

INTERVIEW

[with Bruce Ackerman]

*Bruce Ackerman is a prominent legal scholar and public intellectual. A Sterling Professor of Law and Political Science at Yale, Ackerman's work ranges from political theory and constitutional history to public policy. Ackerman develops a liberal theory of justice based on dialogue between citizens. His constitutional theory turns to the American civic-republican tradition and has shaped debates over the republican revival within the legal academy. Ackerman's books include *Social Justice and the Liberal State* (1980), *We the People* (1991, 1998, 2014), *The Stakeholder Society* (1999), *Deliberation Day* (2004) and *The Decline and Fall of the American Republic* (2010). We sat down with him in January for a wide-ranging conversation that touched upon the enduring tensions that seem to characterize liberalism and republicanism, political philosophy and constitutionalism, and citizenship and cosmopolitanism.*

JPT: Tell us about your background and how you first became interested in political theory.

BA: I went to Harvard College as an undergraduate, where I had a great deal of freedom to explore different subjects. I really liked Judith Shklar's course, which was called Introduction to Political Thought. Because I was an advanced placement sophomore, and maybe because I was verbally aggressive, she became my tutor in my junior year. She was a tremendous influence on me. Every week I read nearly 1,000 pages of some person in the history of political thought and had to write a 20 page paper on each work. Shklar would invariably

tell me, "Bruce, this is no good!" Though I was oblivious to this at the time, Shklar herself did not get tenure until the 80's, and this was certainly because she was a woman. All year, I did very little but read and write for Shklar, and have her condemn my work.

The next year, she passed me over to John Rawls, who had just arrived from Cornell. He was a completely different personality. He was extremely thoughtful and remarkably supportive. Here's an example: I was taking one of his courses and, as was my tendency, I ran up after class to ask a dozen questions. But others got there first, and I had to run to another commitment. That night, he

called me up on the phone to ask me if I had some questions for him. This would have been exceptional under any circumstances, but the fact was that he suffered from a terrible stutter, and it was very difficult for him to complete his sentences over the phone. Nevertheless, we had a lengthy conversation.

During my time as an undergraduate, the consensus view was that ideology, and normative political theory, were dead. But Rawls was thinking for himself, and he was almost single-handedly defining the terms of a tremendous philosophical revival. I ended up majoring in Government and Philosophy and I wrote a dissertation on the place of reason in the political thought of Hobbes and Rousseau. In some ways, this is the question I've been returning to throughout my life.

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After Harvard, I went to Yale Law School. That was a place full of people who didn't know that “political philosophy was dead.” There was Robert Bork, Ronald Dworkin, Charles Reich, and Guido Calabrese. I then clerked for Henry Friendly and John Harlan, both leading conservatives. I was not a conservative then—or now, for that matter. From there I went to teach

at the University of Pennsylvania Law School. I had no idea how to do this and they said to just make it up. I taught property, although I didn't teach any of the standard stuff on property. I also taught Justice.

At that point, both my wife Susan and I had written a few papers. Susan was then writing about racism in housing markets and urban economics. Yale Law School hired me as a professor at the age of 28. Susan was hired in the Economics department as an assistant professor.

I have always done something philosophical and something of the practical sort. Early on, my wife and I wrote on environmental law. We were among the first to propose marketable permits. Once I had tenure at Yale Law School, I was able to dedicate more time to writing *Social Justice in the Liberal State*. What I was doing was not so remarkable in the Yale Law School, but it was remarkable in law-land in general.

Law has gotten much more interdisciplinary, much less specialized over this period. Back then, Yale and Chicago were the only law schools where people without law degrees could become professors. Today, the leading 40 law schools in the country are much more Yale-like than Harvard or Columbia was at that time. Most law schools back then just taught you what the law was, rather than putting legal questions in a critical multidisciplinary perspective.

JPT: Has there been a recent shift in the opposite direction? You recently

wrote a piece in the Washington Post defending the 3-year duration of law school and emphasizing how today's lawyers need to integrate a comprehensive understanding of statistics and economics into their legal work. In that article you described the importance of lawyers mediating between technocracy and the principles of the American legal tradition.

