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Expanding Liberties Freedom's Gains in Postwar America

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book contribute substantially to its admirable quality, as does the emphasis upon recently decided cases. But though these features heighten student interest, they can also diminish the opportunity for penetrating analysis and synthesis. The challenge in future editions would seem to lie in the arrangement of materials, including legislation, for a demanding problem method approach. Some of this appears in the present revision. A functional theme could be the impact of many doctrines upon marketability of titles, already undertaken by the inclusion of adverse possession among methods of title assurance. Likewise, *Oldfield v. Stoeco Homes, Inc.*[22] is such a good case for exhaustive analysis of the determinable fee that surely it should be postponed to a later chapter for its relation to recording, title assurance, covenants, and marketable title acts. At that point, it might illuminate why the Illinois court did so much better in sustaining a statute than the New York court did in striking down a more cautious statutory approach.[23]

All in all, this edition is a significant improvement of an already excellent casebook. As noted, there is no drastic change in the coverage of the book; the reviewer suspects that this reflects the fact that in the field of property we are just entering a period of heightened legislative control. As a result of this development, it is too early to undertake thorough revision of our time-honored methods of teaching the law of property. In any event, the authors have managed to reflect to some degree the increasing flow of remedial legislation, while at the same time preserving as many appellate decisions as possible in the curriculum.

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

In a course at Yale on writing about law, Fred Rodell tells his class that a book reviewer is permitted to criticize what the author said about a subject but is not permitted to object to those things the author did not say, for that would demand that he should have written a different book. One may have difficulty in taking issue with the presentation of the post-war growth of some civil and personal constitutional rights that Professor Konvitz has made in his book because of the validity of what he says. Therefore criticism is necessarily limited to what the author might have done but did not do. This, however, is not a demand that he should have written a different book, but merely an assertion that he should have gone a little further than he went.

The books appears to be an argument for the constitutional views Konvitz holds and is addressed to those interested in constitutional law. It is not the

[22] Id. at 121.

[23] Compare Board of Educ. v. Miles, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965), 51 Cornell L.Q. 402 (1966), with Trustees of Schools v. Batdorf, 6 Ill. 2d 486, 130 N.E.2d 111 (1955).

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neutralist delineation of a constitutional area that lawyers use for research, nor is it the popular exposé of law that appeals to the masses. It is a set of ten almost separate arguments setting forth neither new proposals nor new directions for constitutional principles, but rather a description of the directions the law has taken, Konvitz's reasons why the law has taken those directions, and his arguments as to how far the Supreme Court should go in those areas. The arguments are sometimes legal, sometimes philosophical, sometimes sociological, and sometimes historical. If a picture of the author were not evident from his previous works, it would be obvious from this book. He is a classical, traditional liberal who easily espouses the classical causes of liberalism.

As a method of argumentation, Professor Konvitz presents an historical description of the cases decided in the area, pictures the state of the legal development prior to World War II, and then describes, major Supreme Court case by major Supreme Court case, the growth of the law since World War II. He seems to think of law in terms of rules and precedents rather than as a process, and therefore does not view the decisions of the Court as part of a continuum or a continuous flow. Rather, it would appear that he thinks he is making an argument as to what the Court should do with the next case before it, or what it should have done about a previous case. Because of this failing he does not lay out his view of the general areas very clearly. This is evident from the very first chapter, dealing with religious liberty, in which he proclaims the validity of the school prayer cases and damns the Sunday closing laws, but does not set forth what kind of goals and criteria the Supreme Court should utilize in deciding future first amendment cases. Had he seen law in terms of a continuing process he might have set forth what the Supreme Court should do with the problems of religion versus atheism that must arise in the future. However, to set forth here what the goals should be would be to write the book Konvitz did not write, and would hardly be the function of a reviewer.

The second chapter deals with freedom of association, a recently written constitutional basic. Here the author sets up the foundations of the freedom of association and shows how the Court has created a limit in *Uphaus v. Wyman.*[1] However, he criticizes the *Uphaus* decision on the ground that it "strikes a discordant note."[2] Further, he says, "if one keeps before him certain constitutional touchstones, then one can suggest that the *Uphaus* case was wrongly decided."[3] What those "constitutional touchstones" are, he does not say. While he claims that a free society needs "free men who freely may enter many smaller free societies,"[4] Konvitz does not state what associations are not permitted or should not be permitted under our constitution, leaving that aspect for future speculation as to the "political theories and jurisprudential philosophies of the Justices."[5] On the other hand, Konvitz has spared few words in condemning state investigation of communism as a means of perpetuating segregation and oppressing Negroes.

The third chapter on academic freedom raises slightly different issues in a slightly different constitutional framework. Here Konvitz describes a constitu-

1 360 U.S. 72 (1959), appeal dismissed, 364 U.S. 388 (1960).
2 Konvitz, Expanding Liberties: Freedom's Gains in Post War America 82 (1966).
3 Ibid.
4 Id. at 84.
5 Id. at 85.

tional idea and ideal. He excoriates those who would stifle the expressions of different thought or forbid intellectual experimentation to our schools. However, he admits that a limit to academic freedom exists, at least in terms of the parochial schools.

The fourth chapter is about the Communist Party and the development of the special laws and rules that have evolved in relation to it. While Konvitz does not state it specifically, he leaves no room for doubt that freedom of association for Negroes in the NAACP means one thing and freedom of association for anyone in the Communist Party means quite another. While he brings out the distinctions the Court has used in deciding the Communist cases, the conclusion is inescapable that the criteria used for the Communists are not the same as the criteria used for the NAACP. Whether Konvitz likes or dislikes this difference, he does not argue with it but accepts it as right and just.

In the next chapter on censorship and obscenity, again no recommendation is made as to how the courts should decide future cases. One set of major decisions came out after the book had been written, the *Ginzberg*,[6] *Mishkin*,[7] and *Fanny Hill* cases.[8] Konvitz did not take the opportunity to become a prophet. It is impossible to tell what his position is on the subject of obscenity. He does not agree with Justices Black and Douglas on the absoluteness of freedom of speech, nor does he take the opposite position espousing the right of society to censor that which it considers morally objectionable. His position lies somewhere in between and it is impossible to tell exactly where.

The next three chapters are on civil rights and the legal history of the civil rights struggle. There is no doubt that Konvitz is in favor of the complete destruction of all artificial distinctions between American citizens—whether white, brown, yellow, or red. There can be no legitimate argument with his position or presentation.

The last part of the book concerns the American position in the international protection of human rights and might just as well have been left out of the book, because American inaction and negation not only exhibit a dismal past but show no promise of a future. The author, no doubt, inserted this section for completeness, but it adds nothing to the picture of American liberties which he has drawn.

On the whole the book is well written and interesting, which is rare in books about law and even rarer in books presenting arguments for legal positions. Like briefs, such books are not noted for their brevity nor their writing style, but this volume keeps the reader involved in the story of the post-war development of liberties. I do not hesitate to recommend it as good reading on civil rights. Unfortunately the book will appeal only to the converted, not to the convertible or unconverted on whom the constitutional arguments might have some beneficial effect.

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[6] Ginzburg v. United States, 383 U.S. 463 (1966), 51 Cornell L.Q. 785 (1966).
[7] Mishkin v. New York, 383 U.S. 502 (1966).
[8] "Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966).
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