

# **Biographical Overview: Bruce Ackerman**

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## **Early Life and Education**

Bruce Ackerman was raised in the Bronx in New York City. His immigrant mother arrived in 1923 when her family fled Poland in response to anti-Semitic oppression during and after the First World War. His father's family fled Hungary when an earlier wave of pogroms threatened their lives in the 1880s. Although both his parents graduated from high school, neither seriously considered going to college. Instead, his father worked as a tailor, originally in partnership with his father, and his mother stayed at home caring for their three children. Ackerman was the youngest child, and although his mother placed a high value on education, she was entirely unprepared actively to support his educational efforts. Indeed, books and newspapers were entirely absent from their modest rental apartment.

Instead, Ackerman's life was profoundly shaped by the remarkable teachers he encountered in the public schools of New York – who, inspired by the educational philosophy of John Dewey, were constantly encouraging students to look upon classroom learning as a means for self-definition. For Ackerman, this invitation transformed the classroom into a place where he was having lots of fun finding out about the world far beyond his immediate neighborhood. His early intellectual explorations led to the

Bronx High School of Science, where his interests in math and science enabled him to gain admission to Harvard College. This is the point where his encounters with two remarkable teachers, Judith Shklar and John Rawls, led him to redefine his principal concerns in the direction of political philosophy. These interests were further invigorated by four outstanding teachers at the Yale Law School – Alexander Bickel, Robert Bork, Guido Calabresi, and Ronald Dworkin – whose very different views emphasized the importance of taking a stand on fundamental issues of economic, political, and social theory. In each case, moreover, they responded thoughtfully when students in their seminars took very different positions from the ones that their teachers had advanced.

### **Career:**

Ackerman began his professional career by serving as a law clerk to Henry Friendly on the United States Court of Appeals in New York City and to John Harlan on the Supreme Court in Washington. These leading conservative jurists were well aware that Ackerman held far more liberal views than those expressed in their own opinions. Nevertheless, Friendly and Harlan chose to hire him. This provided him with a priceless opportunity to assist them in deciding a series of cases, at the height of the Civil Rights Revolution, which vastly increased his insight into the dilemmas confronting the judiciary in its on-going struggle for legitimacy in a constitutional democracy.

Once Ackerman left his clerkship with Harlan in 1969, he immediately confronted another life-shaping question: Should he stay in Washington and engage in further exercises in real-world decision-making or should he return to the academy and follow the path marked out by his teachers at Harvard and Yale?

His wife, Susan, played a decisive role in answering this question. Bruce first met her at Yale, where she was a graduate student engaging in advanced econometric research. By the time they moved to Washington, this work was already impressive enough to earn her an appointment as a staffer on the Council of Economic Advisors. As a consequence, when Bruce left his job with Harlan, Susan was also in a strong position to gain new jobs as real-world policymakers in the nation's capitol. Nevertheless, both decided to take the scholarly path.

Under one condition – that they would never have a “commuter-marriage” in which they spent a great deal of their time teaching in different places and couldn't raise a family on a day-to-day basis. Over the past six decades, they have remained faithful to this commitment.

But at the price of moving back and forth from the University of Pennsylvania to Yale to Penn to Yale to Columbia and back again to Yale where, since 1987, they have both held endowed chairs dedicated to interdisciplinary studies – with Susan serving as Henry R. Luce Professor of Law and Political Science, focusing on law and political economy, while Bruce served as Sterling Professor, focusing on constitutional law and political theory. They have, moreover, seen their two children, Sybil and John, flourish in very different places. Sybil became a

leading environmentalist in the Pacific Northwest. John became a professor of public law at UNAM, Mexico's leading university.

### **Scholarship:**

During each phase of his career, Ackerman pursued three different scholarly pathways – political philosophy, public policy, and legal doctrine – paying special attention to their complex interrelationship.

During his first decade, his concern with legal doctrine was exemplified by *Private Property and the Constitution* (Yale: 1977), which explored the philosophical premises organizing competing approaches to the constitutional protection of private property – especially with regard to environmental regulation. This inquiry was provoked by his concrete study of environmental policymaking in *The Uncertain Search for Environmental Quality* (with Rose-Ackerman, Sawyer and Henderson) (Free Press: 1972). Throughout the 1970s, he was also struggling with the larger philosophical issues raised by modern forms of activist government, culminating in the publication of *Social Justice in the Liberal State* (Yale: 1980).