BA: There is a backlash going on. But this is because things are economically grim right now, so we will see what happens in the middle run. Here at Yale, Tony Kronman, Owen Fiss, and I were part of a conversation group that met once a month for 20 years with political philosophers like Judith Thomson, Robert Nozick, David Gauthier, and Michael Walzer. We were all in a conversation together. So I never thought of myself as exclusively a law person. This was a dynamic period of questioning, asking whether there is a place between John Locke and Karl Marx. My work, like that of many of my discussion partners, was trying to answer what society should look like if one rejects anarchy and economic determinism of the Marxist variety.

JPT: People often distinguish between analytic political philosophy a la Rawls and political theory a la Shklar and Walzer. Do you think one is more focused on philosophical argument and the other more focused on political significance? Do you see a distinction there?

BA: I don't think there is a real distinction there. The first footnote

of Walzer's *Spheres of Justice* is an effort to say people like Rawls and Ackerman are simply wrong. It doesn't say that one is doing one thing and one is doing another. Similarly, the distinction between analytic and continental philosophy is simply an excuse for thoughtlessness. One of the more amusing reviews of *Social Justice in the Liberal State* opens with a line about Bruce Ackerman as an English speaking Habermas, by which the author meant nothing complementary.

The critical question is whether you will think for yourself or will be a footnote to someone else. Rawls, Walzer and Shklar are not footnotes to someone else, although of course they are aware of what others said beforehand. A thousand derivative Rawlsians are asking derivative questions, like good graduate students who will get promoted and write nothing.

Rawls's principle of organizing the basic structure of society so as to maximize the position of the least advantaged is a point of political significance, not merely an argument. And Walzer's critique of simple equality in favor of complex equality is an argument, not merely a point.

In my own work, I don't try to "review the literature." I try to present ideas, rather than spend three hundred pages of historical and philosophical reflection on other people's work before I say a word of my own. That being said, my work is just as much shaped by Martin Heidegger, for instance, as it is by Willard Quine.

JPT: What is it about law or legal academia specifically that enables it to serve as a mediating ground for different perspectives?

BA: Well, look at how I got my job at the UPenn. I did well in law school, clerked for some judges and then was hired on the basis of their recommendation. That means that you didn't become an assistant professor by having mastered the literature on a very narrow topic. There are costs and benefits to legal academia. The benefit is that you're freer than professors in other fields, and the cost is that you didn't know what you're talking about.

Basically, the structure of scholarship in law at that time was people being selected on the basis of their general intelligence and having impressed a couple of judges. They then went on to a place where they could mouth off. So we have an infinite number of rediscoveries of the wheel and occasionally, someone will say something original and interesting.

At that time, the standard mode of publication was the Yale Law Journal or the Harvard Law Review. Neither are refereed journals. So you write something and then students, who are not experts, decide which of these thousands of articles is going to get published. The standard law review article is much longer than the standard academic journal article. Law review articles can run up to 30,000 words! Whereas when you try to publish an article for a philosophy journal, you have to get it down to twenty pages. In a twenty page paper, you have to presuppose

certain paradigms. You can't shape paradigms in twenty pages.

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Now, this is slowly being displaced by a more academic path to positions. That's why I am in favor of our new PhD program here. What we have now is philosophy PhDs teaching in law school as a platform for applied philosophy. They aren't taking law seriously and using whatever tools they find appropriate. So it's not quite a question about the intrinsic study of law as much as it's about the fact that legal education is, relatively speaking, a new institution. Contrast this with Europe, where the first law schools were established in Bologna in the 12th Century. In Europe, a person like me doesn't exist. You can't be a professor without having your first or second doctorate, and these doctorates must be in generally respected fields.

JPT: What effect do the different systems of legal education have on how people interpret the law in Europe versus how they interpret it here?

