect too much of the search for original understanding in any legal context. The result of the search is never perfection; it is simply the best we can do; and the best we can do must be regarded as good enough—or we must abandon the enterprise of law and, most especially, that of judicial review . . . . The precise congruence of individual decisions with what the ratifiers intended can never be known, but it can be estimated whether, across a body of decisions, judges have in general vindicated the principle given into their hands. If they accomplish that much, they have accomplished something of great value.

following original meaning, but he also makes room for precedent, "tradition"—and probably, at least by the authors' own account, even for disguised deference to contemporary sensibilities. (pp. 36-54) Dworkin believes in both "fit" and "justification" in constitutional interpretation. (pp. 132-33) Amar's work suggests a delightfully imaginative—or, if you prefer, thoroughly unmoored—thinker whose besetting weakness hardly seems to be that of tying himself down to a "single value." (Ch. 5)

But suppose these theorists and their devotees *do* exhibit an excessive need for "certainty." We would still be pressed to wonder: Why should a need for certainty be especially prominent, and contagious, during the last generation or so? What accounts for the power, over this period, of this supposed need for certainty?

In response to that sort of "Why *now*?" question, the authors tell another familiar though more political story—the story of the "countermajoritarian difficulty." In the post-*Brown* period, scholars became obsessed with the problem of reconciling judicial review with the nation's democratic commitments, and this obsession manifested itself in a profusion of "grand theories." (p. 144-45) But this morbid fixation is unhealthy and gratuitous. So Farber and Sherry, acting now as constitutional therapists, try to treat the obsession by offering a variety of soothing counsels calculated to convince us that the countermajoritarian difficulty is no big deal.[11] What is important, they suggest, is not that every specific institution or practice be democratic, but rather that the system as a whole be essentially democratic: and ours is. And in any case, "we the people" themselves—ourselves?—accept and expect judicial review. (pp. 142-51)

There is surely a measure of truth in these observations. Constitutional theorists and other critics *have* often worried about the countermajoritarian difficulty, or have charged the Court with being undemocratic[12] (and those inclined to this concern may not be wholly consoled by the authors' assurances, for example, that "it is not clear that the Court is *radically* less 'democratic' than other organs of government considered in isola-

11. "Although the countermajoritarian difficulty has a core of truth, it has been blown out of proportion." (p. 145).

12. See, e.g., Mitchell S. Muncy, ed., *The End of Democracy? The Judicial Usurpation of Politics* (Spence Pub., 1997).

tion" (p. 148, emphasis in original)). But is this a sufficient account of the impulse to theorize that has animated a good deal of constitutional scholarship over the last generation or so?

Suppose we frame the question in this way: *If* constitutional scholars were convinced (by arguments such as those offered in this book) that the countermajoritarian difficulty is nothing to worry about, would their reasons for theorizing disappear? Would theory—including "grand" or "foundationalist" theory—dry up? Frankly, it is hard to see how or why any such development would occur. Even if we put aside our concerns about democracy, wouldn't we still need to think about how courts should decide cases, or how to figure out what the Constitution means, or what it even means to say that "the Constitution means" this or that? It may be that *theory* is finally incapable of answering those questions.[13] But the questions are central, and it is hard to see how the disappearance of the countermajoritarian difficulty would make theory either more or less promising as a way of addressing such questions.

So then in that world—the world somehow relieved of the countermajoritarian difficulty—what exactly would theorists be seeking? *Certainty*? Perhaps—but not necessarily. *Democracy*—or at least a reconciliation of judicial power with democracy? No, because we have already stipulated that concern away. But then what?

The answer seems at once so simple and yet, on modern pragmatic assumptions, so unhelpful and almost ungraspable that one is almost embarrassed to say it: the theorists would be looking for... *law*. They would be seeking to explain, that is, how the decisions the courts render in the name of the Constitution are in fact what the courts have always said they are—that is, a product of or a response to something that can plausibly be called "law."

