

THE BOB ZADEK SHOW PRESENTS

POWER TO THE STATES

How Federalism 2.0 Can
Make America Governable Again



BOB ZADEK



Power to the States

POWER TO THE STATES

How Federalism 2.0 Can Make
America Governable Again

Bob Zadek & Guests



BobZadek.com

Copyright © 2018 Bob Zadek

All rights reserved.

ISBN: 9781728973296

FEATURING

Professor Richard Epstein
Honorable Clint Bolick
Senator James L. Buckley
Travis Brown
Cliff Maloney
Joe Mathews
William Watkins, Jr.
Robert Alt



BobZadek.com

CONTENTS

	Introduction – Beating Tribalism with Federalism	Pg 1
1	Power to the States <i>Robert Alt on State-Based Policy Strategy</i>	Pg 5
2	The Anti-Federalists Strike Back <i>William Watkins, Jr. on America’s First Constitution</i>	Pg 17
3	Winning Legislatures <i>Cliff Maloney on Operation Win at the Door</i>	Pg 27
4	California Discovers Federalism <i>Joe Mathews on Immigration Federalism in the Wild West</i>	Pg 40
5	How Money Walks <i>Travis Brown on How America is Voting with its Feet</i>	Pg 52
6	No Strings Attached <i>Sen. James L. Buckley on Ending Federal Subsidies to States</i>	Pg 65
7	Reverse Federalism <i>Professor Richard A. Epstein on Elizabeth Warren’s Federalization of American Business</i>	Pg 77
8	Or to the People <i>Honorable Clint Bolick on *Grassroots Tyranny*</i>	Pg 93
	Appendix I – Original Shows	Pg 105
	Appendix II – Featured Books	Pg 106

ACKNOWLEDGMENTS

I am grateful to each of the guests who agreed to have their interviews included in this book, and to my producer, Charlie Deist, for transcribing, editing, and compiling them in this format. Thanks are also due to KTRB station manager Craig Roberts, my board operator Vince Tocce, and Kyle Bigman for his editorial assistance.

INTRODUCTION

BEATING TRIBALISM WITH FEDERALISM

Commentators worry about the “Balkanization” of America. East Coasters live in their urban enclaves; Republicans in suburban and rural areas. Conservatives absorb conservative media; progressives, progressive media. Many yearn for the civility of the “good old days.”

In fact, we have had incredibly brutal political campaigns since the founders’ era. The most bitter, insulting, and no-holds-barred presidential campaign in American history was the first one – the campaign of 1800, between Jefferson and Adams. So, I am not so sure that we have much to say for the “good old days.”

There have always been factions in our country, and there always will be. People are different, and many do not understand the life choices of others. These factions are not unhealthy. Different people have different points of view and they tend to group together. They live together, hang out together, and read the same papers. That’s natural. That is the exercise of choice. We have never had a country of people who just exist to be persuaded, and we never will.

We are entering a worrisome period of American politics. The divisions are so intense that I have never been so concerned about the country and system of government that I love. I’m usually optimistic. Now it’s hard to find optimism given the level of tribalism.

Beating Tribalism with Federalism

There is a clear relationship between the feeling of powerlessness and the anger at the other side. The centralized and remote power of the Federal Government makes it more important for “our team” to have that power, since our lack of political control over Washington subjugates “us” to “their” will. Under the federalist system which the founders gave us, with most of the political power residing locally (or at least far closer to us than if it rested in distant Washington) we would feel, and we would be, far more in control.

“No taxation without representation” drove us to revolution. We now cry out “no political control with representation.” With local control, Federal power would not matter all that much.

I cherish the founding principles of federalism and have painfully concluded that Washington has abandoned its *limited* but essential constitutional mission of protecting our rights to life, liberty, and pursuit of happiness in favor of using its grotesque and cancerous growth of its power to allow us to practice these natural rights only under carefully controlled conditions. The transfer of power from local to remote evolved from a combination of ill-advised Constitutional amendments, and some unfortunate Supreme Court cases. Madison explained it best: “The essence of Government is power; and power, lodged as it must in human hands, will ever be liable to abuse.”

Before we despair, we should remember that this apparent “bug” is really a feature of the founders’ plans. Progress isn’t supposed to come from the Federal Government. It comes from individuals who make their own lives better through effort and personal sacrifice.

Of course, somebody has to write the laws. Fortunately, states remain – as Justice Louis Brandeis suggested – the “laboratories of democracy,” giving citizens the ability to “vote with their feet” in search of more limited government and greater control over their lives. States like California and New York, which find themselves losing population because of bad policies, are slowly catching on.

The founders always intended that most power over citizens should reside in the states and cities. Thus, a Californian who opposes a “nanny state” government of high taxes, and wealth transfers, can move to Texas. With most political power held by a federal government, the choice, if you can call it that, would be move to another country. This is a much more significant decision than moving to Austin, Texas from California.

Happily, states are rediscovering their historic powers affirmed by the Ninth and 10th Amendments. We see this in areas of drug policy, criminal justice reform, school choice, eminent domain, and even immigration here in my home

POWER TO THE STATES

state of California. Washington is more remote and aloof to Americans than England was several centuries ago to the colonists. States are responding to the needs of their citizens exactly as the founders intended.

On my show, I have never promoted the misleading agenda of “states’ rights,” which has often been used to justify even greater violations of individual liberty than federal encroachments. After all, states have no rights; only people do. (The states surrendered the most important “right” they had when they ratified the ill-conceived 17th Amendment). Instead, I aim to show how most political powers promote the preservation of liberty when they are decentralized. That decentralization begins with the devolution from Federal Government to states and localities.

For many years, I financially supported libertarian or libertarian-leaning candidates for federal office, but never saw any results. No candidate nor any group of candidates can affect even a slight change in the federal power trajectory. It has been said that insanity is doing the same thing over and over again and expecting different results. My principles now prevent me from supporting any candidates for federal office or seeking any reform at the federal level. I have decided to put all of my efforts toward state and local candidates and issues. State legislatures have become testing grounds for sound governance, and libertarian ideals are on the rise.

In this short volume of edited transcripts, you’ll learn how libertarian ideas are winning across the country, thanks to the efforts of a small handful of think tanks, student activists, intellectuals, and politicians with a healthy understanding our of “first principles”.

I try to use my show to provide a platform to those who are leveraging their own resources to make a maximum difference for liberty. The more we focus our attention on what can control, the more we will see real libertarian change. State-centric power gives us the opportunity to experiment with different political viewpoints. Once a single state successfully tests a policy change, other states will copy their success, or learn from their failure.

I do not object to Balkanization. I don’t care if a progressive never reads a conservative newspaper, nor do I aspire to change a progressive into a conservative. I love the fact that California is profoundly progressive, as is New York. I love that Texas is conservative. I don’t even aspire to make people nicer. I wish they were, but I don’t want to force it upon them. It is the use of force that is dangerous. Once you take away choices, people get angry – and sometimes violent – because a different lifestyle is being forced upon them.

Beating Tribalism with Federalism

When power solidifies in Washington D.C., there is a demonstrative erosion of freedom. When people feel freedom disappearing, they feel powerless. This brings out the worst in them. Having power in the states gives people freedom and choice. Not having a choice means not having freedom. Let me have a choice, and I will be perfectly content.

If we had fifty states – each truly experimenting with different political philosophies – I would not necessarily respect progressive voters in California or New York. Most importantly, New York politicians could not impose their political will on Iowans, or the reverse. There are few policies beyond those which protect our natural rights, which must or should be imposed nationally. We will not lose our nationhood with states dictating the speed limit, drinking age, minimum wage, healthcare policy and the like. When we need to be one nation, such as in time of war, soldiers from New York would still fight alongside soldiers from Iowa. They might not understand nor agree with each other's politics, but there wouldn't be any hatred because the guy from New York would not be imposing his will on the conservative from Iowa. It would be live and let live.

This, in short, is the new federalism – federalism 2.0. It is about experimentation with different policies in the states, and robust competition among them for citizens' tax dollars. While it is not a panacea, it is what the founders envisioned. Rather than make America great again (again?), my goal is to make America *America* again.

My full archive of shows is available at BobZadek.com. Every week I interview a really smart guest and provide transcripts and a teaser of upcoming shows via a weekly email blast. Hear my show streaming live online or on the radio every Sunday morning, and check your local AM listings at BobZadek.com/listen-live.

1 – POWER TO THE STATES

Guest: Robert Alt, President and CEO of [The Buckeye Institute](#)

Interview Date: [October 29, 2017](#)

Bob Zadek: On this day – October 29, 1787 – the first Federalist Paper was published. The Federalist Papers were 85 op-ed pieces written in New York by the founders – James Madison, John Jay, and James Hamilton – in order to persuade the state to vote for the ratification of the Constitution.

The Federalist Papers are often cited as evidence of what the founders meant when they wrote the Constitution. That is misplaced in my opinion. The Federalist Papers were written to persuade, not to educate. The daily blog of the [National Constitution Center](#) identified the Federalist Papers as essentially a public relations campaign.

Take them with a grain of salt – they are not legislative history. They are simply articles of persuasion. However, we still celebrate the writing of the first Federalist Paper today.

I have often despaired about the amount of power concentrated in the Federal Government at the expense of the states and localities. This is not the system the founders gave us – they gave us a robust system of federalism, where the states were to be co-equal with Washington. However, it did not turn out that

way due to several Supreme Court decisions and some ill-advised legislation and Constitutional amendments.

Lately, my despair is being mitigated. Indeed, I find that the states are the most interesting political units in our country. From marijuana reform, to the rejection of Medicaid, to criminal justice reform and right-to-work laws – all the interesting initiatives are taking place at the state level.

Leading that charge more than any other state-focused institution is [The Buckeye Institute](#), operating out of Ohio. Although it is Ohio-based, its influence is national in scope.

I am delighted to welcome Robert Alt to the show. Robert has been the Chief Executive Officer of the Buckeye Institute since 2012 when he founded [The Buckeye Institute's Economic Research Center](#), which has an enormous and well-deserved influence on the national scene. Robert was a director of the [Center for Legal and Judicial Studies](#), and served under former U.S. Attorney General Edwin Meese.

Robert, you have the envious position of being a state-based think tank with an impressive national audience. Thank you for joining us this morning on the show.

Robert Alt: Thank you for having me on.

I couldn't agree more that the real action is at the state level. I worked in Washington for a number of years. I've worked in public policy, including out in California, for many years now. Ultimately, I found that you just could not get meaningful reforms done in Washington, but you can at the state level.

Bob Zadek: The founders worried profoundly that the system of government they were designing – a federalist system with co-equal branches of government at the federal and the state level – could not work in a very large country like the one we have now. I think the founders have been proven right. I do not see any short-term hope of any meaningful legislation coming out of Washington.

Yes, there might be political compromises now and again that may do the body politic some good, but don't get your hopes up. Washington is dysfunctional and will remain that way – perhaps forever, if not longer. The states, on the other hand, are doing sound experimentation with wonderful results.

State Experiment #1: Criminal Justice Reform

Bob Zadek: The Buckeye Institute has been a national leader in criminal justice reform. This subject is quite interesting because it transcends typical party positions. Look at the allegiance of Senators Rand Paul and Cory Booker – a libertarian Republican and a Democrat respectively who share common ground on criminal justice reform. They didn't get very far because all of the attention in Washington was paid to terrorist activities, and Washington does not have the ability to focus on more than one issue at a time. Therefore, the criminal justice reform hopes at the national level disappeared – at least for the moment.

Not so at the state level.

When one says, “criminal justice reform,” that describes a series of initiatives. Whenever we see the word “reform” in the public discussion, whether it's tax reform or immigration reform, it is always reforming a bad government policy. Nobody ever needs to “reform” a free market organization, but we must always “reform” what the government has done. What are the broad issues within criminal justice reform?

Robert Alt: Let's start with the proliferation of crimes on the books and whether or not there are adequate protections for the accused. At both the state and the federal level, the number of crimes that carry criminal penalties has exploded. At the same time the protections for the accused – requirements that people actually have some form of guilty mind or criminal intent – have been extraordinarily weakened. One of the first major initiatives that we took on at Buckeye was looking at *mens rea*, or the guilty mind requirement of crimes.

Traditionally, to be convicted of a crime, the prosecutor had to show two things. One, that you committed a guilty act, and two, that you did it with a guilty mind. This wasn't an accident.

Over the years this particular requirement has been watered down. For example, when I was at the Heritage Foundation working for Edwin Meese, we did a joint report with the National Association of Criminal Defense Lawyers – a strange bedfellow alliance. The NACDL has a much more liberal slant and we are much more conservative, but we agreed that there was a real problem with regard to criminal intent, so we took a look at laws introduced in a single Congress.

We found 446 proposed nonviolent criminal offenses. 57 percent of those introduced had an inadequate criminal intent requirement. Even more depressing, 64 percent of the laws that were actually enacted contained inadequate *mens rea* requirements. This was quite disturbing. We worked in Washington for some time to create a default *mens rea* requirement. If Congress failed to put in a *mens rea* requirement, this default would be put in. We were not able to do so in Washington, but here in Ohio we actually were able to enact the best requirement with regard to criminal intent in the nation.

Bob Zadek: Criminal intent is important, since the purpose of criminal law is to discourage people from committing bad acts. People are informed that if you do something bad, then you will go to jail. However, if you pass a statute which criminalizes an activity that is not inherently bad, then how would somebody know that this innocent act is in fact illegal?

The very purpose of criminal law is defeated to the extent that you criminalize otherwise innocent behavior. “Bad” is known instinctively in every society. But when you criminalize otherwise innocent behavior, it is called *malum prohibitum*, meaning “bad only because it is prohibited by law.” People are captured inadvertently by the criminal justice system, defeating the very purpose of criminal law. That’s why *mens rea* – the topic that Robert has just raised for us – is so important. Tell us what you’ve been able to do at the state level to bring some sense to this.

Robert Alt: You made a great point in noting the explosion of the *malum prohibitum* offenses. When I taught criminal law, I described it as follows: if you were kidnapped and dropped on a desert island in the middle of nowhere and didn’t know what the laws were there, there are some things you would know were wrong, like violent crimes. You are going to know not to steal.

You probably won’t know, however, whether or not Form XJ-6 needs to be filed on the 12th of the month in triplicate. But in fact, that lighter thing could in fact be a crime. That would be *malum prohibitum*.

The major issue is the federalization of crime and the explosion of these regulatory offenses. In 1998, there was an American Bar Association task force – these blue ribbon panels, with folks on the left and right – and they concluded that the body of federal criminal law is so large that there is no conveniently accessible and complete list of the crimes. They tried to catalog them and came

POWER TO THE STATES

up with well over 3,000 crimes. By 2007 that number had jumped to over 4,450 crimes, increasing at a rate of about 56.5 crimes per year. Many of these are *malum prohibitum* offenses, many of which are regulatory.

In Ohio, we said that if the legislature created a new crime as part of a bill and it does not have a criminal intent requirement, then the crime in the bill is void. This is the strongest medicine of any place in the country because it holds the legislature accountable. It makes them actually do the work. They can make the law a strict liability offense, or one for which no criminal intent is required – there are certain limited exceptions where legislators have done that.