This book has encouraged a decades-long debate – in which Ackerman participated on an ongoing basis. But he shifted the center of his theoretical explorations to an effort-- exemplified by *We the People: Foundations* (Harvard: 1991)-- to provide a framework for understanding the development of American constitutional

law over the past two centuries. At the same time, he continued his engagement with environmental policy in *Clean Coal/Dirty Air* (with William Hassler) (Yale: 1981) as well as his larger concern with contemporary doctrinal dilemmas in *Reconstructing American Law* (Harvard: 1984).

By the 1990's, however, the fall of the Berlin Wall opened up a new set of challenges that marked the third phase of Ackerman's scholarship. On the one hand, *The Future of Liberal Revolution* (Yale: 1992) moved in the direction of comparative constitutional analysis -- investigating predicaments confronting nations, such as East Germany, Poland, or Russia, in making the transition to constitutional democracy. On the other hand, *The Decline and Fall of the American Republic* (Harvard: 2010) showed how the crisis generated by September 11th was propelling the power of the presidency to unprecedented heights, making authoritarian dictatorship a very real possibility.

Ackerman was not content with sounding the alarm. He collaborated with long-time colleagues to propose a series of reforms that could plausibly reduce – if not eliminate -- the different dangers threatening the future of democracy in the twenty-first century: *The Stakeholder Society* (with Anne Alstott) (Yale:1999); *Voting with Dollars* (with Ian Ayres) (Yale: 2002); *Deliberation Day* (with James Fishkin) (Yale: 2004); *The Failure of the Founding Fathers* (Harvard: 2005) and *Before the Next Attack* (Yale: 2006). These books not only generated wide-

ranging discussion, but served as the basis for a number of real-world reforms throughout the world.

This work required a lot of time and effort – but it was also energizing, and it encouraged Ackerman to continue working on the ambitious project he had marked out in *We the People: Foundations* in 1992. It took a decade before he could publish *Transformations* in 2004 and another decade before *The Civil Rights Revolution* came out. Taken together, this three-volume series explored the historical dynamics through which the Founding ideal of “government by the People” was transformed throughout the course of the nineteenth and twentieth centuries – providing a deeper perspective on the twenty-first century crises that Ackerman’s more concrete writings were confronting during the same period.

*We the People* also set the stage for the current phase of Ackerman’s scholarship. Just as he developed a framework for analyzing American developments over the past two centuries, he has now undertaken a similar effort in comparative constitutional law. This new three-volume series will mark out three distinct “pathways” that different nations have travelled throughout the world in the on-going struggle for constitutional democracy that can gain broad-based legitimacy from their inhabitants.

*Revolutionary Constitutions* (Harvard: 2019) attempts a comparative analysis of efforts at revolutionary breakthroughs to democracy in countries as different as Burma, France, India, Iran, Israel, Italy, Poland, South Africa, and the United States. Despite these differences,

however, the book argues that a systematic comparison of their successes and failures can greatly illuminate the current democratic crisis sweeping the world – and help define realistic efforts at reconstruction.

The book also introduces the distinctive features of two non-revolutionary pathways pursued by many other nations over the course of the twentieth century. But it will take several more years before Ackerman will be in a position to publish similar volumes dealing with their very different efforts to legitimate constitutional democracy over the past century.

In the meantime, he has completed *The Postmodern Predicament* (Yale: 2024). This book attempts a reassessment of the philosophical project Ackerman began in the 1970s. When he published *Social Justice in the Liberal State* in 1980, he joined in a larger effort – led by such thinkers as Jurgen Habermas, John Rawls, and Michael Walzer – to elaborate compelling principles of social justice in ways that made sense of the socio-political realities of the late twentieth century.