And indeed, there is good reason to suppose that this is what at least some of the theorists discussed in this book are primarily about: their theories are designed to show how "constitutional law" is—or at least can be—*law*. To be sure, such theories might not establish the specific content of that law with certainty, but then where exactly did the theorists ever actually

13. To a large extent, I share the authors' skepticism about the possibility of theory that would dictate the decisions in constitutional cases, at least in the areas with which I am most familiar. See, e.g., Steven D. Smith, *Getting Over Equality: A Critical Diagnosis of Religious Freedom in America* 45-82 (New York U. Press, 2001).

promise such certainty? And although the concern about judicial usurpation of democracy surely adds urgency to the task, the need to understand how constitutional law is *law* would press upon the theorists—and upon us—even if we had never heard or thought of that concern. By this view, in short, what the theorists are "desperately seeking" is neither *certainty* (although, come to think of it, a little more certainty *would* be nice) nor even *democracy* (though democracy is nothing to sneer at), but rather *law*.

So why is it that this possible purpose does not even seem to occur to seasoned scholars like Farber and Sherry? We need to reflect on this puzzling situation a bit more closely.

IS *LAW* AN ISSUE?

We can start with the classic statement: "It is emphatically the duty and province of the judicial department to say what the law is."[14] This statement, we understand, is a fundamental presupposition of judicial review. But what sort of statement is it? And what does its reference to "the law" contemplate?

In part, of course, the statement is a claim to institutional authority. In context, though, it is plain that "say[ing] what the law is" is not meant to be equivalent to "*making* the law," much less to "*making up* the law"—whether wisely or pragmatically or otherwise. *Marbury*'s premise, rather, is that there is something that exists independent of the courts—"the law"—which the courts are supposed to understand and declare. Thus, *Marbury*'s claim of authority is not based on a mere tautology (as it would be if, for instance, "the law" were understood to be nothing other than "what the courts say"). Indeed, that sort of tautological understanding would negate *Marbury*'s claim; what looks like an affirmation from which important conclusions might be drawn would dissolve into the feckless observation that "it is our job, as judges, to . . . well, say what we say." In short, it is this presumptively judge-independent thing—"the law"—that supplies the justification for the claim to institutional authority; so if that independent thing were somehow found not to exist, the claim to judicial authority would presumably disappear along with it.

But now let us fast forward, and suppose that this notion of what we can call the judge-independent law comes to seem prob-

14. *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

lematic. Distinguished legal thinkers (some of them associated with what comes to be called "legal pragmatism") teach that "law" does not exist "objectively" or "on its own," so to speak; rather, "law" is at bottom nothing more than what judges (and other officials) say and do.[15] And the Supreme Court at least sometimes seems to accept this jurisprudential account in its own constitutional decisions.[16] So the judge-independent status of "the law" is called into question.

How should we react to this development—one which, if embraced, would preclude the very possibility of law in the older, more "objective" sense while guaranteeing law in the newer tautological sense? And what are the implications of this more modern jurisprudential understanding for judicial authority, and in particular for that embattled practice we call "judicial review"? One can imagine quite opposite reactions. Probably the most logical conclusion would be that the "legitimacy" of the institution of judicial review has been thrown into doubt. If it is emphatically the courts' province to "say what the law is," then if it turns out that "the law" in the sense contemplated in this claim does not exist, the courts' province would seem to encompass, emphatically, . . . nothing.

But the exact opposite reaction, though perhaps not as logical,[17] is also readily imaginable. The legitimacy of the courts' authority depends on their saying "what the law is," we might reason; but once we come to understand that what the courts say just *is* law, then judicial legitimacy might thereby seem to be secured. To be sure, there will still be crucial questions about how courts should exercise their authority—about how to tell which decisions are wise or unwise, just or unjust. These are the questions worth talking about. But questions like "Did the court correctly state 'the law' in this case?" or "Did the court exceed its

15. In particular, Oliver Wendell Holmes (who has been adopted as a sort of patron saint by modern legal pragmatists) sometimes argued that we should think of law as nothing more than a set of predictions about what judges will do. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 457-61 (1897). See also Richard A. Posner, *The Problems of Jurisprudence* 225 (Harvard U. Press, 1990) ("The law is not a thing [judges] discover; it is the name of their activity. They do not act in accordance with something called 'law'—they just act as best they can. . . . The important thing is that law is something that licensed persons, mainly judges, lawyers, and legislators, do . . . .") (footnote omitted).