In recent years, however, you have had many bills that actually have no criminal intent requirement. It doesn't appear that that was done deliberately. Oftentimes it is done by accident or due to sloppiness on the part of the legislators. However, when the courts and the prosecutors are looking at these questions, they say, "There is no criminal intent requirement, and we believe that the legislature intended for this to be a strict liability offense." Of course, this is really dangerous when you think about the power of the state. The application of the criminal intent requirement is the strongest medicine that the state has in its arsenal with regard to its citizens. It can take away your liberty and even your life in certain states. It's very important to make sure that we have adequate protections to assure that the accused are not subject to potential convictions for something that could have been an accident.

In case you think I am being hyperbolic about this, let me give you a specific example that should scare you to death. In the state of Florida, they modified their drug possession laws to make it easier to prosecute drug traffickers. They eliminated the criminal intent requirement, so you no longer have to know that you possess the narcotics.

Let's say you fly into Miami for a conference and rent your car from *Hertz* and you have the #1 Gold Service, so you walk directly to your car. Little did you know, there was a scheme going on where the car was intended to be taken by someone else (a drug trafficker), and there were drugs packed away in the spare tire. You end up speeding on the way to your conference and get pulled over. A drug dog comes and alerts the officer to the drugs in the spare tire. Even though you are perfectly innocent and have no knowledge whatsoever of there being drugs in your rental car, none of that matters. You constructively possessed the narcotics. Since there's no requirement under state law, of

knowledge or negligence regarding possession of those narcotics, you have now met all the elements of the offense requisite to be convicted of that crime. That's just one example of how important this protection is in the law.

Bob Zadek: What bad conduct have you discouraged by that statute? The answer is “none,” unless renting a car is a crime. That is the only “bad act” you did. That shows the importance of the *mens rea* requirement in criminal law.

To libertarians, protecting our life and liberty from harm is the core role of government. When the government becomes the entity that denies you your liberty, then what is left? Nothing is left. That is why this issue of criminal justice reform is so important.

State Experiment #2: Bail Reform

Bob Zadek: The Buckeye Institute has done some wonderful work in the area of bail reform – another area that most members of society take for granted.

When I say the phrase “bail reform,” they think “What is the problem? People get arrested, they post some money, and they get out until their trial.” But the bail system is a stealth area of profound abuse and unfairness. Tell us the problem that Buckeye has identified and what you have been able to accomplish in fixing this very harmful and shameful abuse.

Robert Alt: When you think about people being in jail, you probably think they have been convicted of a crime and are serving time. In fact, there are a large number of people in jail who have not yet been convicted of that crime. In fact, 57 percent of people in Ohio jails haven't been convicted of anything. They haven't even been sentenced yet. They are simply awaiting trial. These individuals are in “pretrial detention.” In some cases, they may have been denied bail, but in most of the cases they are sitting there because they cannot come up with whatever the cash bail requirement is for their release.

Does this correlate well with public safety? The Supreme Court has found that we cannot hold people in jail before they have been convicted as a punishment, but we can do it in order to ensure that they show up for trial or to make sure the public is safe. Is the use of cash bail and the bail bond system really the best way to make sure that people show up for trial and to ensure the public is kept safe? The answer seems to be pretty clearly “no.”

POWER TO THE STATES

Bob Zadek: Tell us the Marckus Brown story.

Robert Alt: A kid from the Dayton area gets on the bus, and his clothing violates the dress code because he is wearing a hoodie.

Bob Zadek: There is a dress code in the transit system?

Robert Alt: There is a dress code in the transit system, which I was unaware of as well before this case. They found him in violation of the dress code so they picked him up for trespassing. He was being held on \$150 bail. His mother ended up having to get a vehicle title loan, which was how she was ultimately able to get the \$150 to get her son out of jail, but that took eight days. So, he spent more than a week in prison because his mother was unable to come up with a \$150.

By contrast, you have another instance, for example, where someone in Pennsylvania paid a bail of \$100,000 for homicide, and then upon release ended up killing someone before the trial. Just because you can come up with \$100,000 bail does not necessarily mean that you are not a threat to the community or a potential flight risk.

We have advised, rather than using these monetary bond payments as a basis for determining who goes to jail and who stays out, that we should take a look at actual risk assessments. Is the individual a flight risk? Are there risks to the community? Are there ways that we could actually have them in the community where they can keep their job?

This is a major issue. The risk that the individual is going to lose their job is extraordinarily high even if they spend only a short time in jail. It actually creates a much higher risk that they're going to commit a new crime or another crime in the future, because by putting them in jail you are taking away economic opportunities. We hope to prevent this by creating systems whereby we actually ask whether this individual is genuinely a risk either for flight or to the community. Also, we can monitor the individual by an ankle bracelet or have some other form of check-in, which will be cheaper for the community and will actually allow the individual stay in their home.

All of these things end up being much more positive both for the balance sheet and for the community.

We are spending a lot less to keep people sitting in jail, but we are also allowing that individual to maintain their job to contribute taxes. We've now experimented with this in a couple of different counties. The first was in Lucas County, Ohio. We found that by using risk assessment tools that actually look at these factors to tailor the release of the individual, 19 percent more people are showing up for court and less crime is being committed by those awaiting trial. The city saves money, more people show up for court, and less crime is being committed. We are hoping to go statewide with this reform.

Bob Zadek: The lesson that I get from hearing these important stories is that you are really doing the work that one would have expected that the legislature would have done before it enacted the legislation to begin with, but that is asking too much. That is asking legislatures to be knowledgeable of too many areas, so you therefore picked up the pieces where they messed up.

One would hope that when you come up with findings that are objectively the correct fix, the legislatures would be receptive. Are there large power blocks such as the bail bondsman association who will resist you, or am I making that up?

Also, what has been the level of success you have enjoyed both in Ohio? How successful have you been in inviting other states to observe and adopt what Ohio has learned to do right?

Robert Alt: You actually hit the nail on the head with a few things, but generally speaking, I think that the legislators have been somewhat receptive. These are issues where you can actually pull together a bipartisan coalition. I can get groups on the left and the right to come together. Oftentimes, the opponents are the prosecutors.

The prosecutors ultimately ended up being enthusiastic cheerleaders of the *mens rea* reforms, but on bail reform the bail bondsmen lobby against us. Dog the Bounty Hunter from the reality television show has been speaking out against these reforms.

Nonetheless, I think the legislature has been fairly receptive over time. Oftentimes, the difficulty is getting past the initial knee-jerk “tough on crime” response. It is popular, whether you are in Congress or in a state legislature, to be seen as tough on crime. If something bad happens on the news – some heinous crime or some particular issue – legislators can show that they are

POWER TO THE STATES

taking that issue seriously by creating a new crime to address whatever it is at this point in our history.

Most of the time when something bad happens there is already a crime on the books that covers it. There was a desire and a move post-financial crisis to create new financial regulatory crimes. But if you look on the federal books, there are over a hundred different fraud crimes already in the federal statutes. We have numerous fraud crimes in Ohio, so you don't need to create a new crime every time fraud is committed. Yet the instinct is still to create new laws and new crimes.

These laws are often written very quickly and very poorly. This is when the *mens rea* requirement is left out. We push back against this knee-jerk impulse to show that you are tough on crime rather than creating a criminal justice system that protects society from those that pose grave dangers to it, while protecting the rights of individuals and of the accused.

Bob Zadek: The important lesson that we can learn from Robert this morning is how important organizations such as The Buckeye Institute are for correcting the mistakes made by the elected legislators in enacting laws in response to media headlines. Without The Buckeye Institute and other state-level think tanks, we would be in a real pickle.

State Experiment #3: Union Voting and Right-to-Work Laws

Bob Zadek: Buckeye has also been very effective in the area of “union democracy” and union members’ rights. When I learned about this issue, it occurred to me that union leadership has achieved the status of the House of Lords – they serve for life. They are unelected and unresponsive. The founders sacrificed and those men died at Valley Forge so that we wouldn't have a peerage society with titles granted for life. However, they lost the battle insofar as union leadership is concerned. Tell us what Buckeye has been doing to give union members some rights.

Robert Alt: I am guessing your listeners will be as astounded as I was when I heard that 94 percent of union members across the country do not have the right to vote for their union representation. These representatives are voted in for perpetuity. You have these one-and-done elections where the union is elected and there is no future vote as to whether or not to keep the union, get

rid of it, or have the option of a different union representing the bargaining unit.

To give one example, in Columbus, Ohio the Columbus Teacher's Association is the local teacher's union. They were voted into place in the late sixties, back when Nixon was the President and the Beatles were still together. If you happen to walk into the local elementary school here in my neighborhood, the teacher up at the front of the classroom was likely not born in 1968 when the union was voted in as the bargaining representative. So not only did they never have the opportunity to vote, they couldn't have because they weren't even alive.

Fundamentally, I think we can all recognize that this is not fair. It is particularly unfair in states like California or Ohio, which aren't right-to-work states. As you know, that means that paying your union dues or agency fees are a condition of your employment. If you fail to do so, the employer is required to fire you – all for not contributing to an organization that you never had the opportunity to vote for.

Bob Zadek: In California you have been involved with Rebecca Friedrichs, a teacher in California who was [a guest on my show](#) right before her case was to be heard in the U.S. Supreme Court. She is attacking the very policy that Robert identified. She was likely to win on a 5-4 vote, which would have been a death knell to the public service unions. This was virtually one week before Justice Scalia died in Texas, so there went her victory. The case was sent down by the Supreme Court because it was too important. So, we will learn if Scalia's death will affect the outcome.¹

Robert Alt: I have known Rebecca Friedrichs now for some time. I was actually at the court the day her oral arguments took place. It is always dangerous to try and make predictions from oral arguments, but it seemed like she had the five votes necessary prior to Justice Scalia's passing away.

The court took a second bite at this case in the *Janus v. AFSCME* case, which involves an employee who works essentially for the welfare department in

¹ [Janus v. AFSCME decided the outcome in a similar case on behalf of workers against their unions](#). The decision was featured on The Bob Zadek Show in July 2018.

POWER TO THE STATES

Illinois. It raises the same claims, which is whether the plaintiff should be compelled to speak as a public employee, to and take positions that he may disagree with. If Mr. Janus is successful, then it would potentially create nationwide right-to-work for public sector employees. This finding would be that unions violate their first amendment rights by telling them they have to speak by giving dues or agency fees to the unions.

Bob Zadek: This raises both first amendment “freedom of association” and “freedom of speech” rights. Tell us about what The Buckeye Institute has been attempting, and where you have achieved some level of success in Ohio on the issue of enfranchising – now disenfranchising – union members. Is it public service unions only or private unions as well? What are you hoping to be able to accomplish in this important area?

Robert Alt: These are public sector employees only. These are individuals who work for the government at the state or local level, which could include your public school teachers and the folks who work for the state agencies. Federal law permits the states to grant voting rights to public sector workers, which is to say, the rights to hold regular periodic elections for the unions to determine whether or not they wish to keep them. It also creates the opportunity to vote for another union to represent them. Not surprisingly, union workers believe that these regular periodic elections would create much greater accountability. 85 percent of union households believe that holding these regular periodic elections would give them accountability over the unions, which currently they simply do not have.

If you go to our website, workervotingrights.org, you can read quotes from the heads of some of the major public sector unions when these sorts of campaigns have been conducted in the past. They admitted they have taken their members for granted. Considering they have life terms this makes some sense. They have very little incentive to be representative of their members and do a good job. Because of that, we have seen dissatisfaction grow in the union worker ranks.

This provides accountability and competition, since elections allow the membership to potentially vote in another union. Competition works in private industry, so it could work with unions as well.

Bob Zadek: This is not anti-union *per se*. It is anti-serve-for-life. All you are seeking to do is to give union members a choice like the rest of society has. You

want to open up union elections to the marketplace and let the best union prevail. How could anybody be against that, including union members? Once again, you have a very strong political lobby opposing what you want to do. What successes have you achieved, or do you expect to achieve? Are you optimistic that other states will follow Ohio's lead?

Robert Alt: We just launched this in Ohio, but our business model is to market our ideas across other states. We seek to have an impact in states across the country through our Economic Research Center. This idea has taken hold in a few states already. Tennessee has worker voting rights for teachers unions. The teacher unions have to stand for reelection every three years in Wisconsin, as well. Iowa recently passed a similar provision, and the workers have voted out their unions. In recent elections in Iowa the unions did very well in being re-elected as the bargaining representatives. The key is empowering the workers and giving them a voice and a choice.

However the *Janus* case comes out, even if right-to-work ends up being the law of the land, you still should not be forced and stuck with that union, and should be able to vote for which union represents you. This goes to the core of fundamental fairness and associational rights, and Buckeye is intent on helping workers exercising that right.

Bob Zadek: If you're a public sector union member listening to my show, be advised that we libertarians and The Buckeye Institute have your back.

2 – THE ANTI-FEDERALISTS STRIKE BACK

Guest: William Watkins, Jr., Research Fellow at [the Independent Institute](#)

Interview Date: [February 5, 2017](#)

The Constitution's First Draft

Bob Zadek: The week of February 3, 1913, was a black week in American history. The despised 16th Amendment, proposed by William Howard Taft, was ratified, establishing the income tax.

To make matters even worse, on this week in 1937 President Franklin Delano Roosevelt announced the Supreme Court packing plan. The Supreme Court had been finding all of President Roosevelt's New Deal legislation to be unconstitutional (which of course it was), so President Roosevelt threatened to increase the number of justices to 15 unless the court backed down. As was said at the time, "a switch in time saved nine." The nine justices on the Supreme Court backed down to the will of President Roosevelt, and so we had the New Deal legislation that changed the country forever. That is why I shudder at the thought of what happened on this week in history.

On that happy note, I am pleased to welcome William Watkins, Jr. Bill has written [Crossroads for Liberty: Recovering the Anti-Federalist Values of America](#).

2 – The Anti-Federalists Strike Back

America's First Constitution. The Articles of Confederation were our first constitution. This is perhaps the third time in the 10-year history of my show that I can visit one of my favorite historical issues: did the founders get it wrong?

Was it a mistake to replace the Articles of Confederation in full with our current Constitution?

Was the ratification of the Constitution a mistake?

What if we would have been better off fixing the Articles of Confederation, which was after all the reason the founders met in Philadelphia in May of 1787?

Bill, was our Constitution a mistake? And if it was a mistake, what went wrong? Do you have a proposal for remedying it? Tell us about the Articles of Confederation and how they came to be replaced by the Constitution.

Bill Watkins: The Articles were our first national constitution. They were drafted by the Continental Congress – later to become the Confederation Congress once the Articles were ratified – and they set forth the relationship between the states and this national government. The Articles were a state-centered system. The states would choose the representatives that would go handle national matters at the seat of government, which was at war with Great Britain at the time.

The states had great control over their representatives. Congress did not have the power to tax directly. Requisitions and money had to come through the states. It was a very decentralized system, where each state expressly retained all of its sovereignty and independence that they were seeking from Great Britain.

Were the Articles a success story? Absolutely. If you measure the Articles against the goals that they were supposed to achieve, one would be independence from Great Britain and the other would be the preservation of self-government in the individual states. Those were the two goals and they were both met once Cornwallis surrendered to Washington and the French in Yorktown. For all practical purposes, the American Revolution was over, and peace talks for the Treaty of Paris started right thereafter.

With the coming of peace under the Articles and the system that they adopted, the states were very free to run their own domestic policies and to experiment

with various policies to serve as laboratories of democracy. If we look at those two goals, we have a great success story.

Strengths and Weaknesses of the Articles of Confederation

Bob Zadek: The Articles of Confederation said nothing about the relationship between the citizen and government. The Constitution, however, has a whole lot to say about the relationship between citizens and government. While the Constitution established the relationship between citizens and the Federal Government, the Articles left that up to the state constitutions. The Articles of Confederation were nothing other than an agreement among states about how they could live together for mutual benefit.

