purposes do not include a challenge to the traditional rhetoric or a full explication of the realities of separation, the hard bargains of wary accommodation between the branches, and the transformations wrought by the realities of positive government in an advanced industrial nation. By observing the tradition of formulaic discourse on the separation, this book marks the extent to which that tradition dominates our jurisprudence and the extent to which we have become its willing prisoners.

LAW & LITERATURE: A MISUNDERSTOOD RELATION. By Richard A. Posner.[1] Cambridge: Harvard University Press. 1989. Pp. 384. $25.00.

Lino A. Graglia [2]

The stated purpose of this book is to "attempt a general survey and evaluation of the field of law and literature." Judge Richard Posner recognizes at the outset, however, that there is a substantial question whether any such field of study can be meaningfully defined, any more so than, say, law and biology. Indeed, Judge Posner's main reason for assembling this group of disparate materials, some previously published, seems to be to demonstrate that literary criticism and literary theory really have very little to contribute to the study and understanding of law—except perhaps to improve the writing of judicial opinions. Even less surprisingly, he also concludes that legal scholars have little to contribute to the understanding and appreciation of literature.

Posner finds five important connections between law and literature. First, many literary works—for example, *The Merchant of Venice, Bleak House, The Brothers Karamazov, The Stranger, The Trial, The Caine Mutiny*—are about or at least involve law or legal proceedings. "The legal matter in most literature," however, Posner concludes after examining several such works, "is peripheral to the meaning and significance of the literature." A related conclusion is that "legal knowledge is often irrelevant to the understanding and enjoyment of literature on legal themes."

Second, and much more promising it might seem, literary scholarship is like legal scholarship in that both are concerned with

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interpreting texts. Literary theory might therefore be thought to have something to contribute to the solution of problems of constitutional and statutory interpretation. Posner correctly concludes, however, as discussed below, that it does not.

Third, judicial opinions and legal briefs resemble literary texts, Posner thinks, in "being highly rhetorical rather than coolly expository." He concludes that literary criticism can teach judges and other lawyers "how important rhetoric is to law"—which, in my opinion, they already know all too well—and, even more dubiously, "craft values, such as scrupulousness." A craftsman's scrupulousness, I'm afraid, is not always consistent with the effective practice of law, and judges are unlikely to put aside their professional training and habits upon ascending the bench.

Fourth, literature is a traditional subject of legal regulation—by means of copyright, obscenity, and defamation law—and judges might do a better job of administering these laws if they knew more about literature. But of course virtually everything is a subject of legal regulation and therefore a potentially useful subject for judicial study, a singularly unimpressive and unhelpful conclusion. It seems odd to find between two covers both extensive original literary criticism of famous works and a discussion of copyright law.

Finally, Posner notes that legal procedures, particularly trials, have a "significant theatrical dimension." This seems to overlap the earlier observation that literature is often about law, and Posner does not discuss it further.

What, the reader is entitled to ask, is going on? Why has Posner written a book on what would seem to be on his own showing a non-subject? The answer is that Posner has scores to settle with a group of liberal and radical academic lawyers who have attempted to find in literary theory and criticism a means of attacking his own highly influential work on the application of economic analysis to law, and he is more than happy to be able to show that he can beat them at their own game.

Posner was an unbelievably prolific scholar when he was a full-time law professor at the University of Chicago, and his output has hardly lessened since he became a judge. He is virtually the founder and easily the leading proponent of the study of law and economics, the most important innovation in the law school world in at least half a century. He is also, not coincidentally, a political and legal conservative, and as a federal judge, in a position to translate, to some extent, his views into law. Liberal law professors—at least eighty percent of the total—could hardly be more displeased, and

they have searched for ways to counter the influence of Posner and his school.

Economics, the science of scarcity and limits, teaches the dismal lesson that everything has a cost, that there is no free lunch—despite the apparently frequent experience of professors to the contrary. This message, acceptable if not congenial to conservatives, is the last one that liberals, committed to the triumph of hope over reality, wish to hear. The recognition of limits is an impediment to the achievement of social advance through law. It tends to make for less law, liability, and government regulation and more individual choice and reliance on voluntary transactions, which in turn leads to social and economic inequalities, all of which are anathema to liberals. In antitrust law, for example, where law and economics has its clearest application and has had its greatest impact, it has greatly reduced liability, litigation, the business of lawyers, and the availability of antitrust law as a means of redistributing the wealth of large corporations and other successful businesses.