16. Though it did not say so in just these words, the Court's decision in *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958), is often taken to have asserted in essence that "the Constitution means what the Supreme Court says it means."

17. This reaction is not as logical because it rests on an equivocation about the meaning of "law."

authority?" or "Is this decision 'legitimate'?" will come to seem obtuse, embarrassing, almost unintelligible. People who ask such questions will seem like the child who asks, "Mommy, does that bachelor over there have a wife?" So a charitable observer (and Farber and Sherry are, at least in this book, charitable observers) will assume that a brilliant theorist is *not* asking that sort of pointless question.

This is not the place to consider in detail how this terse account correlates with our actual jurisprudential and constitutional history.[18] Suffice it to say that the notion of a law—and in particular a constitutional law—subsisting independent of the judges had by the mid-twentieth century come to seem, to many at least, deeply problematic. Decisions like *Brown* and *Griswold*—and later, even more so, *Roe*—underscored and aggravated the difficulty by subverting the possibility of equating "the law" with some judge-independent thing such as "the text" (as *Marbury*, with its almost incessant references to the "written" Constitution, at least seemed to have done). And at least some of the theorists studied by Farber and Sherry—surely Bork and Scalia among the conservatives, I think, and Dworkin among the liberals—have perceived the challenge to judicial authority inherent in this situation. Their theorizing has been centrally animated by the purpose of showing how constitutional law *is*—or can be—"law" in a sense more robust than the tautological sense of "law is whatever the judges say": Dworkin's resounding "I call it law" might be taken as a sort of slogan for much of the work in the area of constitutional theory.[19]

Farber and Sherry do not pick up on this central purpose, however, seemingly because the question of whether and how constitutional law is "law" does not trouble them—or even (for all we can tell from this book) occur to them. In the tradition of

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18. For a preliminary attempt, see Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041 (1999). For a more careful book-length version, see Steven D. Smith, *Law's Quandary* (Harvard U. Press, forthcoming 2004). The jurisprudential claims made in the remainder of this review are discussed in these writings.

19. See Ronald Dworkin, *A Matter of Principle* 71 (Harvard U. Press, 1985):

> We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophecy. I call it law.

Dworkin's later book, *Law's Empire* (Harvard U. Press, 1986), reads as an extended vindication of this "I call it law" claim. And see Bork, *The Tempting of America* at 143-45, 353-54 (cited in note 10); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

"legal pragmatism," they seem to assume that whatever the courts dispense is, by definition, "law." The important questions concern how courts should go about doing their dispensing; so these are the questions they are interested in, and the questions they assume the theorists they criticize are primarily interested in as well. So if theorists claim to be concerned about how constitutional law is law, Farber and Sherry naturally assume that this is an oblique way of expressing some other, more substantial concern—about, for example, "certainty."

In making this assumption, Farber and Sherry misdiagnose the central purpose driving at least some of the theorists they discuss. But beyond that, they also forfeit the possibility of understanding a vital dimension of the legal tradition to which they claim to wish to return.

MUDDLING TOWARDS . . . WHAT?

For Farber and Sherry, the failure of "grand theory" is not alarming, because they think we are better off adopting "legal pragmatism" anyway. But what exactly is legal pragmatism?[20] Richard Rorty, perhaps the foremost pragmatist philosopher of our time, acknowledges that "'[p]ragmatism' is a vague, ambiguous, and overworked word."[21] And for those who find the position or orientation elusive,[22] *Desperately Seeking Certainty* will not provide much help. We know what the authors think pragmatism *is not*—it is not interpreting the Constitution according to any "master" or "single-value" theory. But that negative description still leaves us wondering what pragmatism *is*. And while the book's presentation is stalwartly calm and sensible and occasionally even wise[23]—virtues, I concede, not to be taken for

20. The authors describe pragmatism as an approach that will "weigh text and history, precedent and policy, principle and consequences. No single factor is dispositive, and the persuasiveness of the result ultimately depends on a blend of statesmanship and workman-like lawyering." (p. 3).