Bill Watkins: That is a very good point.

Under the Articles of Confederation, Congress did not have the power to act directly upon individuals. The states essentially served as the mediating bodies between the people and the government of Congress. It wasn't until we had our current Constitution that the national government could act directly on individuals. We had a great palladium of liberty that "We the People" would have an intermediary body, through the states, to protect us from the national government and the powers that it could impose!

Bob Zadek: Your enthusiasm for the Articles of Confederation (and mine) was not shared by many of the founders, or else they would never have called a meeting in Philadelphia in 1787. What were perceived to be the weaknesses of the Articles of Confederation that caused the movement to adopt a Constitution?

Bill Watkins: There would have been some troubles in the years after the war whether we had a strong central government or not. First, British troops occupying forts in the American northwest chose not to leave so quickly because of confiscation of loyalist property.

After the war, we were having difficulty paying our debts. Of course, that would have been true no matter what system of government we had. When you spend that much money and capital in a war, there is typically going to be some economic depression or recession following the war. That was of great concern

2 – The Anti-Federalists Strike Back

to them. Congress did not have an independent source of revenue at the time as well.

Also, many thought that the United States, once free of Great Britain, would be a richer country automatically. What they failed to realize is that the colonies had enjoyed the protection of the Royal Navy. They had certain trading rights with the British West Indies that they lost as an independent nation. These are not intrinsically related to any weakness in the Articles, but the economic situation plays in.

We also had a little rebellion up in Massachusetts as farmers were having their property confiscated because of taxation and other policies that were employed to fill government coffers.

Bob Zadek: Shays' Rebellion?

Bill Watkins: Exactly. They stood up against this taxation so you had a lot of unrest. Many of the framers believed that the United States needed a stronger government to be able to handle these things. Frankly, I think they went overboard. Several modifications to the Articles could have easily addressed these problems, but it was obviously a good opportunity for your more continental-minded, nationalistic, centralized thinkers to bring in a new form of government. That is what they did.

Bob Zadek: I guess they realized that a crisis is a terrible thing to waste. They took advantage of the unrest, especially Shays' rebellion – which scared the bejeezus out of many people because it was a rebellion of debtors against creditors and of agrarians against moneyed interests. This illustrated a weakness under the Articles of Confederation.

The Prophecies of the Anti-Federalists

Bob Zadek: Many people may not realize that when they met in Philadelphia in 1787, the ostensible purpose was to fix the Articles of Confederation, but Madison had a different idea. He attended that meeting in 1787 with the outlines for a new government starting from scratch, called the "Virginia Plan." By doing this, he got to moderate the discussion. He was also quite brilliant and understood the issues better than many of the other people.

POWER TO THE STATES

The Articles were basically discarded and the framers started from scratch. They then spent five months designing the Constitution. Now, after it was drafted, the country was asked to ratify it. The country broke down into two factions. There were the Federalists who supported the newly drafted Constitution and the Anti-Federalists, who opposed it. Tell us about these competing camps, and who could better foresee the future.

Bill Watkins: Well, the Anti-Federalists were your Republicans who believed in a true form of Republicanism.

Go through the Constitution and the Federalist Papers and look at the promises of the Federalists – how the Constitution would be limited, and about how certain clauses would not confer any new powers on the national government, they would just invigorate already existing powers. Then look at the Anti-Federalist arguments and their predictions of what these provisions would actually do and start to run a tally. It is clear that the Anti-Federalists were correct.

They predicted over and over again how the national government would likely abuse certain clauses, such as the general welfare clause, the necessary and proper clause, and the commerce clause, which today has become a source of universal jurisdiction for the national government. They predicted how the treaty power could be used to undermine the rights of the people in the states. We could go on and on. It is almost as if they had a crystal ball and could look into the future. These were men dedicated to a form of Republicanism that stressed government on the local level. It is really a different vision of government and Republicanism that we have today.

Bob Zadek: In other words, all the founding generation were patriots and had the same goal, but the Anti-Federalists saw something that the Federalists saw and did not care to see. I invite our listeners to read a collection of writings called the [Anti-Federalist Papers](#) – a collection of essays written by those who opposed the Constitution. When you read the Anti-Federalist Papers and their dire predictions of what would happen, it all happened – everything from the king-like power of the president, to the reach of the Federal Government into our everyday lives. Given the goals of the new government, the Anti-Federalists knew what they were doing and the Federalists – like Madison, Hamilton, Jay – got it wrong.

2 – The Anti-Federalists Strike Back

The Federalist Papers are often cited as an indication of what the founders intended when they wrote the Constitution. They were written in order to persuade the public. When Madison, Hamilton and Jay wrote the Federalist Papers, were they smoothing over some of the defects of the Constitution?

Remember, they were not really legislative history. Rather, they were written to persuade New Yorkers and the rest of the country that had not yet ratified. Bill, do you have any thoughts on whether Hamilton and Madison really believed what they wrote?

Bill Watkins: That is a good question. It is a difficult question, especially if you expand it outside of the well-known Federalist Papers to other Federalist writers that were friends of the Constitution. As for Hamilton, I don't think the question is hard at all. Hamilton was just writing political propaganda to get the Constitution ratified.

For example, Hamilton talks in one of his Federalist Papers about how an excise tax would only be implemented or used in the most dangerous situations the country would face, and therefore was nothing to be worried about. Well, as Secretary of the Treasury, he pushed through an excise tax on whiskey and then led an army into Western Pennsylvania when farmers rebelled – the so-called “Whiskey Rebellion” – against this tax.

His writings were propaganda. Madison and others were men who in good faith believed that certain clauses would not be misused. For example, Madison credibly argued that the Constitution lifted some language from the Articles of Confederation and, therefore, we should not be alarmed. Madison was also a man who wanted to give the national government or a veto over all state legislation and was very unhappy when that didn't happen. So, I think it is a mixed bag there, Bob.

Bob Zadek: Madison really wanted to get rid of the states. He didn't support the states' continued existence in any event. He considered the fact that the states survived the Constitution to be somewhat of a defeat. It was not part of his plan. He really wanted the states to be the administrative agencies of Washington.

I am troubled by the fact that so many scholars will cite the Federalist Papers in support of a proposition when they were – as you have said – propaganda to support the Constitution. I don't find the Federalist Papers to be appropriate

POWER TO THE STATES

support for any governing principles. It was support only for what the founders wanted us to believe, rather than what was really in the Constitution. The premise of your book is that it would have been better to amend the Articles of Confederation. What amendments would have given us the kind of country that many of us wish we had, but we do not have?

Bill Watkins: I try to model my suggestions in the book off of Thomas Jefferson's draft constitution for the state of Virginia. Some of the features, for example, like bicameralism – a two body legislature – are a good thing. I believe we could have simply given Congress a limited source of revenue, as they had requested but which was not worked for terribly hard – say, by tariffs on imports. They could have used that to raise revenue or pay the debt back. Then when that was paid down, we could have gone back to a state requisition system. The states would have funded the national government honorably.

I think we would have been better off with Article II in the Articles of Confederation – unlike the 10th amendment to our Constitution – where each state expressly retains all of its sovereignty and all of its powers not expressly granted to the national government. We can follow Jefferson's draft and see how a state-centered union would serve the people and their liberties, having these states mediating between the central government and the people themselves. This would give us a system much more conducive to liberty than what we have now.

Bob Zadek: On the subject of individual freedom and that soaring and aspirational language of the Declaration of Independence, “that all men are created equal, that they are endowed by their creator with certain inalienable rights...” There would not be any assurance that an individual state would meet those standards. It would be up to the state itself and citizens of that state to vote with their feet if they were unhappy with their collection of rights. Is that correct?

Bill Watkins: That is absolutely correct. We have a national one-size-fits-all remedy crafted in Washington D.C., today, where people really cannot vote with their feet.

Take Obamacare as an example. Before Obamacare, when the states were allowed to experiment with healthcare, we had “RomneyCare” in Massachusetts. If people were unhappy with that system they could vote with

their feet and reject those policies by moving to a neighboring jurisdiction that was doing a different experiment. But when you have a one-size-fits-all national program, experimentation is over. Absent moving to Canada, which is less free than we are, or Mexico, which is dangerous and socialist and not exactly a welcoming place, you are stuck. There is nothing you can do. Debate is stifled. It is a disaster.

Bob Zadek: Voting with your feet sends a clear message and is a powerful way to express your opinion towards your government. Voting at the ballot box, meanwhile, is ineffective.

The Battle Over Ratification

Bob Zadek: The Article of Confederations, our first Constitution, retained the autonomy of statehood. Citizens had very little relationship with the Federal Government under this constitution. The states had the relationship with the newly-formed United States of America. This was replaced in 1788 by the Constitution after a bitter ratification battle. The Constitution was ratified by the requisite nine states. Ultimately, 12 ratified. Finally, South Carolina ratified it. They were the last state. Thus, we have our Constitution now.

The ratification battle was an interesting political battle. It was presented to the American people on a “take it or leave it” basis. There was a lot wrong with the Constitution in the eyes of many folks living at the time, but they were not able to carry the day.

That battle for the hearts and minds of America to ratify was a pretty nasty affair. People were denied access to a lot of information; Anti-Federalist articles were not allowed to be printed. If you read what happened during ratification, it is not so clear to me that the Constitution was embraced by a majority of the people, and if they did embrace it, they might not have known what they were getting themselves into.

Bill Watkins: It was a big fight. There was a dispute among many of the Anti-Federalists whether they should push for an outright rejection of the Constitution unless there were prior amendments. When the states started to ratify quickly, they wondered whether to go along with ratification and be with the mindset of the new government in order to change it. But it ended up being just a knock-down drag-out fight between the Federalists and Anti-Federalists.

POWER TO THE STATES

Bob Zadek: If I'm not mistaken, one of the issues was that the voters were told to vote on the Constitution, "Up or down. Ratify or don't ratify – but do not try to change it because there isn't any time. The British are about to invade, and the Spanish are about to invade, or the French were about to invade, and if you don't do it now, we will never have a country or you will be dead."

The public had no way of knowing how true that was, so when given the choice of ratification or not, it was a pretty obvious choice.

Bill Watkins: It is sort of like the Patriot Act. Those who want ultimate government power typically either use an actual crisis or they cook one up in order to disturb the minds of the people and their representatives, to pressure the public to take some action rather than calmly deliberate. And unfortunately, as you and I both know, there is a ratchet effect. As Frank Meyer said, once government receives a power it is rarely ever given up. It is just ratcheted up further, to accrue more powers.

A Means to Liberty: The Amendment Process and the Supreme Court

Bob Zadek: What are some solutions that have occurred to you in your scholarship?

Bill Watkins: The biggest thing we can do, aside from general education of the people about our history and about liberty, would be pushing for an amendment process to the Constitution. We have really got a pig and a poke when we have an amendment process where the national government controls all the amendments that could affect its power.

First, we have the never-used "convention method," where you would have a national constitutional convention. There are obviously fears over a runaway convention and what people would do today in a convention. Nonetheless, Congress is the one that would call it and perhaps it could set strictures on what the convention could consider.

Secondly, all the other amendments that we have come through an amendment process whereby Congress sends an amendment to the states. What do those amendments typically do outside of the early founding era? They augment the power of the national government in some way.

2 – The Anti-Federalists Strike Back

So, what do we need to do? The people need to push hard for a more state-centered amendment process, where the people in the states can actually propose amendments. They can be ratified in the states without the action of Congress, and without having to be filtered through Congress. It is just a great sadness that we have such a nationalistic amendment process. No wonder you are not going to get a balanced budget amendment. No wonder you are not going to get a roll-back of certain federal powers. A change to the amendment process would be high on the list.

Bob Zadek: The problem with your solution is that it requires a lot of public officials in the House and the Senate, as well as the President, to agree to move forward in the way that you said. That is not likely because they are the ones who will be surrendering power.

I find the greatest hope to be in the Supreme Court, because with one or two changes in the composition of the court in the right direction, the likelihood for change is profound. You get leverage when one or two justices are changed in the court. This will cause the whole relationship between citizens and the government to change dramatically. Neil Gorsuch is a step in the right direction.

I would remind us all that some of the movements away from and towards liberty were a result of actions by the Supreme Court, not by the Congress. Therefore, I look to them because they have great leverage. Any thoughts?

Bill Watkins: There is a great leverage there. Whatever one thinks about Donald Trump, he has done us “a real solid,” as they say on the streets, with the nomination of Gorsuch. He seems to be a strong originalist and definitely someone who will fill the seat of Justice Scalia.

I do, however, have a concern with the court serving as a fundamental and final arbiter of the Constitution. Having nine unelected individuals exercising the power that they do means that there is a lot they can do that is good for liberty, but also a whole lot they can do to destroy liberty. I would prefer to see the popular branches or state legislatures, which are accountable to the people, make these changes.

3 – WINNING LEGISLATURES

Guest: Cliff Maloney, Jr., President of [Young Americans for Liberty](#)

Interview Date: [June 17, 2017](#)

Toward a Theory of Effective Libertarian Activism

Bob Zadek: Hello everyone and welcome to The Bob Zadek Show, the longest running live libertarian talk radio show on all of AM radio. Thank you so much for listening this Sunday morning – this Father’s Day.

There is an important secret for success in business and in life. It is an important concept without which you waste a bit of your time. The concept is called “leverage.” In everyday life it is called getting the biggest “bang for the buck.” How can one use resources, whether time or money, to their maximum advantage?

The show this morning is all about the effective use of leverage to accomplish political goals.

For many years I have supported selective candidates for federal office. I did so because I wanted them to win. They were liberty candidates who felt the way I did about freedom, personal responsibility, and limited government – but I

3 – Winning Legislatures

found myself getting more and more and more frustrated. There were never any results for those contributions, even if the candidate won. The candidate that I helped into federal office in the House or the Senate in Washington never seemed to get a lot done. The structure of Washington prevents that profoundly.

So I was stuck.

I made a decision that it was a waste of money to support federal candidates. I got no bang for my buck. How we can actually have – irrespective of our limited resources – a leveraged, beneficial effect upon the political life of the country?

This morning’s guest will help us understand how to get the most bang for the buck. I wrote a book called *Secret Sauce: The Founders’ Original Recipe for Limited American democracy*. My guest this morning, Cliff Maloney, has found the “secret sauce” of political leverage.

Cliff Maloney is the president of [Young Americans for Liberty](#), aka YAL. He helped create that organization almost a decade ago. Cliff will help us understand how we can affect profound change in the political direction of our country.

Cliff, welcome to the show this morning.

Cliff Maloney: Hey, Bob. Pleasure to be with you.

Bob Zadek: Tell us about the history of YAL, and how it operates on college campuses.

Cliff Maloney: Young Americans for Liberty was founded back at the end of 2008. This old gentleman from Texas, Ron Paul, had run for president. To the surprise of many people, there was a young following for him. Back then it was unheard of for a Republican to be tapping into support from younger folks. All of these young people just got excited about the ideas of libertarianism that they hadn’t heard of before.

My predecessor, Jeff Frazee, decided to wrap Students for Ron Paul – which he had started and built into a nonprofit 501(c)4 organization – into an organization called Young Americans for Liberty, so that these ideas wouldn’t

POWER TO THE STATES

have to die off from campaign to campaign. Instead there would be some consistency in trying to reach young people across the country.