Yet the very foundations of human existence have been transformed over the past fifty years. Thanks to high-tech medical advances, twenty-year olds today can expect to live until they are ninety or even longer – but in the 1950s, Americans could expect to die before they were seventy. What is more, the rising generation confronts its future with very different educational resources. During the Civil Rights Movement of the 1960s, only 8 percent of whites and 4 percent of blacks had graduated from college – and 50

percent had dropped out of high school. By 2020, 50 percent of whites and 38 percent of blacks are gaining college degrees by the age of 25 – and less than 10 percent are high school dropouts, with many completing two-years of college-level training that enable them to play a significant role in the high-tech economy.

The *Postmodern Predicament* explores the existential implications of this double transformation in life expectancy and educational opportunity. Seventy years ago, people found themselves in a race against time. If they didn't get married by twenty, they might not have time to raise a family and celebrate their children's successes as grown-ups. This meant that, in the 1960s, the median age for first marriages was 21 for women and 23 for men in the United States and Western Europe – but in 2020, it was 30 for women and 32 for men.

Young adults no longer engage in a desperate “race against time” before committing themselves to a particular partner. Instead, they engage in an on-going exploration of intimate opportunities before defining a definite path for themselves in their early thirties. The same is true in their search for a fulfilling career. In short, the typical postmodern confronts an entirely new phase of human development as a young adult – call it the age of exploration.

Once they make decisive personal commitments to one another, and decide whether to have children, they will confront a new series of challenges during the age of achievement – between 35 and 55 – as they try to deepen



their married life and devote enough time and energy to fulfil their ambitions at work and other central spheres of engagement. Even if they succeed, they must struggle once again to redefine the terms of their intimate relationship once they retire from work and their kids (if they have them) leave college and begin their own “periods of exploration” -- frequently in places far away from their hometowns.

In the twentieth century, mature adults typically confronted these decisive turning points in their sixties – at a time when median life-expectancy was about seventy. Yet, in the current postmodern era, most Americans will have 25 more years to live – requiring them to confront their “age of maturity” in ways that will allow very different modes of fulfilment, depending on the character of their previous successes and failures in life. As they proceed into their eighties and nineties, moreover, they confront different dilemmas in confronting the challenges of physical and mental decline. During each phase of life, the internet offers different prospects for enhancing face-to-face relationships – or betraying them.

Part one of the *Postmodern Predicament* addresses the implications of these revolutionary life-transformations in common-sense terms. Part 2 follows down a more self-consciously philosophical path marked out by Martin Heidegger, Simone de Beauvoir, Jean-Paul Sartre, and Maurice Merleau-Ponty. To be sure, these existentialist thinkers of the twentieth century were not obliged to confront the distinctive challenges of

postmodernity. Nevertheless, the *Postmodern Predicament* tries to convince readers that their pathbreaking works contain insights that can greatly enrich our understanding of the brave new world of the twenty-first century.

Part 3 moves from theory to practice. It shows how an existentialist approach can yield concrete reforms that bring citizens together rather than split them apart – and generate especially large gains for impoverished and stigmatized groups in ways that could reinvigorate democracy over the coming decades.

### **Professional Engagement**

Over the course of his career, Ackerman has tried to integrate his scholarly work into real-world efforts to realize its principles.

Most recently, his historical explorations, culminating in *We the People*, have led him to write two amicus briefs dealing with recent Supreme Court decisions. The first, *Moore v. United States*, represents a “moment of truth” for the six “originalists” currently on the Court. It involves the enactment of the Sixteenth Amendment, which repudiated judicial decisions of the 1890s that imposed strict new limits on the national government’s power of taxation. Working with Professors Joseph Fishkin and William Forbath, Ackerman’s amicus brief systematically reviews the original sources surrounding the proposal and enactment of the amendment in the early twentieth

century – and shows that they reveal an overwhelming determination by Congress and three-fourths of the states to enable the national government to tax income and wealth in all its forms.

<https://balkin.blogspot.com/2023/10/the-original-understanding-of-sixteenth.html>;

<https://www.politico.com/news/magazine/2023/12/05/trump-supreme-court-justices-taxes-00129912>

Nevertheless, the petitioners in *Moore* call upon the current Court to pave the way for a new era of judicially imposed restrictions on the fiscal powers of the American government. Even more remarkably, their proposed limitations are framed in a fashion that would be especially favorable to the wealthiest Americans. The particular facts involved in *Moore* do not require the Court to develop a well-developed doctrinal position on the complex issues involved. But if the originalists are serious about their originalism, they should refuse to move down this doctrinal path -- and reject the petitioners' invitation as a matter of principle.