21. Richard Rorty, *Consequences of Pragmatism (Essays: 1972-1980)* 160 (U. Minnestoa Press, 1982). Rorty immediately adds that "[n]evertheless, it names the chief glory of our country's intellectual tradition."

22. I am one such. See Steven D. Smith, *The Pursuit of Pragmatism*, 100 Yale L.J. 409 (1990).

23. See, e.g., (p. 151):

> Grand theories attribute a degree of normative coherence to the constitutional regime that does not exist. Substantively, the Constitution is not based on an overarching vision of the division of powers, or sweeping philosophical theories about rights. The framers made use of their best theoretical understandings, but they were designing a practical instrument of government, not a class project for a political theory course. . . . Grand theory embodies a reductionist vision of

granted in legal scholarship—considered as a whole the book also irresistibly provokes the suspicion that "legal pragmatism" is little more than a placeholder for "whatever seems the right thing to do in the particular circumstances." Or, more negatively, a polite slogan for "We—all of us—don't know what the heck we're doing, but we somehow seem to manage anyway."[24]

Thus, the authors sometimes equate pragmatism with the "common law" approach which, as they explain, has been used by courts since the Middle Ages. (pp. 152-56) But this equation is dubious, to say the least. Judges and scholars in the older common law tradition depicted themselves as finding and declaring "the law"; they would likely have been horrified at a depiction of them as ungrounded ("No foundations!") pragmatists happily deciding cases in whatever fashion local common sense or sentiment might indicate. And indeed, many of the standard techniques of common law reasoning—the intricate and deferential use of precedent, for example, or the retroactive application even of novel decisions—are hard to account for convincingly within a pragmatic framework.[25] Hence, other leading proponents of legal pragmatism—Holmes, for instance, or Judge Posner—have often (and more plausibly) portrayed the common law approach not as an embodiment of pragmatism, but rather as something that pragmatism should seek to overcome.[26] Farber and Sherry for the most part claim to align themselves with Posner—and Posner reciprocates with a (somewhat faintly) laudatory blurb on the book jacket—but the union, I fear, is thin and mostly verbal.

Farber and Sherry also repeatedly insist that their pragmatic approach would be "eclectic": unlike theorists who have favored using "framer's intentions" or "text" or "policy" or "philosophy" as "single-value" controlling criteria, they want decisions to reflect a little of all of these factors: a pinch of this, a smidgeon of that. In the same spirit, they suggest that legal scholars ought to devote their attention primarily to four sorts of enterprises: care-

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constitutionalism, which cannot do justice to the untidy grandeur of our constitutional regime.

24. Of course, I don't mean to deny the accuracy of this observation. Cf. Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 Georgetown L.J. 647, 650-51 (1998) ("Indeed, both Karl Llewellyn and Benjamin Cardozo concluded that judges themselves have no idea how they do what they do.").

25. For further discussion, see Smith, 40 B. C. L. Rev. at 1053-65 (cited in note 18); Smith, *Law's Quandary*, ch. 3 (cited in note 18).

26. This perspective is nicely reflected in the title of one of Posner's books: *Overcoming Law* (Harvard U. Press, 1995).

ful doctrinal analysis, social science research and application, historical research, and comparative law study. (pp. 142, 165-68) There is something fetchingly ecumenical about this attitude: "Let a thousand flowers bloom." Even so, it is an incongruous list. In the past, proponents of social sciences in law have often favored this approach precisely because they have viewed conventional doctrinal analysis as manipulable and barren. Similarly, in "The Path of the Law" Holmes advocated the development of a more scientific approach to law as a way of escaping the controlling grip of tradition and history. By contrast, Farber and Sherry seem blithely unconcerned about possible incompatibilities in their list of factors and approaches—like someone whose political philosophy boils down to "Why don't we all just get along?"