As of today, we have close to 900 chapters around the country, specifically working with college students. We're working on college campuses to try to reach people and pull them back from the brink of socialism.

We have built a pipeline – we like to identify key leaders in each of the chapters; we educate students as much as we can about the principles of liberty through campus activism; then once we've built that army of students, we train and mobilize them.

Today I want to talk about not just training our students but *mobilizing* them into a new program we are calling [Operation Win at the Door](#). This focuses on the state level, because your opening remarks could not be more correct. So many resources are spent on federal races that you can't really impact. Operation Win at the Door is focused on deploying our students to knock on doors for *state* legislative races.

I don't care if it's left, right, libertarian, or socialist – we are out there and trying to reach and create new libertarians. Just this past school year alone we did over 3,200 campus recruitment events. This is the type of excitement, energy, and buzz we're trying to create around the principles we believe in.

The Fertile Soil of College Campuses

Bob Zadek: Many of my listeners and subscribers to the podcast have been out of college for a while. Can you share with us what it's like on the ground on college campuses? Most of the information I get is what I read and see in the media. What is it like when you recruit on college campuses for a liberty-focused organization? How receptive are students to the message? Have there been any problems in recruiting? How do you overcome them, and specifically, have you detected that certain demographics on college campuses are more receptive than others?

Cliff Maloney: We are recruiting in a world where most people are apathetic. When they *are* engaged – typically in the Republican and Democratic Parties – most of the engagement is either identity politics or party politics and is not about philosophy or the proper role of government.

3 – Winning Legislatures

You have to look back to the 2016 election. Many people told me they thought the election must have been tough for us. But it actually opened a door, because the entire election discussion was about her emails and his hair. I like to say that jokingly, but it's pretty true. Nobody was talking about the issues, except for us. The candidates didn't even really have policy positions on their website.

Many folks think that college students are socialists, but it is really a time when people are willing to have conversations. They are going to think. They are curious and looking for solutions – that is why we focus on campuses. This type of curiosity leads people to have an open mind about our message.

We were out there talking about things like civil liberties, a sober foreign policy of non-intervention, and a truly free market. These are ideas that most people just weren't engaging with during the presidential election.

When we put together a national activism project at our national headquarters, such as [“Restore the Fourth”](#) (all about the Fourth Amendment), or [“Bring them Home”](#) (foreign policy), we test it on some campuses and iron out the kinks, then we package it in a way so that all of our chapters can participate. We put all the materials in a box, ship it to them, and then do a big national push.

Regarding demographics, we pick issues that reach different people on campus regardless of their upbringing and preconceived ideologies.

People assume that 75 - 80 percent of kids are coming to campus are already socialist and think the government is the answer to all of our problems. We've found that typically 9 out of 10 students that come to campus are just apathetic. They haven't engaged. They don't care. I don't think that is horrible. I wish more people were engaged, but these kids just care about getting their degree and finding somebody to marry. They care about having a beer at night. They care about the intramural soccer league. They have things they are passionate about, but at this point the government has not affected them much.

10 - 20 percent probably have already been pulled into this idea that government is the answer and we need another government committee every time there is a problem. We try to reach the low hanging fruit by focusing on issues outside of the role of government, because we are trying to get them to engage.

“Bring them Home,” for example, focuses on foreign policy. We have a mock military draft – like street theater – to engage students. We have a spin wheel

POWER TO THE STATES

that lists the last seven countries that we bombed or have been militarily involved in. Wherever it lands, that is where you are headed. For example, you may be deployed to Iraq, and we have a palm card that that has some statistics about how long they've been there. It illustrates the need to bring the troops home. These are the types of conversations we like to start.

We also realize that we only have probably one and a half to two minutes with somebody on campus when we trying to recruit them. Our goal is not to get them to be full-blown libertarians, but just to pique their interest.

Every campus is going to have people with different ideologies, but there are certain issues that connect better with people that had an upbringing on the left versus people that had an upbringing in more of a Christian or right-leaning type of household. For example, Liberty University in Virginia, which is very Christian, is going to have a very different culture than some of these other campuses.

The issues that people on the left can connect with typically concern civil liberties, such as privacy, the War on Drugs, mandatory minimums, foreign policy, etc. Whereas with people on the right, we can talk about economics, lowering taxes, and the limiting the size and scope of the government.

However, if you look at our leadership and the people who come to our events, I am proud to say that we are reaching people of all backgrounds. We are able to engage just about anybody if we can find the right issue.

The “Heckler’s Veto” – the New Face of Censorship

Bob Zadek: We read a lot about what’s called the “heckler’s veto.” When speakers (admittedly inflammatory speakers) such as Milo Yiannopoulos, Ann Coulter, or Charles Murray go on campus, they get shouted down. Do you find yourself targeted as well, or not? Because your message is not inflammatory.

Cliff Maloney: Right now there is an interesting climate on college campuses – it is very emotional and gets very heated.

I believe in the free markets and I think what happened is that some of groups realized that there is actually a light that shines on them, and they get credit and press when they protest. It is this vicious cycle because they realize that they can continue to get the spotlight if they protest.

3 – Winning Legislatures

There is a huge difference between endorsing and tolerating speakers. I'll give you an example. At Young Americans for Liberty, we don't host Milo. There was a time back in the day when he would say things about cutting government and lowering taxes, and at that point we would have him on campus. But at a certain point it became more of a Trump show.

Now, while we do not want to endorse him, do we think he should have the right to speak on campus? Absolutely. Everybody has the right to speak. That is what free speech is all about. However, let me be very clear. I support their right to speak on campus 100 percent. The Young Americans for Liberty will not, however, be endorsing or advocating or promoting these speakers, because we don't agree with what they say. There is a key difference between tolerating somebody and endorsing them.

People on the right need to get their act together and realize that they should not be promoting certain people. It is fine if you want to be controversial. Cutting taxes is controversial. Reducing spending by 75 percent is controversial. I am all about that type of controversy or radical change and would promote those people but putting your name on some of these other speakers is not a good place to be.

About two years ago we were continuously running into this problem where school administrators would either shut down speakers or would shut down our campus recruitment events. It did seem biased. They implement unconstitutional speech code policies that we call "muzzle codes" because they muzzle speech on campus, and then they can start to use those to shut down speakers or events or campus recruitment activities. They always have had reasons like "ensuring campus security." They started to build these things in because they want to have jurisdiction to determine whether somebody can speak or recruit on campus.

About two years ago we began challenging these codes, which had become an epidemic. Young Americans for Liberty launched something called the "National Fight for Free Speech Campaign" – the whole purpose of which was to go after and directly target unconstitutional speech codes and reform them.

Bob Zadek: On speech codes, there's an interesting dichotomy. One must draw a distinction between public colleges – colleges run by government – and private colleges. At public colleges the Constitution governs behavior, and since

POWER TO THE STATES

government cannot limit free speech they cannot either. The Constitution, on the other hand, does not regulate private colleges.

How does one enforce the right to free speech on private universities? Well, organizations like YAL and FIRE, the Foundation for Individual Rights and Education, have sued the colleges – not citing the Constitution – but citing contract law. They say that students and the universities, in their websites and their materials, advertise themselves as offering a free speech environment, and organizations sue to enforce that. They say that is part of the contract between the student and the university and sue these universities successfully on breach of contract theories.

So, we have the Constitution regulating free speech on public school campuses, and we have something as basic as the common law of contracts regulating free speech on private colleges. It's very interesting and I must say very effective.

Operation Win at The Door

Bob Zadek: Cliff, tell us about Win at the Door, and specifically, tell us about the “win” part.

Cliff Maloney: It's important to understand how we got to this point, because if you don't then it is really simple to push back on this idea that we should focus locally.

There are plenty of different ways to define success. For some groups and people in the movement, success is educating people. We have a huge component of education in our work. That's how we recruit all of our member base. Some people are more focused politically. Look at Ron Paul, Congressman Thomas Massie, Congressman Justin Amash, and Senator Rand Paul. Here is some success. Some would say that we only have a few people, while others would say that having just these three to five people elected that identify as libertarian Republicans is success. It is all about perspective.

We saw that we were having a lot of success as an organization. We were holding ourselves accountable to make sure that we were producing results, and we are recruiting new people to be effective in our work. Our slogan is “make liberty win.”

3 – Winning Legislatures

I asked the team, “How many more chapters do we need to restore the republic and to save liberty in this country?” There was an honest conversation, and the answer was that there was no straightforward number, but we realized we needed to put this youth army that we have built at Young Americans for Liberty into action. We needed to mobilize them to take action to advance the cause.

Sending mail, doing TV, radio, digital ads is all just money. Anyone who has money can do that. That’s not an advantage for us when we have this youth army of students who care about the principals. We went back to the drawing board and started talking about knocking on doors. Knocking on doors is *something*. People aren’t out knocking on doors for Jeb Bush, let’s put it that way.

We decided that if knocking on doors is the tactic, we needed to focus on state House races. I had a conversation with Thomas Massie and Rand Paul about how every time a seat opened in a district they were struggling to find a libertarian candidate. It was because we didn’t have the bench. When we started putting all these pieces together, we realized that we could build this bench if YAL took this youth army and focused on winning state legislative races in the lower houses, not the Senate.

First, we wanted to have legitimacy – a voting record so somebody could point at us and see voting success, rather than just standing on the sidelines.

Second, we wanted media. The media will listen to somebody who has been elected by a community, so when we get someone elected they are not just the local schmuck who cares about the property tax. They will be given attention from the media.

Third, we wanted to develop this bench. We need a bench of people across the country that care about the principles at the lower-level state governments, so that when higher seats open up they can get more involved.

We have ten students in the district knocking on doors for one month. They knock on between 30,000 and 35,000 doors to try to get around 2,000 votes to win.

In order to find the right candidate to support, they need to pass our liberty and our viability threshold. I’m not going to sacrifice any of our principles when we endorse a candidate. However, they also have to be viable. That is, they have to

POWER TO THE STATES

have a chance at winning. We will endorse anybody from any party. I don't care if you're running as a Libertarian or Green, Republican, or Democrat.

That's our test, and so far, we have had three victories. Because of our door-knocking efforts we have three state legislature victories across the country that showcase these ideas once we get past the generals.

Bob Zadek: I wish you were around when I was in college. My life would have been so different if I had been involved in an organization like YAL when I had the time and the motivation. Now, when you talk about knocking on doors, what are the students doing?

What's the experience of knocking on doors like? How receptive is the person on the other side of the door? How long does a typical exchange take and what has the receptivity been?

Cliff Maloney: Let me walk you through a day in the life of a door knocker. We've got 10 students staying at a hotel or Airbnb. They have a morning meeting – let's say at 9:30 in the morning. So, everybody's up, showered, and ready to go at 9:30 in the morning. The team huddles and talks about the goals for the day. They talk about the neighborhoods they are going to be knocking in. Any other information we have about how this neighborhood might have voted in the past election and those types of things are discussed. When they go out and knock, they actually use an application called [i360](#) directly on their smartphone that has a built in GPS, that gives you the best route possible based on the doors that you're knocking on.

For each door that you knock on, there's a script on the phone with different information about the voters that live in that house, and there are a lot of specifics that show you what issues you can try to connect with the voter on. As you approach the door, you have a piece of literature and your phone. The literature is about our candidates that we have endorsed. This is our own message and is not coordinated with any campaign. We look at the district and what the candidates are running on and we see whether we can use any of that public information to build our message.

After one to two days of knocking doors, you don't really need the scripts. Every district might have a different script depending on our strategy. So, somebody answers the door and you say, "Hi, Mrs. Smith, my name is Cliff and I'm with Young Americans for Liberty. Are you a concerned citizen?"

You try to get them kind of engaged right off the bat.

“I’m supporting Savannah Maddox for state representative. Have you heard of Savannah?”

At that point it’s a conversation to try to get the other person to the point of saying that they would support the candidate.

We talk about issues like her respect for privacy, limited government, and lowering taxes. The goal is to connect with the person at the door. Now a sad fact, if you want to live in the world of reality, is that most people have no idea who their state representative is. That’s the truth. This is a name game. We need people to hear the name Savannah Maddox. If nobody is home, we leave a door hanger with some literature. Each day a door-knocker will knock on between 100 to 175 doors. They take an hour for lunch and sometimes knock late into the evening.

These guys are warriors. These guys and girls are out there, and they really care. It is cool to see that culture because we don’t have to push them. They are there for 30 days and this is their opportunity to elect a real liberty voice, and that drives them to take action. Bob, if a young kid comes to your door who is 19, 20 years old, and they care passionately – especially if it’s 110 degrees out, or if there is three feet of snow – and they are bright, competent, and know the issues, this is a complete contrast from how you see the millennials portrayed. We have seen a lot of good results and we won an open seat in that Savannah race in Kentucky by 26 percentage points using that exact model.

Bob Zadek: Say that number again because that is really powerful. What percentage do you win by?

Cliff Maloney: We went in there, knocked on over 30,000 doors and we won by 26 percentage points over our opponent.

Early Wins and the Long Game

Bob Zadek: Here is the reason why I have become such a committed supporter of the Young Americans for Liberty. There are two issues I care about profoundly.

One is, of course, the political direction of our country.

POWER TO THE STATES

Second is my fear of what's going on college campuses. As Cliff mentioned, students are apathetic, uninformed, and indoctrinated into a Big Government state of mind. I tend to feel helpless and discouraged and depressed. Here I find that when I support Young Americans for Liberty, I accomplish great leverage. On the one hand, I help to expose college students to a point of view to get them active – to get them engaged – and I further political points of view that I really support.

Even though I might be getting somebody elected in the lower house in Georgia, or the lower house in Kentucky (something that's probably going to have a very diminished effect upon my life) the fact is that there is power in numbers.

These are people who want to do something in politics, and if they are good they move on to higher offices. The analogy that Cliff made to building “a bench” is true. It is a long game. It is an effective game. I found that rather than giving whatever support I could to a candidate for federal office (which was always money in the toilet with no benefit) I can use these organizations and get more bang for the buck.

Tell us a bit about the victories, because Operation Win at the Door is a young movement. You're still building it, but you have already had some successes.

Also, when the students come back from 30 days in the hot sun knocking on doors, do they come back exhausted and say, “never again?” Or do they come back and want to run for president?

Cliff Maloney: The students are typically looking to continue. We see that a lot get involved. Many of them we will actually promote to run a race. We have nine door-knockers and one person who kind of knocks doors but is also a field director for the program. They have a great time, they have victories on their resume, and they are energized.

The best thing that comes away from this, outside of the victories, is the bench of people that now understand what it takes to win. It's difficult out there. You need to realize that you are trying to connect with everyday voters – you're not on Facebook trying to win Facebook arguments. You have to realize that these are the people that vote. They come out energized because they've learned so much. Now, directly on the ground, they are leap years ahead of the establishment and all these other political hacks that think that they have it

3 – Winning Legislatures

figured out because they have the best Facebook ads in the world, and this is the reason we won the race.

We have won three races so far. The first one was Mayes Middleton in Texas. We went up against an incumbent for our first race because I wanted to prove the concept and wanted to really go out on a limb for a tough race. We went against a four-year incumbent who stands for everything that liberty is *not*: cronyism, raising property taxes, etc. I mean just, *not liberty*. So, this young guy, Mayes Middleton, decides to run. The opposition spends over half a million dollars against us. We went in there for 30 days, knocked on 30,000 doors, and we beat the incumbent by 14 percentage points.