The economic analysis of law is most threatening to liberals, however, when applied to constitutional law, where the conflict between liberal and conservative scholars is sharpest and of most consequence. Modern constitutional law, the product of the Supreme Court's exercise of its power of judicial review, has nothing to do with the Constitution and is simply a cover for the Court's enactment of the liberal political agenda. One can get elected president running against the ACLU, but for three and a half decades the Supreme Court has uniformly adopted and imposed on the country as a whole the ACLU's notions of good social policy on such issues as abortion, compulsory racial integration, criminal law enforcement, prayer in the schools, government aid to religious schools, pornography, street demonstrations, vagrancy control, discrimination on the basis of sex, alienage, and legitimacy, and so on.

Economic analysis is the antithesis of the liberal analysis of constitutional law. The liberal analysis is that the Constitution is a cornucopia of costless rights—the more the better—which are endlessly discovered and bestowed on a grateful nation by such wise and beneficent public officials as Justices Brennan, Blackmun, and Marshall. The Court sits, and lo, we all have wonderful new constitutional rights—such as to have an abortion, buy and sell pornography, and have endless appeals and retrials of our criminal convictions with lawyers provided by the government—rights that our narrow-minded fellow citizens would otherwise deny us. Because liberal constitutional law crucially depends on convincing the public that the Court's apparently socially-destructive policy

choices are somehow derived from and required by the Constitution, obfuscation is its essential technique. Economic analysis—insistence on rational choice, on consideration of the costs and benefits of alternative policies and the relation of means and ends—is a potential antidote to wishful thinking and obfuscation.

On the theory that you can't fight something with nothing, liberal law professors have desperately sought alternatives to the economic analysis of law. The possibilities seem limited and unpromising, but they have come up with at least two: moral philosophy—judges should be less concerned with law and more with justice, with simply reaching the right result, which to liberals is always very clear—and literary theory. Unlike economics, these have the advantage of facilitating wishful thinking and obfuscation.

A major figure in the law and literature movement is James Boyd White, a professor of both law and English at the University of Michigan, whose many books on the subject have, as Posner points out, much to do with literature and very little to do with law. White sees literature as a means of defense against the influence of social science in general and economics in particular in legal matters. His writings, however, amount, as Posner says, to little more than "exhortations to the judge and the lawyer to be more sensitive, candid, empathetic, imaginative, and humane." He considers it useful to advise judges to avoid "end-means rationality," that is, economic analysis, and "to decide a case as well as they can and to determine what it shall mean in the language of the culture."

Illustrating the value to law of the rhetorical and metaphorical skills gained from the study of literature, White, a supporter of "affirmative action" along with all other liberal causes, argues that "we must change our statement of what we are doing" in order to persuade "affirmative action's" white victims to accept it. The victim shouldn't be told that he "must pay for what someone of his race did a hundred years ago"; that approach has had little success in converting people to White's view. It will be much more effective, White apparently thinks, to tell the victim that his relationship with blacks is like that between "the ideal Union soldier and the slave he fought to free" and that he should, therefore, look upon being disadvantaged because of his race as "a burden like the soldier's burden which is in some sense a privilege to bear, even when imposed on a draftee, then or now." Posner correctly points out that the analogy fails on several grounds, including that the Union soldiers were not fighting to free the slaves but to preserve the Union. I can only assume, therefore, or at least hope, his conclusion that "White has found a brilliant metaphorical formulation of the case for af-

firmative action, one that judicial supporters of affirmative action [not including Posner] could employ with profit in their opinions," is to be understood as sarcasm.

Professor Richard Weisberg, another leading literary lawyer, is a Nietzschean romantic who believes the message of certain works of literature, properly understood, is that law is repressive and dehumanizing and that legalism, along with Christianity, led to the Holocaust. Posner devotes a long chapter to showing, with impressive erudition and skill, that there is little to be said for Professor Weisberg's readings.

"Critical legal studies" scholars, subscribers to the Frankfurt School of Marxism of which Herbert Marcuse was the leading American proponent, who see their mission as the "trashing" of law and much else in American society, have also found literary theory useful. My colleague, Sanford Levinson, for example, argues that "there are as many plausible readings of the United States Constitution as there are versions of *Hamlet*," and modern literary theory shows, of course, that there are as many readings of *Hamlet* as there are readers. The result, once the judges have absorbed the teachings of Professor Levinson and his innumerable counterparts in the law schools, should be a Constitution capable of being a real instrument of social advance.