BA: There are several differences. To become a judge in France, Germany, or Italy, you take an exam at around

the age of 24 and then you get promoted over time. By contrast, in the U.S., as a friend of mine likes to say, “a federal judge is a lawyer who knows a Senator.” The judge is an experienced person of practical wisdom, rather than a legal specialist. This is a big difference in the structure and nature of judicial thought. The role of the academic in each respective system is very different. The academic in Europe, through writing commentaries, provides the foundation for law. The relationship between the professoriate in America (or in Britain) and the practitioners of law is somewhat more problematic. There is a great book along these lines by Mirjan Damaška called *The Faces of Justice and State Authority* that touches on these foundational differences.

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JPT: Today, lawyers are increasingly working on public policy using statistical models and methods. It reminds me of a line in Philip Pettit’s book when he says, “At some point, the philosophers have to make way for the lawyers,” and perhaps we might add that the lawyers have to make way for the technocrats. Could you talk a bit about that?

BA: Technocracy is certainly a big problem. Though it may be a great shame to think that cost and benefits measured by dollars is the best way

to proceed, the language of model building is essential for moving beyond 19th century classical liberalism. Classical liberalism takes the stage of social life as given and then talks about freedom on that stage. Today, the liberal activist state, through strategic intervention, can change that underlying social life. One cannot understand the problems facing our environmental integrity without creating and implementing mathematical models for air currents, water pollution, and global warming. Similarly, examining the strengths and weaknesses of mathematical models is essential in order to understand when markets generate externalities, or what the implications of the “theory of second best” are, or in order to actually answer the question of how should the state intervene strategically in the name of social justice and liberal ideas?

To bar ourselves from these questions is to limit ourselves in the pursuit of practical schemes for social justice and environmental integrity. On the other hand, leaving it all to model-builders and technocrats who do not understand themselves to be (and sometimes proudly) equipped to engage in “normative discussion” is equally blind.

One has to develop notions of legitimacy that are responsive to 21st century problems, to achieve social justice without the banalities of libertarianism on the one hand and Marxist determinism on the other.

JPT: On that note, what are your

thoughts on liberal neutrality in the state? Is it possible to have the kinds of “strategic interventions” that you mentioned without advancing a vision of the good?

BA: Well, the foundational notion that I talk about in my book on the liberal state is intersubjective recognition through justification and dialogue. The critical question citizens engage is “why is that jacket yours and not mine?”

My notion of neutrality is not that there ought to be a neutral outcome. Neutrality is a principle used to define a bad answer. It is, as it were, what we’d call a “conversational constraint.” So, liberalism for me is a form of constrained conversation. Habermas, in contrast, supposes that justification should be understood from the ideal state of affairs, where everybody can say anything.

A liberal political culture is emphatically and self-consciously partial. You and I have the right to go to hell in our own way. In the ideal speech situation, I don’t argue with you whether Islam is preferable to atheism. However, we do need to resolve why that jacket isn’t actually mine. Neutrality dictates that I can’t answer that question by saying, “Because I’m just better than you are.”

So, is liberalism, as so conceived, bankrupt? The first aim of the foundational side of my work is to establish that there is a possible world in which we can order all fundamental power relationships within this liberal culture so that it

isn’t in principle bankrupt. This is the part that people like Walzer don’t like, but he’s wrong. It is important to know whether it is nonsense all the way down or not.

Of course, if it were nonsense all the way down, he’d have a better reason for dismissing the conversation. But, I humbly believe that the first half of *Social Justice and the Liberal State* establishes that it is possible to imagine a world in which the fundamental power relations are all compatible with this principle of mutual, dialogic, constrained recognition as common citizens of a liberal state.

What are these fundamental power relations? Here I borrow from Rawls in thinking that the basic problem of 21st century liberalism is the allocation of power so far as opportunities are concerned, rather than outcomes. There are four fundamental relations of power that are necessary conditions for acting in the world: birth, education, certain entitlement of property rights, and then making one’s way through a transactional structure.

This basic framework, and the implications of neutral dialogue within it, serve as a foundation for the policies I advocate. For example, one important dimension of my work is on the topic of genetic endowments. Until recently, we thought that we were in the state of nature, so far as genetic endowments were concerned. In the 21st century, this is no longer the case; we increasingly have the capacity to shape the genetic composition of the next generation.