The next race we won was Savannah Maddox in Kentucky. She's actually a state representative in Thomas Massie's congressional district. I'm not going to make any predictions, but let's just say that if Thomas Massie ever ran for president, we would be excited about this because he would have a replacement. We went in there, knocked on over 30,000 doors, and won in a heavily Republican district by 26 percentage points in the primary.

Win number three was in Georgia. You guys can look him up – he's a gentleman named Matt Gertler. He is an absolutely principled guy and votes "no" on pretty much every single bill. The best part is that he is a Republican – and guess who is the majority down there? They don't believe in any type of limited government or liberty. So, he is the only Republican to vote against the budget and the Governor, the state Senate Majority Leader, and the Speaker of the House – every member of leadership winds up against him. We went in, deployed 10 students, knocked on 36,000 doors in rural Georgia, and we beat the challenger by 20 percentage points.

So those are the three big victories that I am excited to share with you. This is just the beginning. In 2018, I wanted to do three races and prove the concept, but the idea here is to build a real bench. Our five-year plan is to elect 250 liberty legislators and state representatives across the country. This would be a bench that would make a difference.

Bob Zadek: To me, the only way we can affect change in this country is at the state level. The Federal Government dug in its heels with marijuana regulation. The states have turned the tide and rejected it. 20 states enacted "right to try"

POWER TO THE STATES

bills to try drugs that have not been approved by the FDA, so if you are fatally ill, you now have the right to try in 20 states.

The Federal Government has also come along for the ride regarding sanctuary cities. So, all the action is at the state level. The states are pulling Washington in the right direction, so that is why I am so excited, and YAL is working at the state and local level. Now, Cliff, we only have a couple of seconds left. How do our listeners follow what's going on at YAL and the successes of "Win at the Door"?

Cliff Maloney: You can head on over to YALiberty.org. If you are a student and want to get involved, we have plenty of opportunities. If you are a donor who wants to support our efforts we would love your help. You can tweet at us [@yaliberty](https://twitter.com/yaliberty).

We are just trying to make liberty win, so we're out there now. We're fighting the good fight for this bench and trying to get young people to realize that the free market and individual liberty is the way forward.

4 – CALIFORNIA DISCOVERS FEDERALISM

Guest: Joe Mathews, California editor for [Zócalo Public Square](#)

Interview Date: [July 22, 2018](#)

The California “Residency” Permit Plan

Bob Zadek: It is heartbreaking for me to see the news every night about what the Federal Government is doing in my name – and presumably on my behalf – to immigrant families and children at our borders. I wish I had the capacity to change things, but change will come.

The media, for one, has become very active in encouraging a change. I’m delighted to welcome to the show this morning Joe Mathews, a journalist who writes for [Zócalo Public Square](#), a blog sponsored and administered by Arizona State University. Joe’s column appears syndicated in many newspapers around the country. The piece that caught my attention for today’s show was in the *San Francisco Chronicle*. Joe’s thesis in his piece was that California, in particular, and perhaps the states in general, should be allowed to create, enforce, and regulate their own immigration policy independent of the Federal Government. Welcome to the show this morning, Joe.

Joe Mathews: Thanks for having me.

POWER TO THE STATES

Bob Zadek: Now, Joe, you can never summarize a thoughtful piece in one line, so please expand, if you will, the thesis in your piece entitled, [“In great American tradition, let California take undocumented immigrants”](#) (Sept. 10, 2017, SF Chronicle).

Joe Mathews: I was inspired by a fellow named Dave Moran, the Research and Policy Director for the California Freedom Coalition, which is sometimes the butt of jokes. They were trying to get initiatives on the ballot for California to leave the union. The Freedom Coalition is the most moderate of his proposals. It actually doesn't call for secession – it just asked for as much autonomy as possible from the Federal Government over the long term.

The central idea is that California should be able to determine who is a legal resident. Whereas now the Constitution and the Federal Government get to decide who citizens are, that's not true in all sorts of places. I spent a lot of time in Switzerland where the local government gets to decide who the citizens of the country are. Unlike the U.S., Switzerland is a truly federalist system.

Could we protect the immigrants we want to protect and make that decision for ourselves? This is what has begun, and it is a natural extension of what California has been doing over recent years, regarding everything from in-state tuition to Medicaid eligibility for undocumented immigrant children.

There is something like a driver's license for undocumented folks, but the idea of the piece was that California should have the ability to determine that certain people are residents and that we want them. Not all undocumented immigrants would become residents – there are certainly people in that class that we don't necessarily want in the country. But there are other folks who are part of American families, or that serve in the military, or are from a number of other groups to which we would grant residency.

This is not a new idea. The state has a very strange body called The Little Hoover Commission, formed in 2002, that created a “Golden State residency program” to accelerate the integration of immigrants. The idea was that anyone who was participating in their local community should be considered a resident with the rights and responsibilities that entails. This includes voting in local elections – as is about to happen in San Francisco, where immigrants will be able to vote in school board elections. I would argue that this could provide protection if you were a resident. If you had a residency permit you could sue

the Federal Government, seeking a resolution to protect at least your own immigrants, or at least the ones you deemed deserving of protection. If a California resident was in another state, for example, and the Immigration and Custom Enforcement (ICE) grabbed them for deportation, I would like to see them deported back to California. If the Federal Government deported them anyway, they would have to bear all the costs.

The Wall is Not the Issue

Bob Zadek: Now, Joe, would the group of immigrants you are protecting under this proposal otherwise be considered by the Federal Government to be illegal immigrants and therefore subject to deportation? Here they are living in California, under the protection of California residency – a new status you would have created. If they are still illegal according to the rest of the Federal Government, would the government now have to build a wall along the California border with Nevada? Because then all you would have done is move the wall from the southern border to California’s eastern border. If the government says they want to keep out bad actors, but California has a different standard, how would the Federal Government protect the rest of the country from illegal immigrants doing a run around the wall?

Joe Mathews: I think this is a foolish question. The border is not the point of entry for most immigrants. People mostly come into our country by the airports. They don’t come in illegally by jumping around fences. They come in legally, and then they often stay.

Every time I write about immigration someone says, “These people knew when they were coming over the border that it was illegal.” But in many cases, they didn’t illegally cross the border. Almost everyone came for legal purposes and then decided to stay. In many cases, they’ve done everything legally, right? They just stayed illegally while they were in the process of trying to stay here legally.

We have a really broken immigration system with terrible bureaucracies that take way too much time. They take years to do things that could be done in a matter of days or weeks. People complain about how the government can’t do anything right in other contexts other than this one. They will tell you that everything’s perfect and if you’re in any violation it must be the immigrant’s fault – not the government’s fault.

POWER TO THE STATES

The wall is nonsense. That's not how we controlled immigration in the past. Under current law, you're not going to be checked right at the border anyway, you're going to be checked 100 miles away from the border. I don't want to bore you with the details, but people with residency cards – or however we would identify them – would not be allowed to live in other parts of the country. However, I would hope other states might follow our idea.

We wouldn't want to have dangerous and violent people in the state, either. Anyone convicted of a violent felony, even under current laws, is not welcome here. The residency program protects people who haven't been violent and haven't committed a serious crime, but who have family members who are U.S. citizens or legal permanent residents, people who are veterans of the U.S. military who are not U.S. citizens, and I would include their spouses.

Another group is asylum seekers. This is just a gross violation of law, of the Constitution, and of all sorts of treaties and basic principles of human rights by the current administration.

Finally, the DREAMers would have status – that is, the 800,000 people nationwide, a couple hundred thousand of which are in California. This is who we are trying to bring in as residents. This program is about getting to decide – as a state – who our residents are, and who has the right to do what in our system.

It is much better to know who everyone is and to bring people out of the shadows. When people have the status of residency, they can then do other things like make legitimate businesses, so they can grow through different kinds of financing. I spent a lot of time in South Central L.A. and there are tons of very ambitious people who have been here for 10, 15, 20, 30 years, who have businesses they could grow and do more with. The notion that these immigrants are in some ways an economic weight is nuts. I mean, this is being told to us by a president who thinks that putting tariffs on things is anything less than disastrous economic strategy.

Bob Zadek: Now you've captured my imagination. What you seem to be describing is California becoming a sanctuary state. That is, California creates a status of California residency, and people who are granted this status but are otherwise in the country illegally under Federal law do not have to fear deportation. Even if they leave California, if they go to Nevada or to Texas, for

example, the worst that could happen to them – under your theory – is that they get deported back to California. This is not the worst thing that can happen to somebody, I dare say, because of the weather.

Is this a fair characterization of what you are saying? That the Federal Government endorse the concept of sanctuary states and California becomes a sanctuary state? It will be good for the economy, people will be happier here, and only good will come of it. Is that a fair summary of your proposal?

Joe Mathews: It's also good for the U.S. citizens who have family members who are now living in fear. It gives protection from the incompetent and abusive ideology held by ICE, which predates Donald Trump. In our whole history – until less than two decades ago – we somehow managed to survive without it, and now it is pitched as essential by the Trump folks. The policy of family separation has been the policy for years. It was aggressively pursued by the Obama administration and the late Bush administration, which is to separate American children from their parents. We want to protect people and families from that ideology. There are many mixed American adults, younger adults, and children with parents or grandparents who are more likely to be undocumented. Essentially, we were trying to keep families together long before there was this big controversy of separating people who were basically fleeing Central America with their children.

Not that many years ago the parents of people across the street from me were separated by ICE, which came in the early morning and took the parents away and deported them, leaving behind an 18-year-old who is about to start her freshman year at U.C. Riverside along with her four-year-old brother. I dug into the case and it turned out that the mother had once been accused of shoplifting and had been previously deported, so they had a second illegal entry. It strikes me that this is the sort of person that should be protected by California residency program, so they can raise their American children – one of whom has gotten into our elite universities. That way, this young woman could actually go to school and not have to quit to take care of her four-year-old brother.

The Problem of Open Borders and Welfare

Bob Zadek: Milton Friedman has written a lot about this. Milton Friedman, of course, is a one of those well-known libertarian free market economists.

Joe Mathews: I interviewed him several times when he was alive.

Bob Zadek: Milton Friedman thought long and hard about immigration and concluded that an open border policy cannot exist in a welfare society. I say that with no pejorative. That's just a statement of fact. The United States has reasonably generous welfare benefits, as we all know, and Milton Friedman concluded in a data-driven analysis that open immigration and open-border policy cannot exist in a welfare state. It will bankrupt us. Therefore, he said, we have to scale back the welfare benefits.

Well, of course, our society is not quite ready for that. Perhaps it never will be. But if you don't do that, then you have to simply deny welfare benefits to immigrants or else the system will die. You cannot have the two policies. They can't coexist.

Joe Mathews: I haven't read his work on that subject. I spent much more time talking to him about tax policy and involvement in the development of Proposition 13.

However, I would dispute that premise. I actually think societies with really high degrees of welfare need immigration – particularly aging societies like our own, and even more dramatically in places like Japan. You need younger people to be productive young workers who pay taxes to cover our welfare suite of things which disproportionately go to older people. Most of our welfare goes to health. There is very little evidence of open borders bankrupting the country. You see it in California where we extended medical care to undocumented kids. There is virtue in that. We want them to be healthy so that they're well-educated, productive taxpayers who pay for their retirements and all of the benefits that go to older people.

I think the problem is the Trump argument, which makes it sound like we are in the late seventies and eighties when we had all this immigration into the country. We don't. We have historically low levels of immigration. In the last decade, we have had a net-zero or negative immigration from Mexico – which has been a big source of immigrants – and Latin American immigration is way down.

In California, immigration from Asia is greater than that from Latin American. Those are still at very low levels and that's a problem. We actually need more immigrants. We have historically high levels of job openings. We have massive

shortages of skilled workers and college graduates. We should certainly be receiving more immigration among people who either are skilled workers or are college graduates or are very likely to become those folks. That is the conversation we should be having. Racial and ethnic fears are driving the conversation rather than the reality.

It is not logical. People are crossing the border both ways. They are crossing in from Mexico and going back. Latin American birth rates are going way down. Our birth rates here are now well below replacement in California and dropped last year. California had the lowest birth-rate in recorded history – lower than even during the depths of the Great Depression. So, California is a place where we have a lot of immigrants, but they have been here for a long time. We could use some more that have the capacity and the desire to become well-educated and productive members of society.

California: America's Petri Dish

Bob Zadek: Joe's proposal in part suggests an immigration status called "California Residency." Under this system, undocumented immigrants would be lawfully in the state of California, even if perhaps not welcomed legally in other states. That, of course, invites a conversation of one of my favorite topics, which is federalism. Federalism reminds us that we have had separate but equal levels of government since our country's founding. The Federal Government was only assigned certain enumerated responsibilities and powers and all other powers were given to the states.

The 10th Amendment of the Constitution is often forgotten. It says that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states are reserved to the states respectively and to the people. In other words, almost all the powers reside in the states or in the people, and only enumerated powers are reserved for the Federal Government. That seems like a cruel joke when you read it today, given the power of the Federal Government, but Joe's suggestion reminds us of the 10th Amendment.

Why not devolve power back to the states? In this case, why not give California the power to grant residency status to put out the welcome mat for a certain class of undocumented immigrants? Joe suggested that California would set the standard and, therefore, otherwise-illegal immigrants would be welcome in the

POWER TO THE STATES

sunshine. They would have drivers' licenses, they would have many of the rights of residents, perhaps all of the rights of residents – not citizens – but residents.

One interesting aside before I turn it back over to Joe is that the 10th Amendment is a rather strange title. Even though it is the 10th Amendment and it is part of the Bill of Rights, it doesn't "amend" anything as I read it. It is a reminder. It tells readers of Constitution not to forget about the states because the founders felt that was important.

Is it fair to say that you are simply embracing the concept of Federalism and saying, "Why not have at least part of our immigration policy be decided by the states? If you are right about welfare, that California can give welfare benefits, or some welfare benefits too?"

Whether Joe is right, partially right, or wrong, California should become in the words of Justice Brandeis, yet another "laboratory of democracy." This is what the states are supposed to be. You and I don't have to agree on whether it'll work or not – we do agree it ought to be tried.

Joe Mathews: Right. Of course, the great irony is that there are many liberals and progressives who, in other contexts, have been willing to embrace the 10th Amendment. California does have a history of its carve-outs, like policies that date back to powers and exemptions that were granted under President Nixon. California pursued different policies and higher standards around auto emissions, air quality, and the like, in part because of our famous problem of smog here.

We have a lot of different rules. I could tell you lots of funny stories about licensing and occupational issues in the state, which is completely crazy and overdone. We proudly don't align with other kinds of regulations. In architecture, rules which apply to everywhere else in the U.S. don't apply here. California has an entirely different set of rules and different tests. Some of that comes from litigation. For example, when you get into special education and you're trying to test whether kids have learning disabilities, there are actually specific limits. The result of a court case basically makes it illegal to give an IQ test to an African American kid.

Bob Zadek: Joe, you mentioned licensing. I've done lots of shows on licensing. It's an issue of great importance to libertarians because it denies economic freedom. What's interesting is that California, which has had very strongly

Democratic, progressive administrations in recent history – pretty much in total control of all branches of state government – has an economic freedom index of 49th or 50th out of 50. California has failed in many ways in the exercise of its constitutionally-given right of what it can legislate as a state. California has a pretty shameful background in licensing.

Joe Mathews: I would say that in water and healthcare we have had freedom and we've tried to be generous. Certainly our extension of medical benefits to undocumented folks is an example of us exercising our rights under federalism, and we do a lot of other things in a lot of other areas. We have a big fight now. We have had it with both of Obama and Trump on education standards, where we have very much sought to go our own way. There is good and bad to all of this depending on where you're coming from.