Tragically, the originalist Justices have already failed this test in a second and even more important case: *Trump v. Anderson*. It arose when Colorado's Secretary of State refused to allow Donald Trump to compete in the state's Republican primary – on the ground that his role on January 6<sup>th</sup> required his disqualification under Section 3 of the Fourteenth Amendment. When the Secretary's decision was affirmed by the Colorado Supreme Court, the

Supreme Court in Washington moved rapidly to resolve the issue on a nationwide basis. Because the Colorado courts had done a remarkably thoughtful job of establishing that Trump's conduct violated the original understanding of the Disqualification Clause, Ackerman's amicus brief – written in collaboration with Martha Minow, Geoffrey Stone, and other leading scholars – directed itself to other plausible-sounding arguments raised in Mr. Trump's defense, and argued that they were decisively outweighed by competing constitutional considerations.

<https://acrobat.adobe.com/link/track?uri=urn%3Aaid%3Aascds%3AUS%3A01c7d456-8164-3f1c-b63c-ocf6a966624a&viewer%21megaVerb=group-discover>

When the Court announced its judgment, however, it turned its back on all the originalist work of the Colorado court -- as well as the legal briefs filed by its defenders. Instead, the Justices invoked the political question doctrine and refused to decide whether whether Trump was barred from office under the Disqualification Clause.

[https://www.supremecourt.gov/opinions/23pdf/23-719\\_19m2.pdf](https://www.supremecourt.gov/opinions/23pdf/23-719_19m2.pdf)

This may well generate a shattering crisis in January 2025, when the time comes for the next Joint Session of Congress to determine whether Trump or Biden should be recognized as the *legitimate* president on January 20th – when the next four-year term begins.

<https://slate.com/news-and-politics/2023/11/supreme-court-trump-cases-jan-6-repeat.html> Nevertheless, the prospect of massive violence on Inauguration Day was not

enough to induce the “originalist Justices, to confront the overwhelming evidence, detailed in the Colorado court’s opinion, establishing that the Framers would have found Trump’s conduct a paradigm case for disqualification for further service in the government.

This is not the first time that Ackerman’s efforts in advocacy have proved unpersuasive. Turning the clock back to the year 2000, it soon became clear that the presidential race between Bush and Gore would be determined by Florida’s 25 electoral votes. Yet, the state’s 6 million voters were almost equally divided between the two candidates – requiring a recount to determine the final result under the supervision of a Special Joint Committee of the Florida Legislature. In response, Ackerman was asked to prepare the principal presentation on behalf of Senator Gore before this Committee. With the statewide result moving in Gore’s direction, there was every reason to believe that he would be entering the White House on January 20th – until the Supreme Court ordered Florida to stop its recount and awarded the Presidency to George Bush by a 5 to 4 vote.

Despite this defeat, Ackerman organized a Symposium at which leading scholars on both sides considered practical ways of reforming the process to avoid a repetition of this chaotic scenario, see *Bush v. Gore: The Question of Legitimacy* (Yale: 2002). Indeed, there were encouraging signs on Capitol Hill, and elsewhere, of a serious effort to act decisively on this issue – until the September 11<sup>th</sup> attack

on the World Trade Center in 2001 focused constitutional attention on very different questions.

Most notably, Al Qaeda's sneak attack provoked an escalating debate over the president's power, as commander-in-chief, to make war against an increasing number of governments on different continents without the express authorization of Congress. This issue had already received much attention after the disaster that followed Lyndon Johnson's unilateral warmaking in Vietnam. With the anti-war movement gaining increasing momentum during the early 1970s, Congress enacted the War Powers Resolution of 1973 which authorized the commander-in-chief to take decisive short-term action in response to foreign threats to national security -- but required the President to terminate these interventions within six months if Congress did not expressly authorize their continuation. Although George H.W. Bush initially complied with these requirements in the aftermath of 9/11, his Administration increasingly ignored them as the War on Terror escalated over the next six years.