This is already happening. Therapeutic abortion, for example, is one form of genetic manipulation. With regard to women's equality, more and more children will be born outside the womb.

How should all this be regulated? With a perfect technology of justice, we can imagine a world in which the genetic domain is regulated according to liberal principles. Many theorists can't deal with these questions because, by taking our genetic composition as given, they start the discussion too late.

“ I am more of a liberal individualist than so called libertarians who are confusing the liberty of the parents with the liberty of the children.”

JPT: When you speak about deliberation, are you making an epistemic argument about good decision-making or do you conceive of an intrinsic good to deliberation itself?

BA: Liberalism for me is about achieving an understanding of ourselves as individuals. I don't mean this in the sense of some Kantian transcendental deduction or a kind of state of nature individualism. After you are taught a language at the age of two, you are initiated into a culture of individualization or subordination. Liberal political culture is the foundation of your status as an "I" vis-à-vis "you." When we talk to one

another as liberal citizens, rather than trying to pursue our aims of personal fulfillment, we are engaging in the foundational conversational project of legitimation at the foundation of the liberal state.

That's different from a contractarian view based on will and it's different from Kantian reason. It's something like a Deweyite insistence on a form of intersubjective recognition through dialogue as the foundation of the political. That's why the idea of Deliberation Day--a day when citizens come together to participate in a communal discussion about elections--is attractive to me. But Deliberation Day is not the same thing as liberal conversation, because it isn't as exclusionary. On Deliberation Day, citizens of the United States can say things like "this is a great country, don't let other people come in." In a truly liberal state, made up of well-socialized liberal citizens, people would not make such arguments. Here in the United States we are republican first and liberal second. The Germans, by contrast, are more liberal on their foundations and secondarily republican.

I would say that there is a constitutive feature of deliberation – we are recognizing each other as citizens by engaging in this conversation. And the contexts in which we recognize each other as citizens are disappearing. The draft is gone, and that was once a way we recognized each other as citizens. The public school is being eroded. The most important way we recognize each other as citizens today is when we go to Kennedy Airport and present our

passports.

We need to construct new rituals of citizenship and that is what I was trying to do with Deliberation Day. Consider the fate of holidays – July 4th means practically nothing today and Martin Luther King Day will mean just as little in a few decades. The only holiday of a secularish kind that has any meaning in America is Thanksgiving. Why? Because people go home for the weekend; they have a ritual. I want Deliberation Day to constitute a new ritual of citizenship. These practical proposals come more out of my conception of the liberal state than my constitutional reflections.

JPT: So far your discussion has operated at the level of the state. How does your account of liberalism negotiate the boundaries between national constitutionalism and global justice?

BA: At the international level, I'm a world federalist and I still try to take liberal commitments seriously. So even if the proposal set forth in *The Stakeholder Society* were adopted and every American citizen is given a certain amount of money as a grant on their 21st birthday, we must still ask, what about people from other countries? Why should the mere fact that you're born in this particular place determine whether or not you receive this money? The reality is that there is no good reason.

The aim of my philosophical work was to take activist liberalism seriously and not accept the historical contingencies of our

particular moment. At the same time, I was grimly determined not to go down the path of John Rawls and defend myself for the next fifty years. I wanted to do something new, and so I made this turn to American Constitutionalism and comparative constitutionalism. This kind of work takes our historical situation more seriously.

Unlike Ronald Dworkin, I do not think that constitutional law merges into political philosophy. I think that constitutional law is a cultural discourse that emerges in a particular historical context. Now, this discourse can be pushed in various directions and political philosophy gives us the tools for thinking about what those directions might be. But in my mind, there is a difference between constitutionalism and political philosophy.

JPT: But isn't there a tension between the particular historical contexts that make us "citizens," and the moral arbitrariness of the situations in which we are born into?

BA: Well, I think we should have a North American Federation with Canada and Mexico. Insofar as ours was an Enlightenment revolution, these borders are a matter of accident. In principle, there aren't large differences between Mexico, the U.S., and Canada. By the way, the capital of the North American Federation should be San Francisco because it was once part of Mexico and it's the only part of America that the French Canadians would be willing to go to.