Hard Trade-offs in the Welfare Debate

Bob Zadek: You mentioned that you favor allowing those otherwise illegal or undocumented immigrants who have the status of California residency to have somewhat full, or at least meaningful welfare, and other types of healthcare benefits.

Why would that be part of your proposal if the assumption is that most immigrants come here not for the purpose of welfare, but for the American Dream – to live free and to give their children the possibility of a better life than they had? To simply live with the ability to preserve their life, liberty, and the pursuit of happiness. If that's why immigrants seek to come here, and not for welfare benefits, why do you find it appropriate, or necessary, or desirable to also offer them some bonus – as if freedom needs a bonus – of welfare benefits?

Wouldn't the policy be more acceptable to more people if you had a period of time during which these holders of California residency would not be entitled to benefits, other than perhaps education and perhaps emergency healthcare? Why do you feel it necessary to throw in the bonus?

Joe Mathews: Well, it's one of the reasons that you listed. You want your children to have healthcare and health coverage. You don't want them to be in emergency rooms – that's more expensive. So, having kids on Medical is better. More than a third of kids in all of California are on Medical. I want younger

POWER TO THE STATES

immigrants who are not big users of such benefits, and the legal folks who are eligible and undocumented folks who are less so on Medical. We made this exception for kids in Medical, which seems wise.

I want them to be healthy. I want kids to be well-developed, and this only works if you integrate kids and make them healthy – and hopefully wealthy members of society – so we can have the investments we need. That’s the basic reason to do it.

If you are looking at basic family of three, they get \$700 a month in California. I don’t think it’s going too far. I think they need food stamps. They are residents and we can make them eligible or not eligible for certain benefits.

But I would focus on giving families and particularly children what they need to succeed because this really works for the state. These kids will do well and succeed and become taxpayers and that’s what we’re talking about here. I don’t want to throw money at people and make people dependent. You want supportive benefits that do the opposite. I also certainly want benefits that make immigrants eligible for in-state tuition, which is not any bargain anymore.

Bob Zadek: Isn’t there a danger, because people respond to the appropriate incentives and to stimuli? For example, what if the deal was that you become a California resident and you have economic freedom, can earn money, and pay social security, but for a period of time you will not be eligible for welfare. Wouldn’t that have the effect of eliminating those immigrants who are motivated primarily to get welfare benefits? I’m not suggesting it’s a very high number anyway – I have too much respect for immigrants.

Joe Mathews: You could do what you suggested. Of course, life is complicated. The mother who comes as an asylum seeker from El Salvador with two kids and is working two jobs, and she’s got an older mother that she wants to bring – the older mother might need that welfare. The mother also helps her pick up the kids from school. These things are complicated. I would certainly rather have that mother get the benefits of Medicare even if she not working, since she has long-term economic value if those kids are safe and doing homework.

We would have to look at whether we could afford these generous benefits, but that is a bigger question. We should make certain that those kids do well, though, if they stick around. That’s where the long-term economic value is to all of us.

Bob Zadek: While those benefits are of course valuable, I would suggest that the system to provide those generous benefits ought to be voluntary, such as by charities and churches and the like. If California has felt that immigrants needed that added benefit, those who felt that way could contribute. Those who didn't feel that way would not contribute. The fund would be created to be used for the purpose of providing those benefits to immigrants. However, forced charity is something that I just find myself immediately railing against.

Joe Mathews: That's a very libertarian view, and you're a libertarian. I'm a squishy moderate and I think that sort of thing would lead to a very different society – a less wealthy one...

Bob Zadek: It may be wealthier.

Joe Mathews: I don't think so. Look at the history of our state – it succeeded when the government and private industry formed a social compact, where the two worked together. That is the story of the place. You have a deeply individualistic way of looking at things and I respect that. But, I think we know a lot more about how human biology works. We are not so individual. We are profoundly parts of other people, like our families, and the geography, the neighborhoods, and the communities we live in.

I am talking about state-level stuff, but I don't like our state government, which is why I agree with a lot of libertarian ideas. If it were me I would do what the Swiss do: a very free society that operates at a very local level. The money flows up. Unfortunately, we don't really live in that state – this is such a big state, and it is about to be 40 million people.

Bob Zadek: We may become three states. Oh, never mind that was taken off the ballot.

Regionalizing Minimum Wage Laws

Bob Zadek: Minimum wage laws are a big deal in this country. It may be a topic in 2020. We have a Federal minimum wage war – with states, cities, and localities all have living wage laws higher than the federal minimum. Would you support eliminating the Federal minimum wage, and just letting the states decide, just like you would have them decide immigration policy? Is there anything wrong with that?

POWER TO THE STATES

Joe Mathews: No, I don't like the statewide minimum wage laws. Our regional economies are so different – they should be managed at a regional level, not a state level, and certainly not on a federal level.

I read a lot about direct democracy and lead a global forum on direct democracy. The people in California who reach for a higher minimum wage are worried about inequality and what has happened to the middle class. They have not found the tools to do that or figured out how to revive it, or their ideology keeps them from thinking about better ways to revive the economy, so they reach for the minimum wage in desperation because it's something they can do. Ultimately things like wages should be set at the unit of economy, and in this country, our economies are very much regional.

Bob Zadek: How about set at the level of the market and never mind government at all?

Joe Mathews: Your libertarian bona fides are unchallenged.

Bob Zadek: Just curious.

Joe Mathews: If you're going to do that, which I'm not sure you want to, it should be done at the level of the people who are living in and dealing with the economy in consultation with people who work there and own businesses there.

I am a big believer in participatory democracy. In my ideal world I could see regular folks who have some background in economics decide regional economic policy and make those decisions based on their knowledge and experience.

Bob Zadek: Tell our listeners about Zócalo Public Square. What is the mission and how can our friends out there follow your writing?

Joe Mathews: Sure. It's ZocaloPublicSquare.org. We put on free public events – 40 or so a year, mostly in Southern California. We partner with the Smithsonian Institution and we publish essays about what it means to be American. We have published on all kinds of topics. We are very eclectic. We connect people to ideas and to each other.

5 – HOW MONEY WALKS

Guest: Travis Brown

Interview Date: [April 28, 2013](#)

Voting with Your Feet

Bob Zadek: Our country was founded on the principle of freedom. As Milton Friedman famously said in his book and *PBS* television series, freedom means being “*Free to Choose*.” We are free to live where we wish, to buy what we want, to pay the price we want (or not), and free, of course, to vote for who we want.

This definition of freedom is not an abstraction. Political scientists and economists recognize that the way to determine whether an idea or a product is what the people want is to let the marketplace decide. As Adam Smith put it, the “invisible hand” of the market sets prices. One can tell if you are offering a product or service that people want by the demand for that product, and therefore the price people are willing to pay for it. If people are willing to pay what you hope to sell it for, then you have a successful product. If not, the market will control it.

The value of a commodity is set by millions and millions and millions of individual decisions by millions and millions of people every day. That collective

POWER TO THE STATES

decision making is far more valuable and accurate a predictor of what something is worth than is a dictate by somebody in Washington or Sacramento. We all trust the marketplace.

Today's guest explains how the marketplace helps to determine what form of government is the most desirable to the people, as well as what structure of taxation people support. There is a marketplace for ideas about taxation. There is a marketplace for the level of taxation, and that marketplace is just as harsh and cruel to the losers as is the economic marketplace for candidates. We have a very vigorous marketplace for forms of political governance – that marketplace is the 50 states. Each state is more or less free to determine, by the will of its people and its elected officials, what is the nature of the government of that state?

How much wealth will taxes take from the people, and what will they give the voters in exchange?

We have 50 states and therefore 50 different mixes of taxation, government services, efficiency, and skill at political philosophy.

One can tell whether an idea or a concept for state government is successful by the taxpayers and the citizens who can, and very often do, vote with their feet. They vote with their feet by moving from a state where the system of government is unappealing and to a state with a system of government that is more appealing.

One can tell by looking at the collective taxpayers voting with their collective toes what they support by determining where people are moving *to*, and where they are moving *from*. This requires an understanding of statistics and the ability to read and synthesize data. Fortunately, my guest Travis Brown has done all the heavy lifting. Travis is here to share with us what he has learned about what forms of government at the state level are appealing to taxpayers because they moved there, and what systems of government are unappealing to taxpayers. That information will tell us, just like the product-pricing in the economic marketplace, which systems work, and which systems don't work.

Travis, thanks so much for joining me today.

Travis Brown: It's a great pleasure to be here. I am excited to give you lots of stuff with very little fluff, because all of this is Internal Revenue Service data

that we ultimately assimilated in the book [How Money Walks](#). We show in the data across 50 states, in all counties across America, taxpayers in the past 15 years have been fleeing high-tax states and flocking to low-tax states.

Bob Zadek: What is the premise of your book?

Travis Brown: The premise of *How Money Walks* (everything is available on howmoneywalks.com) is to do exactly what you just described. We wanted to know, on a net transfer basis – looking at all migration patterns in every county in America – *from* where and *to* where taxpayers are voting with their feet. This is to determine where they are most welcome. State tax regimes are variable and therefore in competition. A California taxpayer that doesn't like the California tax system can choose to live elsewhere on the west coast or across the United States.

In order to measure that, we had to sift through over 134 million taxpayer records available from the Internal Revenue Service taxpayer data file and make that data intelligible in conjunction with the U.S. Census Bureau data population count as well. The book describes America's biggest winning states, such as Florida and Texas, America's biggest losing states – losses in the measure of adjusted gross income, people, and taxpayer wealth.

Bob Zadek: Travis knows who has left every county in the country and where they have gone. If you have a particular friend who is no longer around, and you want to know where that friend went, contact Travis. He will tell you where that person is, and how much in taxes that former neighbor of yours is paying. If you live in California, it might be on your to-do list to move to Texas and Florida – or perhaps Nevada. Nevada, if I remember correctly, is the biggest recipient of former Californians. You are able to draw very specific conclusions, which are really unassailable because they are drawn from so much data.

California Dreamin' No More – The Wealth Exodus from the Golden State

Travis Brown: We looked at where every taxpayer in America has declared their residency over a 15-year span – beyond one administration, one recession, one boom time, or one bust. Over that period from 1995 to 2010, sifting through all of this data, you get a clear picture for a long-term pattern. Is this notion that Californians are fleeing due to high tax on personal income real or

is it overblown? In the app, you can see for yourself by your county, your city, your MSA, or by the statewide totals – the massive movement. 20 percent of the wealth from California is going into states like Arizona – \$6 billion to the Phoenix area alone, and \$8 billion going to Las Vegas and Nevada.

Bob Zadek: Explain MSA. The premise of the book is about the movement of wealth. It is about the movement of people, but more significantly the wealth that they bring with them. Tell us about what you mean by the “movement of wealth” and tell us the dollar amount because they are quite meaningful.

Travis Brown: MSA is the metropolitan statistical area. It is a federal definition – the metropolitan statistical area of San Jose, for example, or San Francisco. If you look at the metro area of all the counties and the general areas where the Federal Government considers that to be a part of the San Francisco area, you’re showing a loss of about \$10.2 billion – a net adjusted gross income including all transfers in versus all transfers out over a 15-year period.

Bob Zadek: That means that when an individual moves, not only does he take his family and his dog and his golf clubs, but he takes with him their earnings, which now are available to be spent in the new state and not in the old state. The movement of a person – while significant in itself – is more significant because of the spending and investment power that that individual takes with them. What you focus on quite correctly is how much wealth is going with these people, because that’s what gets people’s attention.

Travis Brown: You are exactly right. If I am a California taxpayer this year and I become a Nevada resident next year, then this year’s tax returns will be filled out with some kind of version of a state 1040 tax return. Ultimately, at the bottom of that form, will be your adjusted gross income that we will be starting to see over these statistical long-term trends. If next year, you are now a Nevada resident, we subtract you from the California totals and add you to the Nevada totals. By looking not just at the people count of over 240,000 folks on a net basis leaving California, but on an adjusted-gross income basis, we can tell with some degree whether these are working families or Fortune 50 corporations responsible for these kinds of moves.

Bob Zadek: If you were a voter in California, Texas, Florida, Maine, or Nevada, what are the lessons of your book? More importantly, if you are part of the political class in one of these states, what are the inescapable lessons of the

book? What does the book teach all of us about the marketplace for state government? After all, state governments are very much in a marketplace. They are competing for businesses and taxpayers.

Travis Brown: The most fundamental lesson that a California listener can learn from *How Money Walks* is that when you start to raise the price of work to make it hard to collect your disposable income, you can expect to see less of it, and when there are other domains next door that may offer you many of the same advantages with a lower price of work, taxpayers will move to those jurisdictions – like Las Vegas and Phoenix – in relatively large numbers.

Even in the areas like San Jose, where you see a lot of people at first moving within California counties before you see a migration over the long-term to Nevada, you are still talking about numbers that are roughly equivalent to the profits of Apple. These are not insignificant numbers of folks moving around and responding to the market one at a time. Intuitively, you probably have family and friends out there in the process of doing this or who have done it, but now we can put accuracy and clarity behind what this means in dollars and cents to every county in California.

Bob Zadek: Travis Brown has studied the movement of individuals and their earnings with them from certain states to certain other states, and the conclusion that Travis has reached is that this movement is a direct result of punitive tax policies in the states that are losers and sound tax policies in the states that are winners.

The concept of people moving to a better political environment is very common. We have discussed on this show many times the subject of immigration. Immigration is the same issue except that the movement is not state to state, but country to country. On a narrower level, it is very common for individuals to move from within a state to get better schools. So, people do feel themselves to have the freedom to choose and to say, “I am getting out of here. I can’t take this anymore. I want more for my dollars that I earned.”

Rather than simply moving from one county to another, or one school district to another to get better schools, we now have individuals leaving the state because of these tax policies. California is a basket case. New York is a basket case. Florida and Texas are whatever the opposite of basket case is. They are economic powerhouses. What is it about Nevada, Florida, and Texas that makes

POWER TO THE STATES

them such economic powerhouses in terms of their ability to draw very productive people.

Travis Brown: You keyed in on the price of work. The California personal income tax rate is 13.3 percent. This is the highest in the country. Let's look at two graduates that are leaving school for a very good career. One wants to return home to California, and the other wants to go home to Texas. Once those two people depart and go to their home states, this reality – the difference between a zero income tax in Texas versus a tax rate as high as 13.3 percent in California, can make a huge difference on their lifetime earning potential. If they are starting out it is the difference of lowering their student debt. If they're going along it is maybe the difference on when they afford their first down payment on a mortgage on their first home.

I meet people throughout the national book tour every week that come up to me and say, "You know, by going to a zero income tax state, this has changed our life and our family, because we were able to pay for college tuition with the money we saved." So, this is not insignificant.

You tend to see it all over the country. Every state has a little bit of a different offering in terms of why people find it attractive, but on average these nine states with no income tax have collectively gained over \$146 billion over the 15-year period. If you do the reverse and look at the nine states with the highest personal income tax rate, they collectively lost over \$100 billion dollars. You'll see other correlations going on in those states like Texas, where labor participation keeps increasing. Jobs have been better than almost anywhere else in the country. When you get out of the way of work, Americans will work more.