This raised a fundamental question for Barak Obama upon his ascent to the White House in 2009: Would he return to the constitutional path marked out by the War Powers Resolution and gain the explicit consent of Congress to intervene militarily in the different wars in which America was then involved – or would he continue down the unilateralist path marked out by his predecessor?

As a long-time teacher of constitutional law at the University of Chicago, Obama well understand the high stakes raised by this question – and by appointing Gregory Craig as his White House Counsel, he gave every indication that he would move forward with a serious Congressional initiative to reinvigorate the War Powers Resolution. Craig then asked Ackerman to serve as one of his advisors, but the White House Counsel quickly encountered serious opposition to his efforts on a number of fronts – and resigned his position within a year as Obama began pursuing an aggressively unilateralist course.

Ackerman responded by collaborating with other scholars and political leaders in an on-going effort to urge Congress to take the initiative in defense of its war-making authority. Although these initiatives generated a good deal of political momentum, they were ultimately unsuccessful. See Bruce Ackerman & Oona Hathaway, “Limited War and the Constitution: Iraq and The Crisis of Presidential Legality,” 109 Mich. L. Rev 447 (2011).

See:

<https://repository.law.umich.edu/mlr/vol109/iss4/1/>

Ackerman then turned to the courts to emphasize that the original Constitution granted the power “to declare war” to Congress -- precisely because its draftsmen feared that future presidents would abuse their powers as commander-in-chief to transform themselves into dictators. He developed this point most elaborately in a case before the D.C. Circuit challenging the president’s undeclared war against the Islamic State. The case arose in response to a

concrete dilemma confronting Captain Nathan Smith during his service with the army in Iraq. When accepting his commission as an officer, Smith swore to “uphold the Constitution of the United States.” Once stationed in Iraq, however, he was ordered to engage in activities that he believed went far beyond any military actions that Congress had authorized. Yet if he refused to obey these unconstitutional orders, he faced a court-martial for disobeying his commanders.

Within this context, a decision by the federal courts provided the only plausible way for Smith to resolve his real-world dilemma – since, if the judges decided that his constitutional views were incorrect, he would have no difficulty following the commands of superior officers.

When Ackerman and his co-counsel presented Smith’s case to the Court of Appeals in 2017, moreover, the three-judge panel took their constitutional arguments very seriously. Moreover, given Smith’s concrete dilemma, they responded skeptically to the claim that his petition for a declaratory judgment merely represented a partisan effort to involve the judiciary in a “political question.” See <https://www.lawfaremedia.org/article/smith-v-trump-dc-circuit-guided-tour-oral-argument>

At this point, however, the Administration moved decisively in defense of the unilateralist *status quo*. During the time that the three judges were considering their decision, the military made a deal with Smith that convinced him to resign from the service, leading the panel



to dismiss his case moot.

[https://caselaw.findlaw.com/court/us-dc-](https://caselaw.findlaw.com/court/us-dc-circuit/1944653.html)

[circuit/1944653.html](https://caselaw.findlaw.com/court/us-dc-circuit/1944653.html) At the end of the day, Ackerman's efforts to encourage a thoughtful constitutional response from the courts were no more successful than his previous efforts to generate a serious response from Congress or the Presidency.

Nevertheless, he has not responded to these defeats with despair – but continues to urge thinkers-and-doers to renew the search for decisive reforms that will reinvigorate America's commitment to social justice and constitutional democracy in the twenty-first century. See generally *The Postmodern Predicament*, and more particularly, Ackerman, *America's Childcare is Unfit for the Modern Age*, April 23, 2024 at <https://www.project-syndicate.org>; *Democracy in a Postmodern Age* at <https://democracyparadox.com/2024/04/09/democracy-in-a-postmodern-era-with-bruce-ackerman/>; *Follow the French!: The Urgent Need to Rethink America's System of Political Primaries*; at *Balkinization: January 18, 2023* at <https://balkin.blogspot.com/2023/01/>; *How to Reorganize NATO and Deter Putin's Aggression* at <https://www.politico.com/news/magazine/2022/05/17/new-nato-21st-century-revitalize-putin-00032744>