Another example of my disappointment in this regard is the author's failure to explore the interesting reminder that Robert Peel considered it necessary to reform the English penal law—rationalizing its content and radically moderating its severity—*before* promoting creation of a professional police.[7] Someone has observed that English criminal law prior to its nineteenth century reform consisted of severity tempered by inefficiency. Peel apparently concluded that in order to establish an enduring social order, the benefits of inefficiency in enforcement would have to be replaced by those of leniency in disposition. This political wisdom seems to have been lost in modern times, specifically in our attitude toward narcotics. If, as did Peel, we want to regard law enforcement efficiency with seriousness, then we have to regard with equal seriousness what it is we are trying to enforce. It seems to me Dr. Skolnick has the material, but misses the opportunity, to develop this fundamental point with special force. My disappointment in this respect, as in the others mentioned, however, does not mitigate my admiration for the work as a whole. No one interested in the administration of criminal justice should miss it.

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7 See p. 209.

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Expanding Liberties—Freedom's Gains in Postwar America. MILTON R. KONVITZ. New York: The Viking Press, 1966. Pp. xvii, 429. $8.95.

At a time when civil rights and civil liberties have become matters of national as well as of international concern, Professor Konvitz's recent work provides an inventory of what has been accomplished in the United States over the past two decades. The era of which he writes has produced considerable turmoil. In fact, the road toward the achievement of a greater measure of human freedom and dignity has never been an easy one. Though the post-World War II record reveals occasional lapses that can hardly be cause for pride, the advances outweigh the reversals. Few can disagree with Konvitz that "in the last twenty-five years, progress in civil liberties and civil rights has been made at an unprecedented pace."[1]

There is much that is familiar in Konvitz's recounting of the development of first amendment freedoms and of landmark actions in the

1 P. xiii.

civil rights movement. Nevertheless, the narrative often is engaging (though not always objective), for Konvitz writes as an advocate rather than as a disinterested observer of events. There is no doubt of the author's commitment to the cause of civil liberties and of his personal involvement in its successes and failures. If Konvitz manages to maintain the scholar's detachment reasonably well in presenting the major cases, a fervency occasionally comes through when he moves to an evaluation of the Court's work, especially in its treatment of civil rights demonstrators. At one point, Mr. Justice Black's performance in the 1964 sit-in cases is singled out for critical attention. Konvitz seems particularly troubled over Black's dissenting opinion in *Bell v. Maryland*[2] which he calls "a deep and hurtful disappointment."[3]

Konvitz shows considerable acumen in reviewing the status of the free exercise and establishment clauses of the first amendment. He draws parallels between the struggles of Jehovah's Witnesses in the 1930's and 1940's and of the Negroes two decades later. Both groups, Konvitz points out, followed a strategy of nonviolent resistance and both succeeded in vindicating their rights in the judicial forum. He is given to hyperbole, however, in discussing the "centrality of religious freedom in the complex of constitutional liberties . . . ." This freedom, he asserts, "conditions all our expectations and provides a setting and an atmosphere which predispose us to want, to expect, and to insist on the enjoyment of all other fundamental liberties and human rights."[4] It is as least debatable whether such primacy properly can be attributed to religious liberty—whether freedom of political expression, surely an essential precondition of an open society, should not be considered more fundamental in the assignment of priorities on a scale of constitutional values.

Konvitz performs a useful service in depicting, at some length, the elements of continuity in the series of decisions that led to *Brown v. Board of Education*.[5] Though the "higher education cases," beginning with *Missouri ex rel. Gaines v. Canada*,[6] plainly set the stage for what followed, the myth still persists in some quarters that the school desegregation cases represented a sharp break with the past. Konvitz makes clear that *Brown* was but a step (admittedly a major one) in a process that overlapped the Vinson and Warren Courts. It is also worthy of recall, as Konvitz notes, that the Solicitor General urged an

2 378 U.S. 226, 318 (1964).
3 P. 328.
4 P. 14.
5 347 U.S. 483 (1954).
6 305 U.S. 337 (1938).

end to the "separate-but-equal" doctrine, spawned by *Plessy v. Ferguson*,[7] as early as 1950.[8]