Of course, we also have cultural

nationalisms. In the 18th and 19th centuries, America was a cultural colony of Europe. Our great poets and thinkers were following London, Paris, and Berlin. But what does “American culture” really mean today? We mean something very superficial: Hollywood, McDonald’s, Harvard, and Yale. So we have these two identities: a cultural nationalism and an Enlightenment heritage.

The principles of Enlightenment cosmopolitanism are under threat in a very obvious way by cultural nationalisms from people like Donald Trump and Marine Le Pen. This war between cultural nationalism and the Enlightenment is one of the struggles of our time, especially now that we are after the Fukuyama triumphalist moment. On top of that, we have this new technocratic cosmopolitanism that some people call “neo-liberalism.” What they really mean is technocratic manipulation of markets and the depoliticization of the legitimation process. The problem with that form of legitimation via outcomes is that it’s hard to manage outcomes without foundational principles that are generally intelligible and meaningful to ordinary people.

One of the central aims of my work is to make liberal citizenship real. My “realistic utopian” proposals are an attempt to take my philosophical work on liberalism into the practical realm. Over the last several years, I have been trying to develop a thicker account of constitutionalism as a mechanism through which we legitimate power through

conversation. Power is legitimated not simply by votes but through substantive liberal principles. If you get a grant of \$80,000 like I propose in The Stakeholder Society you’ll have to ask “why did I get it?” These are efforts at constructing the foundations of cosmopolitan liberalism in ways that are meaningful to its participants.

JPT: But how does constructing a thicker vision of liberal citizenship as you propose strengthen these cosmopolitan foundations? Aren’t we still operating at the level of the nation-state where civic status is bound up with the state?

BA: This brings us to the distinction between cultural nationalism and civic nationalism. When the armies of the monarchies of Europe were about to invade France after Louis XVI was prevented from escaping, the French National Assembly debated not how to defend the country, but rather a list of people who should be named honorary citizens of France. George Washington, Jeremy Bentham, and James Madison were on the list. But after the defeat of the French Revolution, the Germans decided it had been a French revolution, not an Enlightenment liberation from feudalism that would sweep the world over the next two centuries in its liberal and communist varieties.

Into the present day, whether we will be cultural nationalists or civic republicans is very much a living question. It is easy to think of a dystopia in which Europe succumbs to xenophobic cultural nationalism and the U.S. succumbs to nationalist

militarism. The Danes are asking the Swedes to prove that they are Swedes before they can come into Denmark. And in the U.S. there is all this agitation over the right to bear arms and the right of the president to bomb anybody he likes.

I say that rather than getting sunk into the Middle East, the real challenge for the United States is to show that the Enlightenment works in its homeland. If we don't do that over the next twenty five years, we will be in a bad way.

JPT: How do you maintain civic nationalism with so much internal cultural diversity? The cultural sense of someone in Appalachia might be very different from that of New Englanders.

BA: Here I'm with Michael Walzer: through the concept of spheres, roles, and the differentiation of society. In the economic sphere, we have these Appalachians and these sons of Harlem and the Bronx all going and working for Google. This happens at the same time that people might have very different tastes when it comes to their music. This is an example of role differentiation.

The problem today is that the sphere of citizenship is disintegrating. The old parties are growing less meaningful—that's what people like Bernie Sanders, Donald Trump, and Marine Le Pen are all telling us. The 20th century parties are becoming more removed.

To borrow a concept from continental phenomenology, there

are different lifeworlds. When you go into a hospital you behave one way, and when you go into Deliberation Day you behave another way. James Fishkin and I organized Deliberation Polls in twenty places in the United States, one of which took place here at the Yale Law School. Everyone took it very seriously, all showing up in suits. There is a conversation which does unify people from California to Appalachia to Georgia. Just think about the presidential elections and conversations about candidates. This certainly does not constitute the whole of people's lives but nevertheless it is something significant.

JPT: Can role differentiation be taken too far? France's *laïcité* is a form of role differentiation. The idea that once you leave your home, you must leave all religious attachments behind--in schools you become a "child of the republic"--is used to justify Muslim headscarf bans in schools. Are the tensions in France in part due to this extreme case of role differentiation?

