Author’s argument: Grant ‘full constitutional status’ to civil rights acts

March 27, 2014
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BOOK REVIEW
Review of We the People: The Civil Rights Revolution.

BY DR. GLENN ALTSCHULER
SPECIAL TO THE COURIER

When we think of the mid-20th century civil rights movement in the United States, we tend to think, first and foremost, about Supreme Court cases. Brown v. Board of Education, the school desegregation case, overturned Plessy v. Ferguson. And a spate of decisions, including Heart of Atlanta Motel Inc. v. the United States and Katzenbach v. McClung, upheld the authority of the federal government to expand the scope of equal protection, under the 14th Amendment and the commerce clause, to public accommodations, employment, housing, and voting.

The high court did, indeed, play a pivotal role in the civil rights revolution. That said, Bruce Ackerman, a professor of law and political science at Yale University, claims that the “official constitutional canon” (the 1787 Constitution and the subsequent amendments, as interpreted by the Supreme Court) should be supplemented by “an operational canon” that assigns “landmark statutes” a central place in law.

The product of a mandate from the people, as manifested in a series of elections, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968, should therefore be granted “full constitutional status.”

Since these landmark statutes and the transformative principles they expressed were hammered out through the collaborative efforts of presidents, Congresses, and Courts, “we should honor them more” than the 14th and 15th Amendments to the Constitution.

Beyond Supreme Court decisions
“We the People” is a sophisticated, sweeping, and searching reinterpretation of civil rights jurisprudence. Ackerman’s thesis hinges, at times, on apparently technical distinctions, such as whether the foundation for the “Second Reconstruction” should be grounded on the Equal Protection Clause of the 14th Amendment or the privileges of American citizenship.

These distinctions, however, are very important. And, Ackerman demonstrates, the landmark statutes went beyond Supreme Court decisions (and their “qualitative verbalisms”), using a “constitutional pragmatism” that imposed egalitarian obligations on private property owners; specified stringent requirements of equal treatment; endorsed “technocratic forms of government by number;” and created federal agencies to implement policies “in ways that revolutionized traditional notions of states’ rights.”

A work in progress
Perhaps inevitably, Ackerman’s thesis raises questions. What distinguishes a “landmark statute” from an “ordinary” piece of legislation? What weight should the courts give to them (are they “legitimate substitutes” for amendments to the Constitution)?

How can we connect a “decisive political mandate” to a particular policy (did the voters endorse “government by numbers” – or did they oppose quotas. Did the Fair Housing Act represent “a remarkable show of determination by the American people to sustain the promise of the civil rights revolution”)?

Although “We the People” remains a work in progress, its publication is timely. According to Ackerman, Chief Justice Roberts’ decision (for a sharply divided Court) in Shelby County v. Holder to strike down a key provision of the Voting Rights Act, singling out mostly southern states and localities, with a history of
discrimination, for preemptive federal scrutiny of changes in their elective systems, demonstrates how a “court-centered canon” can be used to trump the wishes of the American people, expressed through their elected representatives.

His entire book, Ackerman emphasizes, “is one long argument against such acts of erasure.”

Ackerman believes there is “zero chance” that the Roberts Court will take the lead in remedying the ongoing denial of equal protection. And so, he urges members of the legal community – and every American – to integrate the contributions of each branch of our government “into a larger doctrinal synthesis” that can sustain a commitment to the civil rights revolution.

His book can be an important first step in a process that “will take a lot of work, and many different workers.”

Dr. Glenn C. Altschuler is the Thomas and Dorothy Litwin Professor of American Studies at Cornell University. He wrote this review for the Florida Courier.

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