Konvitz berates the Court for the manner in which it chose to uphold the Civil Rights Act of 1964. He questions the decision to predicate the prevailing opinion in *Heart of Atlanta Motel, Inc. v. United States*[9] solely upon the commerce clause when, in his view, the "occasion called for something better than resort to a legal fiction or crutch."[10] It is no secret that Congress, after considerable deliberation, determined to provide a dual constitutional channel by way of the commerce clause and the fourteenth amendment. But is there not a strong probability that the fourteenth amendment route, suggested by Justices Douglas and Goldberg, might have opened the act to recurring litigation in the manner of desegregation itself in the years when the Court was compelled to depend entirely upon its own inventiveness and resources? Of what advantage would it have been for a majority, in effect, to have set aside the definitions of coverage supplied by Congress after eighty years of legislative inaction? The Court's choice of the commerce clause had the effect of enlarging the area of discretion available to Congress in establishing usable standards. It was consistent with an oft-stated philosophy of deferring, as broadly as possible, to the legislative will in the selection of the means best suited to the achievement of specified policy objectives. Then, too, by eschewing any extensive dependence on the fourteenth amendment, the Court avoided the need to concern itself with a nebulous definition of "state action" which was no less troublesome because it was embodied in the act. Mr. Justice Douglas, concurring in *Heart of Atlanta*, noted that the statutory definition was within the scope of the 1948 decision in *Shelley v. Kraemer*.[11] But holdings subsequent to *Shelley* neither followed the lines initially set forth in that case nor gave any other precise meaning to the state action concept. Out of a miscellany of interpretations there was little to support Douglas' assertion that a ruling founded on the fourteenth amendment would have had a "more settling effect"[12] on the law affecting places of public accommodation. If the commerce clause was subjected to a strained interpretation, it occurred in the companion case of *Katzenbach v. McClung*,[13] with which Konvitz does not deal. It was here that Mr.

7 163 U.S. 537 (1896).
8 Pp. 249-54.
9 379 U.S. 241 (1964).
10 P. 332.
11 334 U.S. 1 (1948).
12 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 280 (1964).
13 379 U.S. 294 (1964).

Justice Clark, speaking for the Court, had to find a sustainable nexus between shipments of food and supplies in commerce and a restaurant's pattern of racial discrimination. *Wickard v. Filburn*[14] offered a parallel which, though arguably tenuous, seemed to provide a feasible way out of a quandary.

To assist the reader toward an understanding of the circumstances out of which the Civil Rights Act of 1964 grew, Konvitz includes a brief history of early state efforts to achieve racial equality.[15] Yet, aside from this account and a reference to the "creative work" of the states, there is no further evaluation of federalism and its contributions (positive or negative) to the progress of civil rights. It is said, misleadingly, that the "Civil Rights Act of 1964 *displaced* a century of state legislation."[16] Displacement was never the intention of Congress; in explicit language, Title XI specified that nothing in the act should be construed as "indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act . . . ."[17] The Equal Employment Opportunity Commission, established under Title VII of the act,[18] has deferred to thirty-one states and territories that have fair employment practices laws enforceable by a designated agency or authority.[19]

In all of the important areas surveyed—religious liberty, freedom of association, censorship, and civil rights, Konvitz has brought a diversity of complex and sometimes disparate problems within manageable bounds. This is no small accomplishment in a field of public law that is constantly expanding. While the specialized monographic literature has been abundant, works that offer guidance to the main nuclei of ferment are few. It is regrettable, and yet a sign of vitality, that the currency of any book of this nature is in jeopardy even as it is being issued. The *Ginzburg* case,[20] for example, cast doubt upon the efficacy of the *Alberts-Roth* rule[21] in judging obscenity. New challenges, tied to the establishment clause of the first amendment, may result from congressional efforts to ensure judicial review of a number of federal

14 317 U.S. 111 (1942).
15 Pp. 255-58.
16 P. 264 (Emphasis supplied.).
17 78 Stat. 268 (1964), 42 U.S.C. § 2000h-4 (1964).
18 78 Stat. 258 (1964), 42 U.S.C. § 2000e-4 (1964).
19 11 RACE REL. L. REP. 533 (1966).
20 Ginzburg v. United States, 383 U.S. 463 (1966).
21 Roth v. United States, 354 U.S. 476 (1957).

educational and welfare programs which make funds available to sectarian institutions.[22] And it is becoming increasingly apparent that the burden of advancing the cause of civil rights in the United States has shifted to the political branches of government—to Congress and, on an even more impressive scale, to the executive. The courts may be expected to continue to play a significant role though the day has passed when the federal judiciary alone will carry the responsibility of initiating and implementing desegregation procedures.

There are other lines of inquiry relevant to an assessment of the state of civil liberties and rights in America. If doctrinal development is to be pursued, a critique of the several meanings of equal protection should be included; the meanings assigned by the Court have been broad, ranging from the economic regulatory cases at one end of the spectrum to the racial cases at the other. It is obvious that no single presumption of constitutionality has come to prevail. The relationship between deference and individual liberties is another problem that calls for additional exploration in the mid-1960's—three decades after the judicial turnabout of 1937. The evidence continues to accumulate that economic freedom and personal freedom cannot be wholly divorced.[23] To turn to a familiar theme, the theoretical basis of "incorporating" the Bill of Rights by way of the fourteenth amendment requires more intensive commentary in an era when, as now, the process is approaching completion. But none of these suggested modes of inquiry need detract from Konvitz's work. Perhaps, more properly, they are the subject of another book.

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22 See *Hearings Before the Senate Subcommittee on Constitutional Rights, on Judicial Review of the Constitutionality of Grants or Loans Under Certain Acts*, 89th Cong., 2d Sess. (1966).

23 An account of the "double standard" appears in McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REVIEW 34.

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