Bob Zadek: What is so interesting to me is that I live in California. I live in a beautiful small town north of the Golden Gate Bridge, and needless to say I am not that fond of paying taxes as a libertarian – especially to my state and my county, because I don't like how the money is spent. And yet, I say that it is worth it. I love it here. I love everything about my life here.

Let's say that there is a \$20,000 difference between state taxes that I might pay in California and Texas. It's worth it. I'm getting something of value – not from the government, but from being in California. From the weather, from the

Dungeness crab, or whatever it is. I have made a decision that I am willing to spend the premium to live in California.

The most interesting part of this conversation is that I *like* that California, New York, New Jersey, and Illinois have punitive tax policies and much more of a welfare state than the other states. The reason I like it is that I like the idea that taxpayers have a choice. They have voted with their feet, either by staying or by leaving. So, the states have a marketplace and they get a chance to test their theory in the marketplace. California may have a very high-tax policy – not enough to chase me out – but it is enough to chase other people out.

There was a time when the whole country was “California Dreaming.” They wanted to move to the sun, to the Golden State of California, because of the weather, the opportunity, the jobs, and the freedom to live the way you want to live. How times have changed since California Dreaming in the sixties! We have 50 states – 50 laboratories of innovation in the words of Justice Brandeis. He called them “laboratories of Democracy,” saying that a state may, if it’s citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country.”

Fifty laboratories of democracy, each state experimenting on what is best for it. That is the core principle of federalism. 50 states, coequal in many ways with the Federal Government. We have 50 states experimenting with the right combination of taxation versus benefits to its citizens, and the success of one state will be dictated by the movement in or out of that state by its taxpayers.

If we had one big state, i.e. the Federal Government, doing all the experimenting, then our choice would be to move to a different country, which is a far more drastic decision than a decision to move from one state to another. So, God bless federalism.

Governors Get the Message

Bob Zadek: Now, Travis, these days, especially with so many governors jockeying for position to run for president in 2016, they are getting very aggressive in their efforts to appeal to the citizens of their state, and to other states in order to bring in more customers and more taxpayers. You have observed that Bobby Jindal and Sam Brownback, as well as Governor Christie – to name a few – have been at least giving lip service to adjusting the state tax

POWER TO THE STATES

policy to make their states more appealing. What have you seen happening at the state level?

Travis Brown: It has been exciting to watch this year. Governors are doing more than just marketing efforts. This takes structural tax reform. Two weeks ago, I was called by Governor Bobby Jindal in Louisiana to come explain this data from parish to parish across the state of Louisiana. They are looking at a complete zeroing out of personal income tax, corporate income tax, and even corporate franchise taxes, because they are right next door to the big powerhouse of Texas, which has gained \$22 billion according to our analysis.

You've got governors in the middle of America as well. I'm from Missouri. We're next door to Kansas. Governor Brownback just laid down the gauntlet to execute what he described as a ploy for making an economy more like Texas and less like California. He meant that he wants zero income tax on small businesses, subchapter S corps, LLCs, LLPs, all those little small business formations that are so vital to their state economy. He did that in January of this year, passing major legislative reforms. Governors of Indiana, Ohio, North Carolina, and New Jersey all are on that list to put more money in the hands of taxpayers. Small businesses need all the help they can get right now in this economy, and that includes how they might spend their disposable income versus how the government might balance it a different way.

Bob Zadek: An outlier is Governor Cuomo in New York, who just raised the taxes on high earners. I guess Governor Cuomo has not read or properly processed the lessons of your book, since he's going in the opposite direction. What has been your observation about the money walking into or out of New York?

Travis Brown: New York is on a death-spiral, economically. In the past 15 years our analysis shows over \$58 billion leaving – over \$7 billion of which is going straight to Florida. So, it is not just New Jersey and Connecticut and states next door. People are checking out of the northeast economy and with that, taking all of their consumption and hard-earned investments.

You mentioned why you're still in San Francisco – there were cities that were attractive because of the gains from trade. Ultimately, that is why we created cities. A city like New York City has a limit to the number of taxpayers with

mobility that they can afford to lose. What is stunning in this economy is that you still have governors ignoring the evidence.

We were privileged to have a foreword from Dr. Arthur Laffer, who has had 40 or 50 years of state evidence looking at not just tax migration, but economic growth and employment figures, and the strength of state revenues. All of the data points clearly to lowering marginal tax rates so that you can see an expansion of work in your state.

Bob Zadek: Art Laffer, of course, is famous for the “Laffer Curve” – a curve drawn on a napkin to explain to President Reagan how you increase tax revenue if you lower tax rates, because if you reduce the tax on something you get more of it. If you tax an activity, that activity will diminish. Tax cigarettes, and cigarette consumption goes down. Tax earnings, and earnings go down.

Certain areas and states have enough going for them that they will retain a core population – people who just plain like it here. I consider it to be a bit of a luxury tax, which I am willing to pay because I cannot replace the lifestyle, but for many people it’s not a luxury tax they can afford.

Most of our listeners know that states will set up offices in other countries to try to bring business from those other countries into the U.S. They set up commercial missions to bring in business. Well, Governor Perry has been marketing to people in the state of California to induce them to move to Texas, so it has gotten pretty down and dirty these days. Governor Perry understands that his state will be far better off the more high earners he brings from California and other vulnerable states into Texas. That competition is very aggressive these days. Texas is driven by somewhat of a higher property tax than California, so obviously Governor Perry wants to bring people into California who have high net worth, who will buy more expensive houses and pay higher property taxes. He makes a profit every time he poaches a California taxpayer and brings them into Texas.

Travis Brown: That’s exactly right. Everyone wants that high-income entrepreneur – that next big investor taking bold risks to expand their company and create a new industry or sustain a lot of other jobs in the future. That’s why you see Governor Rick Perry being so aggressive.

I also want to point out that the taxpayers you leave behind in a high-tax state, who do not have the mobility that you mentioned, face more and more dire

consequences in the future. If, in fact, the state and local revenue does not prove to be balanced when high-earners do exercise mobility, you are left taxing only the tax base of people who cannot leave. That puts a tremendous burden on many of the most vulnerable people in any state.

Consumption Taxes and Interstate Competition

Bob Zadek: You have pointed out that states are questioning whether or not to have an income tax at all, but rather to use a sales tax or a consumption tax. Now, that is being done for the very same reason. If you have a sales tax, you don't punish earnings. You punish consumption. People who study this stuff say that consumption taxes are regressive because lower-income people consume a much higher percentage of their income, and therefore they pay all the sales tax. That of course can be fixed by simply giving a tax credit for certain necessities to lower-income people.

With consumption tax, it is built into the price of a product that I buy, and if I choose to buy something, I am making a choice. I am deciding that I will buy something and buying it is worth the price, even if I build in a much higher sales tax. If I don't like the combined price, I don't buy it. I am driven – because of my DNA – to earn as much as I can. While I don't mind one bit paying a high sales tax, because I will simply decide not to buy the product, the thought that I might someday make a decision to earn less because I don't get to keep enough of what I earn would deny me my soul. I couldn't stand that. So, the freedom to move gives birth to another freedom – the freedom to earn as much as I want. The movement away from income tax and towards a sales tax is another very healthy result in my view.

Travis Brown: What choice do you have, other than to not become a resident of California on how much state income tax you pay today? Let's review that. Personal consumption is up to 70 percent of our GDP in America. It is literally what drives our national economy, so we know the consumption is very important. But consumption can only occur when you have some kind of means of production or earnings. So, taxing your most mobile resource – your personal income – ends up being very damaging, not just because it is collected from your wages, but because it impacts and lessens your ability to save, consume, invest, or share it any other way.

Bob Zadek: Your book really is encouraging state governors to give us all more freedom, and it shows us that when they deny us freedom they will lose us. Whatever else you may think about Governor Perry in Texas or a Governor Scott in Florida, those states really do support freedom far more than states like California.

There was an interesting study of economic freedom which considered factors other than taxation, like paternalism, free choice, and occupations. On overall freedom ranking, the three lowest states in the entire country were California at 48, New Jersey at 49, and New York at 50. The top three states were New Hampshire, South Dakota, and Indiana. I wonder what the top three have in common. I wonder what the bottom three have in common.

Travis Brown: Revenue from states like Texas have been surviving with a general shift towards consumption taxes. They also have severance royalties and things like that from petroleum, but it's less than four percent of their gross state product even for a large state like Texas. A good example of this dependency is Tennessee, which is in the middle of the country and borders eight states and has a high retail consumption tax. They collect 75 percent of their tax collection from that state sales tax. Many states also have a relatively hollow sales tax base because their sales tax systems were created over 80 years ago. I think that's another reason you see many other states modernizing their tax code to favor consumption taxes.

Also, looking at other streams of revenue, many of the other states in the Midwest that found shale energy plays are choosing to change their royalty systems so that they can help lower revenues from taxes on income for many of their small businesses. That phenomenon is occurring in states like Ohio. We go back to Dr. Laffer on this – who studied this for so many years. State revenue growth is actually better from those states that have relied less on income taxes, so this is very contrary to the narrative that Governor Jerry Brown has recently supported with the passage of Proposition 30 in California².

² Proposition 30 was a 2012 initiative to increase taxes to prevent budget cuts in California state schools, which passed by a margin of 55 to 45 percent.

POWER TO THE STATES

Bob Zadek: As states go to a consumption tax, it means our economy has changed from a goods economy to a service economy. It means taxing services, like barbers, attorneys, accountants, etc. Traditionally, services have not been the subject of a sales tax. It is inevitable that these services will also be taxed. As a practicing attorney, that's fine with me – it is just a price my clients have to consider when they buy my services.

Part of the problem is always a spending problem. California starts with a decision of how much to spend and then secondarily figures out how to pay for it. Other states will determine a level of taxation that encourages growth and then say, "This is the amount of money we have to spend, how shall we spend it?"

If it is income first, spending second, no problem. If it is spending first, income second, then it is a problem.

How much activity is going on at the state level? How much of these state governmental policies are driven by competition and how much is driven by just bare political ambition?

Travis Brown: In the case of Governor Jindal – having reviewed his joint legislative committees with his Department of Revenue and many other people at the local staff level – this is a very serious, very well-balanced, very deliberate plan. It is clear that it's way beyond ambition and headlines. This is also true for many other governors, like Governor Brownback in Kansas, Governor Walker in Wisconsin, Governor Kasich in Ohio – all of whom have specific plans that they feel are within reason to give more money back into the hands of taxpayers so that they can invest more, consume more, and generate more activity in their state.

Bob Zadek: This is all happening because states are in competition with each other. Of course, just by reading any national media, we are so aware of the competition.

Michigan, for example, just enacted a right-to-work statute because they were responding to competition from the southern states, which had no right-to-work laws.

We have states which are competing to bring businesses into a state by offering them sometimes too generous a tax package. The competition at the state level

is so healthy – and a libertarian view of taxation doesn't have to be just theoretical. We can prove that we are right (and by right, we are proposing something that most people favor – that we are getting 51 percent of the votes). We don't have to talk in abstractions about economic freedom, keeping what you earn, and deciding to whom you give it. We can point to Travis's data and we can prove that we are right.

Travis, tell us about your app.

Travis Brown: Sure. Howmoneywalks.com has a smartphone app where you can download the true performance of your county or any other county in America by simply selecting it. It looks at your net loss, net gain, and adjusted gross income. It's what governors are looking at when their data comes in. It is why we are having this debate, and it is why state tax regimes can even be a hedge against some of the rising federal taxes and economic burdens.

6 – NO STRINGS ATTACHED

Guest: Hon. James L. Buckley

Interview Date: [July 26, 2015](#)

The Federal Spending Power

Bob Zadek: Today we are going to discuss one of the most important topics that I have ever discussed in my years of sharing Sunday mornings with you. We are going to discuss a matter with its roots in the meaning of two words of the Constitution. The topic affects everybody's economic and personal freedom in the country every single day. The words are "general welfare." These two words have been perverted to transfer power from the states to Washington to the detriment of all citizens.

To help us understand this crucial issue and to share the wisdom from his recent book, I am happy to welcome former Senator of New York and United States Court of Appeals Judge, the honorable [James L. Buckley](#). Jim was a United States Senator from New York for six years from 1971 through 1977. He was the last elected national candidate to be on a third-party ticket. He ran as a Conservative in New York. He is a member of a very exclusive group with President Reagan as one of the last two nationally-elected officials who I voted for and who – despite my vote – actually won.

Jim, we are talking about the general welfare clause of the Constitution. What is the premise of your book, *Saving Congress from Itself*, which has been distributed to all members of Congress? One would think they are pretty able to take care of themselves, so what wisdom are you hoping that Congress absorbs?

James Buckley: Unfortunately, Congress has focused on getting re-elected while ignoring national issues that only Congress can handle. They have begun spending disproportionate amounts of time on matters that are the business of state governors, city councils, mayors – you name it.

Bob Zadek: Explain to us what the traditional system was which the founders gave us regarding the “police power” in its historical context? How has it changed?

James Buckley: In writing the Constitution, the founders decided that the central government they were creating would have a specific and limited number of powers which are called the “enumerated powers.” These gave Congress the power to tax and spend, to raise an army, to control interstate trade, to handle foreign affairs, and so on.

But the Constitution also says that every other governmental power that was not specifically allocated to the new federal government would be *reserved to the states and to the people thereof*. This division of power meant that Washington would concentrate on only those matters of national importance. Everything else was to be handled by the people closest to the citizens who voted them into office.

The effect of my book is to cause Congress to give up a habit that grew up out of an unfortunate Supreme Court decision back in 1937. The decision allows Congress to create programs offering money to the states to engage in activities which are acknowledged to be the exclusive business of the states and localities. When these federal subsidies are allocated to the states – and the states do not technically have to accept them – they come with the most detailed regulations that require the people you elected at the state level to perform their essential responsibilities in accordance with a federal rule book. This has created tremendous costs and distortions, vastly increased the costs of the Federal Government, and made it impossible for you and me as citizens of a particular state to ensure that our elected officials will follow our priorities and not Washington’s.

POWER TO THE STATES

When the Constitution was ratified it was always understood that local issues could best be handled locally; the states were perfectly competent to decide speed limits, health issues, welfare issues, and so on, because who better than the elected officials that are closest to the citizens to understand the special needs of these citizens? Of course, that is as true today as it was in 1787. No one thought we needed Washington's assistance on those issues. Congress, however, is always seeking to accumulate power.

Bob Zadek: We should also mention that it was clear that Washington was prohibited from coercing states to do their bidding. They were not allowed to coerce states, but they have learned a trick, which was endorsed in a 1937 Supreme Court case. The trick is based on the income tax that gives Washington all of their money. Washington gives the states back the money they acquired through taxation, but with strings attached. In effect, this usurps local control over these issues. There are two events that separately got us into the pickle we are in today.

James Buckley: That is correct. Although these programs are technically voluntary they are in fact coercive. Even though the money distributed from these programs comes from the taxes you and I pay (or which our children are going to have to repay) the states still consider it as "free money."

Politically, it is almost impossible to turn this money down, because it came from that particular states' own taxpayers. If the officials do not participate in these programs, that money will go to another state. These bribes from Washington are almost impossible to resist.

Downsides of Federal Control

Bob Zadek: Tell us some of the wonderful stories about how this issue first occurred to you in your own state of Connecticut.

James Buckley: When I was in the Senate, I knew there were programs to provide grants for housing developments, education, and so on, but I never put them all together. This occurred to me when I started reading a local newspaper, and I found reports of grants upon grants for purposes that were totally local. To give you a couple of examples, almost \$2,000,000 was granted to rehabilitate an abandoned railroad station that had long since been devoted to private, non-transportation uses.