According to the "crits," even the constitutional requirement that the president shall "have attained to the age of thirty-five years" is obscure and in need of "interpretation," which will necessarily be in the service of political ends, giving some idea of what judges can be expected to accomplish with, say, "due process" and "equal protection." The crits are to the law as Jacques Derrida and other deconstructionists are to literature. The real significance of law and literature is that radical legal scholars see in literary theory support for their view that language lacks meaning and that, therefore, communication, law, and indeed rationality itself are impossible. This is an essential point because rationality is a major impediment to their program to overthrow all existing American institutions on the theory that whatever follows cannot be worse.

The best-known figure in contemporary Anglo-American jurisprudence is probably Ronald Dworkin, professor of jurisprudence at both Oxford and New York University. Professor Dworkin is a liberal rather than a crit. Instead of arguing that law is meaningless, he takes the even less defensible position that it always means exactly what, in his view, it ought to mean. Dworkin is as intensely opposed as the crits to Posner's economic analysis of law; his suggested alternative, however, is not law and literature but law and

moral philosophy. His major contribution to constitutional interpretation is the notion that the Constitution should be understood to embody not the framers' "conceptions," that is, what they are known actually to have intended, but their alleged "concepts," vague abstractions that turn out to agree precisely with Dworkin's policy preferences.

Posner likens Dworkin's approach to legal interpretation to the approach of the New Critics to literature. In essence, the New Critics believe that a work of literature should be read, not necessarily in accordance with the author's intentions as determined from extrinsic sources, but so as to give it its best and highest value as a work of literature, as a source of pleasure or instruction. While Posner agrees with this approach to literature, he points out that it is entirely inconsistent with the very different purposes of statutes, constitutions, and judicial opinions. The function of written law is to regulate human behavior in accordance with authoritatively adopted policy choices, not simply to transfer policymaking to the law's "interpreters." Dworkin's approach would effectively abolish the distinction between the legislative and judicial functions in the interest of improving on the results of the democratic political process by infusing it with the teachings of moral philosophy. Dworkin, Posner correctly points out, would impose "an intellectual burden on judges—that they be philosopher kings—which none is fit to bear."

Dworkin has made another and distinct contribution to constitutional interpretation, the "offbeat suggestion," as Posner calls it, "that the Constitution should be interpreted on the analogy of a chain novel." Each interpreter should see his task as writing a new chapter in the story of constitutional law, somehow related to and limited by earlier chapters but containing his individual and original contributions. "The problem with this ingenious analogy," it seems hardly necessary for Posner to point out—if Dworkin were not so famous and well-placed, it would be difficult to take his ideas seriously—"is that it places the judges who interpret the Constitution on the same plane as the framers of the Constitution: the framers just get the ball rolling." The result is to make, not the Constitution, but the notions of its latest judicial "interpreter," the supreme law of the land. Because judges are much more likely to be influenced by Dworkin than are the mass of his fellow citizens who would otherwise get to determine public policy, Dworkin naturally sees this as an attractive governmental arrangement.

"Unlike most practitioners of law and literature," Posner writes with considerable understatement, "I do not conceive of the

field as a bulwark against further encroachments by economics and other social sciences on the autonomy of law as a discipline." Indeed, it would be fair to say, despite his protestations to the contrary, that he doubts there is such a field. In addition to the fact that most law professors, with good reason, find law a boring subject, there has been, Posner notes, a "flight from humanities to law by graduate students and young faculty, who in the 1970s saw jobs and promotion opportunities and salaries falling steeply in real (that is, inflation-adjusted) terms and decided to go to law school and who today see in the field of law and literature a means of amortizing their original training." Not only does teaching in a law school generally pay much better than teaching in an English department, but the accomplishments necessary to achieve recognized expertise as a literary analyst and theoretician are much less demanding. It is hardly surprising, therefore, that whether or not it is a subject, law and literature is a burgeoning enterprise.

THE POLITICAL IDEAS OF LEO STRAUSS. By Shadia B. Drury.[1] New York: St. Martin's Press. 1988. Pp. xv, 256. $29.95.

Mark Tushnet[2]

As an undergraduate I was exposed to the study of the Supreme Court by the historically oriented political scientist Robert McCloskey. While I was in law school I became acquainted with the behavioral study of the Court by other political scientists. It took a while for me to assimilate what law professors had to say about constitutional law, so for several years I stopped reading what political scientists had to say. When I again started reading constitutional studies by political scientists, I came to realize that there was an entirely new—at least new to me—world out there. This was the work, I now know, of the Straussians. I have learned that there are East Coast Straussians and West Coast Straussians, though I am not yet familiar enough with the territory to provide a decent map. (As I understand it, both groups think that democracy is a Bad Thing, but one group thinks that the United States Constitution fortunately doesn't rest on democratic principles while the other group thinks that it unfortunately does.)

What I read of Straussians on constitutional law was interest-

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