BA: This is a question about liberal education. How can we understand the legitimate use of power as children evolve from birth through maturity? Most liberal theorists do not deal with education. They speak about pursuing one's own idea of the good life but never explain how it is that people arrive at such conceptions. Rawls, for example, treats us as if we are created through *The Birth of Venus*, born already grown up. John Locke famously argues against Robert Filmer, saying that the model of the king should

not be the model of the family. My question is more radical: why should the model of the family be the model of the family? What is the justification for a very small number of adults to essentially brainwash children during primary education? I define primary education as the first mode of socialization, when the child has not yet mastered the skills necessary for posing questions concerning legitimacy. During primary education, I will concede that parents must teach the child some form of life. Some particular form of primary socialization and education is necessary for any subsequent pursuit of intersubjective recognition and the good life.

During secondary education, when the child begins to develop the capacity for liberal dialogue, other concerned citizens may object to certain parental activities. If parents order their child to go to bed, another equal citizen may legitimately object to what the parents are doing. Liberal education means that the more successful the parent is in primary education, the less right the parent has to control the subsequent secondary education. Of course, this is not to deny that parents generally know their children best, care the most, and that we therefore should typically defer to their judgement.

To the France case, I agree with your intuition about *laïcité*. My position is that there should be strong public education in the way I described, but it should not be uniform public education. The curriculum you receive will depend on where you are coming from. The atheist should

confront religion in the public school and the evangelical Christian should be forced to consider the possibility of atheism. I suppose that I am more radical on this than in the other dimensions of my thinking.

My wife and I sent our kids St. Thomas, an establishment Protestant kind of place, so that our children would have an idea that there are

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people who think there is such a thing as God. In a liberal culture, everyone enters society from one place due to varying experiences of primary education, and then should be exposed to non-threatening yet broadening possibilities. At the end of this process, the child can decide exactly what kind of life he or she wants to live.

For these reasons, I am certainly opposed to vouchers which allow parents to select the schools that will maximize brainwashing until the child is finished with education. I am more of a liberal individualist than so called neo-libertarians who are confusing the liberty of the parents with the liberty of the children.

JPT: In light of this discussion of students’ liberty and education, I’m curious to hear your thoughts on the

recent student protests at Yale and at other campuses.

BA: My basic attitude is that student mobilization on campus is a good thing. Given the alternative of simply focusing on grades, I am glad to see that students are engaging. My second basic thought is that the real challenge for Yale students is to organize for a national set of objectives rather than a curricular set of objectives. These are not mutually exclusive but it is a question of focus. The major question is, to what extent should we be moving to focus on class, rather than race and ethnicity. This is the Bernie Sanders question.

The second major question is about militarism. Militarism and justice are the two fundamental questions facing America. For me, these are

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the two key issues that students should be focusing on. I remember going to a teach-in in the aftermath of the invasion of Iraq. I don’t see much of this going on right now. Meanwhile, President Obama has basically confirmed and solidified

Bush’s war policy. It is striking to me how much this is not a campus issue. Similarly, if you would ask me what is the most pressing question on the cultural identity front at the moment, I would answer that it is Islam. This might lead us into a hundred years war, but it has not been the focus on campuses.

The concerns here have been much more parochial: “What should Yale’s curriculum look like?” and “Why isn’t faculty more diverse?” I am on the appointments committee at Yale Law School and we would love to have a more diverse faculty. I expect that it will be much better in fifteen years than it is now because more diverse people are getting first-rate educations.

The surprising thing to me is not that there are problems at Yale, but that the concerns are so Yale-centric. Only if we thought we reached the end of history, to cite Francis Fukuyama’s phrase, should we begin to think exclusively about micro problems.

But all this is secondary to the pressing national issues reshaping America. Of course, there are connections between what happens on campuses and what happens on the national level. But it is too much about Calhoun College and not enough about how we should mobilize and organize for reforming police practices in America, for example. I do not want to suggest it is an either/or, because it isn’t, but I would like to see more focus on the wider national issues.