The deeper problem, however, is not just that Farber and Sherry provide no formula for combining the disparate factors and concerns that they think should guide constitutional adjudication. They would say, quite plausibly, that no such formula is possible, and that in fact constitutional adjudication *has* been influenced by all of these approaches.[27] But the problem is that their account leaves us in the dark about what constitutional decisions should even be aiming at.

As discussed, it is no help to say that courts should try to declare or implement "the law": depending on what sense of "law" we are using, that objective is on the pragmatist conception either impossible (because the "objective" law doesn't exist) or inevitable (because whatever courts say *is* law). So then what *should* the law be striving for? Justice? Equal concern and respect? Wealth maximization? The greatest amount of happiness for the greatest number? High public approval ratings? Survival of the species?[28] It is well enough to say that in the absence of any single-value formula or theory to determine our decisions, we must "muddle through." Still, it would be nice to know what we ought to be muddling *towards*. And perhaps the most deeply unsatisfying aspect of what is in many ways an admirable book is that Farber and Sherry give no clue—none, at least, that I could

27. However, to give even an accurate account of the diverse factors that have influenced decisions in the past—by working on different actors and at different levels of cognition or in non-cognitive ways—is not necessarily to say anything helpful to a current decision-maker about how she should go about actually making a decision.

28. This list represents a sort of rhetorical question, of course, but I concede that it is not unanswerable. Indeed, I can almost hear Farber and Sherry responding: "Yes! All of the above, without limitation. Whatever is good—whatever anyone *thinks* is good—we're for it."

discern—about what the destination of our muddling ought to be.[29]

THE TRIUMPH OF THE THERAPEUTIC OF COMPLACENCY?

Books can be valuable in different ways—some of them intended, some not. *Desperately Seeking Certainty* is valuable, I believe, in both ways. As discussed, the book provides an engaging and insightful discussion of some of the leading constitutional theorists of our time. By appraising these theories against the backdrop of the authors' own more pragmatic and theory-skeptical perspective, the book also manages to convey a broader picture of the major alternatives in constitutional thought available today. It gives us a sense of our times, of the ways we can live and think now—and thereby underscores the thoroughly unsatisfactory condition of the modern constitutional situation. That is because although Farber and Sherry want their picture to be a happy one, it is hard to find anything to feel hopeful about in the offerings of either the theorizers or the theory-skeptics.

But perhaps this pessimism just expresses an unhealthy, unnecessary clinging to what is sometimes called "the Cartesian anxiety."[30] Perhaps the solution, as Farber and Sherry counsel, is to *just let go.* At the heart of the essentially therapeutic anti-theory impulse is an inviting intuition: If we could somehow just stop *thinking about* our problems, maybe they wouldn't be problems for us anymore. Right? The approach seems to work—and whether something "works" (whatever that means) is after all what pragmatists care about, isn't it?—for lots of people. Probably it is the way most of us deal with most of the difficulties and doubts that might otherwise trouble us: *stop worrying about them.*

Thus, in the midst of their efforts to treat away the countermajoritarian difficulty, Farber and Sherry offer a revealing observation: other governmental features besides judicial review (such as the composition of the Senate) are also less than democratic, but "the fact is that *hardly anyone really cares* . . . ." (p. 149, emphasis added) They are probably right, and the point

29. Farber and Sherry indicate, however, that they are contemplating a sequel to this book. Perhaps the sequel might address some of these questions.

30. Bernstein, *Beyond Objectivism and Relativism* at 16 (cited in note 8).

might be applicable more generally—to most of the issues considered in this book, for example (and in this review). Perhaps that is the book's real prescription and the real antidote to "grand theory": not anything even as vaguely dignified and residually theoretical as "legal pragmatism" or the "common law method," but just good old-fashioned complacency.

Still, there is something odd—and perhaps a hint of quiet desperation—in a situation in which whole books are written in quest of such quiescence. So it makes you wonder.[31] And in any case, let us hope for the authors' sake—because this *is* a book deserving attention—that this therapy does not prevail until *after* the theorists and the people at risk of becoming theorists buy and read *Desperately Seeking Certainty*.

31. Surely I am not alone, for example, in detecting a trace of (apparently inadvertent) irony in the following citation: Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 Yale L. J. 153 (2002).