Another example: \$2,000,000 to replace a one-lane bridge connecting two tiny communities twelve miles from my home. Another example was half a million dollars to widen two streets leading to a particular school. Now, that last example to me is a striking example of congressional imagination as it tries to scratch the backs of constituents. This was a program called the “Improved Access to Schools Program.” Its explicit purpose was to fight juvenile obesity by encouraging children to walk and bike to school. Probably not the most cost-effective way to keep your children slim. It goes on and on and on.

Back when Lyndon Johnson started his Great Society Programs, the Federal Government began to deal with matters that until then had always been considered off bounds to the Federal Government. But once that habit started, members of Congress realized that this was the easiest source of pork. They could go to their constituents and ask what was bothering them. The things that were bothering their constituencies were the kinds of things that belonged to their local representatives. So back at the beginning of this explosion of grants programs, there were only about a hundred of them. Today, there are 1,100 of them.

When I entered the Senate some years later, these programs dispersed \$24,000,000. This year they will disperse almost \$641,000,000 – namely, one out of every six dollars of the Federal budget – all for purposes that are recognized to not even be the business of Congress.

Bob Zadek: Those somewhat silly but economically significant examples you cited are really telling. I ask our friends out there to ask themselves, “Would a locally-elected politician who tried to spend his constituents’ money for something silly like this be voted out of office?” It is very likely. However, where you have that spender somewhere far away in Washington, spending your money in silly ways, there is no way to politically punish this waste of money. The citizens of Jim’s town or county in Connecticut have no redress, and the reason is because these grants are always perceived to be somebody else’s money.

James Buckley: That is correct. It is impossible to hold your locally-elected officials responsible for cost overruns or poorly functioning programs because they are required to apply Washington’s rules rather than use their own judgment. You cannot hold them responsible because the rules are made by distant bureaucrats that individuals are unable to reach. You end up with

nothing but frustration when the taxpayers are deprived of the ability to set their own priorities and to decide how their own taxes are going to be used in their own backyard.

Bob Zadek: It is even worse because the representative can present himself to the constituents and say, “Look, don’t yell at me. I brought you the money. I’m the good guy. It’s the bureaucrats in Washington who are messing it all up!”

He gets to avoid the responsibility, yet he receives the credit for bringing what appears to be somebody else’s money into a local community. It is simply a scheme to waste money for the sole purpose of fostering the prospects of re-election.

So, what have we learned? Collectively, all of us pay for these mistakes. These mistakes are made with no accountability and are made solely so that sitting members of Congress can get re-elected. That is the system that Jim’s book is seeking to remedy. Of course, the solution is quite difficult because you are asking Congress to rid themselves of a tool for their own self-preservation. That is a big burden to try to overcome. You are also trying to prevent the coercive effect of Washington upon the states, which perverts the whole system of local control and democracy. It is really quite a challenge.

James Buckley: First of all, the public at large, taxpayers, and citizens understand the true costs of the so called “free money.” As we have learned in the past, if you develop an engaged citizenry, they are able to achieve political miracles. Also, don’t give up on Congress itself. You may recall earmarks, for example – a habit that Congress had until very recently – where they stick a provision into legislation that provides federal funding for purely local activities, such as the notorious “bridge to nowhere.”

Bob Zadek: In Alaska?

James Buckley: Yes. This became such a source of pork that in 1996 there were 3,023 freeze earmarks in federal legislation. In 2006, there were 15,700 of them. In other words, it increased five-fold in just 10 years.

Nevertheless, a determined senator was able to stigmatize the practice and in 2010 he persuaded Congress to abolish earmarks. If we can get a political force together to stigmatize the use of federal grants and aid for states and local

purposes, perhaps we will have a chance to stigmatize that practice and get rid of it.

In my book I proposed that these programs be eliminated. However, because at the present time 30 percent of state income comes from these grants, I would convert those expectations – the money that the localities and states are now getting – into block grants with no strings attached. This would gradually be phased out to allow the Federal Government's taxes to come down. State taxes would make whatever adjustments are necessary to enable the states to meet their own needs.

If this reform is adopted, it would reduce Federal expenditures by one sixth and balance the budget. It would rid Congress of a major distraction from its essential national responsibility and it would restore the people's ability to exercise control over their own state and local affairs.

Bob Zadek: The problem, as Jim explained, is that all of us are denied control over our political lives. We don't have control over how our money is spent locally. It perverts the whole system of democracy by ensuring that incumbents stay in power. Those are serious weaknesses, all of which can be solved by Jim's solution.

This all started with two words in the Constitution. When the Constitution was ratified, almost all the power over citizens and regulation of citizens' health and welfare would reside in states, counties, towns, and cities. Nothing in the Constitution was expected to change that. The Constitution was created because there were certain universal powers of national defense, coining the currency, running the federal court system, the post office, and things of that nature, for *national* needs. Congress was, however, given the power to tax for the "general welfare."

James Buckley: That clause in the Constitution authorizes Congress to "pay the debts and provide for the general defense and *general welfare* of the United States."

Bob Zadek: This was debated when the ratification process was being considered. Many opponents to ratification feared that this "general welfare" clause would give Congress the power to regulate everything. Madison tended to believe that was not an independent power, but only a modifier as to how

POWER TO THE STATES

other powers could be used. Hamilton and others believed that it created another enumerated power. That is, general welfare was itself the end.

The country generally adopted the Madisonian view until approximately the New Deal era, and it was not felt that the general welfare clause gave Congress any additional power. We also should note that Congress was forbidden to coerce states and localities to do federal bidding. All of that was existing Constitutional law until 1937, when an unfortunate Supreme Court case ruled that Congress could use a grant of money – money taken from States from the income tax – to induce the localities to adopt federal programs. This resulted in a one-size-fits-all policy scheme across the states.

What locally-elected politician would ever say, “keep your money because we want to regulate our own local political life”? The answer is none. Of course, this is coercive, and coercion is the important word in this conversation.

James Buckley: The Supreme Court case described the effect of the earlier decisions in the following way. It said that Congress could spend money to induce the states to adopt policies that the Federal Government itself could not impose. But, it also went on to emphasize that the conditions could not be coercive on the states. If they were coercive the grants would be unconstitutional. I think we could explain to the Supreme Court in a new case and demonstrate the effect of 70 years of actual experience, that a federal grant is almost always coercive. Not always, but generally speaking.

Therefore, these programs should be abolished when applying the Constitution. However, there are extraordinary costs imposed on the states and on society at large – not only cost in terms of dollars and cents and all of the unfunded mandates that come into being if you accept federal money – but the enormous distortions in the political process. This has stripped voters of so much power over what’s happening in their own backyards.

Bob Zadek: This very issue of coercion was the basis of the Supreme Court’s finding that provisions in Obamacare were unconstitutional, insofar as the law threatened to withhold Medicaid funding from states who did not adopt the eligibility rules. If I’m not mistaken, the Supreme Court said that it was coercive. So, this issue is still being debated, and is the basis of important Supreme Court decisions.

There are two amendments – one after the other – to our Constitution, which I think got us into this pickle: the 16th Amendment, or income tax, and the 17th Amendment, or the direct election of senators. If those two amendments had not been adopted, we wouldn't be having this conversation today. If senators were indirectly elected by the states, the senators never would permit Congress to coerce the states, because they would report to the states.

James Buckley: You make a good point. It created an endless supply of money that Washington could throw around. There is no doubt about that. I believe it is fair to say that if Senators were appointed by state legislatures, they would feel that their job was to protect state prerogatives against encroachments by the Federal Government.

The Inefficiency of the Federal Grant System

Bob Zadek: 1916 was a dark year for the Federal Government. You have given us, in your book, many examples of the adverse effects of these grants, and how wasteful it is. What happens is that the money that is taken from the states, and cities, and citizens by direct taxation – something which the founders abhorred and prohibited – and is sent to Washington. Then there is a handling charge as the cost of administration, and then there is a whole infrastructure to enforce all of these conditions, which of course provides no benefit to any of the citizens who are taxed.

Explain how a dollar of taxes does not come back when it comes back to states and localities, but rather gets reduced considerably through the existing system. If it had stayed in the state it would have been a dollar of benefits, correct?

James Buckley: There are administrative costs in Washington. You have people coming up with the regulations. You have people screening applications for grants under these programs. They have to negotiate the specific ways it will be spent with the states requesting the money, etc. Those costs have been estimated at \$1 for every \$10 distributed.

One of the arguments made in favor of these programs is that it serves to distribute money from wealthy states to poorer states. If you live in a state such as Connecticut, New York, or California, the round-trip will cost 10 to 20 percent of the value of the money sent to Washington. If you live in Mississippi, which is the poorest state, you get back from Washington more than you ever

POWER TO THE STATES

sent in. But once you get that money, you are subject to several different kinds of collateral expenses.

First of all, you have to set up your own administrative machinery to screen through the cafeteria of grants. You have to decide what to apply for, you then have to set up administrative mechanisms to make sure the money is spent correctly.

You also expose yourself to a whole host of what are called “unfunded mandates.” To give you just one example, the money you get from back from Washington is used for construction. You have to pay union labor rates for that construction even if that adds 15, 20, or 25 percent to the cost of what that project will cost if you. If you weren’t able to use the locally available labor that was cheaper.

Bob Zadek: That is the Davis Bacon Act.

James Buckley: You also distort state priorities. Washington may think it’s a great thing for you to widen the sidewalks and offer you \$4 for every one of your own. So, you start spending money that you could be better using to improve your infrastructure.

Let me give you another example from Connecticut. Last summer, some extraordinary grantsmanship was able to finance a half-billion-dollar construction of a 9.4-mile busway connecting two cities which would theoretically save about 13,000 commuters 10 to 15 minutes a day of commuting time. It did this by stitching together six separate Federal programs to get 80 percent reimbursement of that half-billion-dollar nine-mile busway. That caused the state to commit \$130 million of its dollars to that program.

At the same time, 200 Connecticut bridges have been identified as subject to collapse on the failure of any single major structure. 49 of those bridges are crossed by 1.8 million vehicles a day. However, that money is not available to look after these bridges. In other words, priorities be damned. If the Federal Government offers you \$4 for every \$1 of your own, that offer is irresistible.

Bob Zadek: So, Connecticut money, which would otherwise be spent for bridges, gets sucked up through the income tax and goes to Washington. That same money comes back, but they can’t spend it on bridges. Who better than

the locally-elected officials to know that it is better to spend money on the bridges than on the mass transit bus lanes?

The decisions in Washington are not benign. They are made for political purposes. The money gets spent in the way that the political process in Washington dictates. Nobody in Washington has made a study of what Connecticut or Mississippi might need. All they do is respond to political influences.

The solution is to give back to us Americans local control over our locally-created tax revenue. There is no need to take money from Mississippi, send it to Washington, just to send it back to Mississippi with a whole lot of rules and conditions on how the money gets spent. There is no collective benefit in having the money go to Washington.

As Jim points out, there is an overwhelming dependency by states on the Federal Government because the money – strings attached or not – was taken from the states and localities to begin with. Ultimately, the real solution is to reduce the money going to Washington, let the states raise their taxes to make up the difference if that is what the people want, and then have the money spent locally.

There is a movement in America – a silly movement – called locavore movement, which is to eat locally grown food. What is wrong with spending locally grown dollars?

James Buckley: You still have the redistribution argument. If one says that this is a proper federal function – and I have problems with that – there are ways of handling the situation with those strings attached, and that is block grants. Block grants are when money is transferred to a state from the Federal Government. There may be a condition stating, for instance, that the money must be used on education. However, nobody tells you how to educate your people – the money is transferred to the states and the people use it as they see fit.

Bob Zadek: One would argue that if you're going to do that, why bother? Just let the money stay locally. Why should Washington be able to say that you must spend this amount of dollars on education? That is a local issue. So, I would say that the block grant solution is a halfway house.

James Buckley: The only reason you would do this is for those states that do not have enough money to meet basic minimum standards of education. If you believe there should be some distribution from the wealthiest states to the poorer states, this would be a way to do it with no strings attached to how that money is spent.

Bob Zadek: Since I am hawkish on federalism, I reject the concept that should be a national standard for education. It is a state-driven standard. A politician who doesn't further the interests of his constituents in a state or locality will not be re-elected, and along the way its citizens will vote with their feet and send a clear message.

James Buckley: I am not saying you set standards. Standards would be strings attached. If there is simply not enough money in your pocket to hire a teacher, the Federal Government would give you money, but you would decide what teacher to hire. You would have total say over how people are educated. There is no federal interference on how you educate. But if there were not enough money to have any education, there would be some money transferred from Connecticut or New York to Mississippi.

Bob Zadek: As long as the federal electorate determines that it is appropriate for the wealthier states to offer some support to the poorest states through income transfers, that would be fine with me.

Ideally, you would reduce federal taxation in one stroke of the pen, so that less money would go to Washington, leaving more money in the states. But that can't happen. It is just too big a task. So you would do it in stages. You would keep the money flowing and get rid of the strings with the ultimate goal of not having the money go to Washington to begin with. This is a big task, which will take lots of time.

James Buckley: Exactly.

Bob Zadek: If we accomplish this, more of the average citizens' tax dollars would be spent directly and less would be spent on administration. More of it is spent directly to satisfy local needs and we are not subsidizing an incumbent's re-election prospects along the way.

You can control the political process because a vote in a local election is more meaningful. When you and I make charitable contributions, we try to do so on

an informed basis, we look for charities that have a very low percentage of administrative cost. You don't want to give money to a charity where most of the money you give goes to support the salaries of those people who are running the charity, because the benefit would not get to those people who you believe need the money. Your system is the same analysis. It is reducing administrative costs so that a dollar of taxation produces much more benefit to the local taxpayer.

A Reason for Optimism

Bob Zadek: What are the prospects that something along the lines of your plan might be welcomed in Washington?

James Buckley: I am extremely encouraged – not necessarily by Congress, although I know a couple of senators who have, to quote one letter, made a “compelling case.” There are people in Washington who know how the system works who are at this moment devising a program to do the additional research, lobbying, and education so that there is a fair chance this proposal could be adopted. So I am very encouraged.

Bob Zadek: Is it along party lines or are Democrats and Republicans equally receptive?

James Buckley: All I can say is that what I propose applies to people across the political spectrum. I might also say that one of the people who wrote a little blurb on the cover of my book was Erskine Bowles – Chief of Staff for President Clinton. It makes economic sense to get the best return on the money raised in taxes. It makes political sense to restore to the ability to voters to have maximum control over what happens in their own areas. That applies whether you are a Democrat or a Republican – a liberal or a conservative.

7 – REVERSE FEDERALISM IN AMERICAN BUSINESS

Guest: Professor Richard Epstein

Interview Date: [August 26, 2018](#)

Surreptitious Socialism

Bob Zadek: In the past week, Senator Elizabeth Warren from Massachusetts, formerly a Harvard Law professor, published an opinion piece in the Wall Street Journal entitled “[The Accountable Capitalism Act](#)” (8/14/18) – right out of Atlas Shrugged. In that opinion piece, she offered a proposal to basically “redo” (some might say eliminate) capitalism in America. She wants to juggle everything from how we do business to how we organize business affairs in America.

Her plan received attention from thinkers both on the left and on the right, including this morning’s guest. I am happy to welcome back to the show Professor [Richard Epstein](#). Professor Epstein teaches law at NYU and is also at the University of Chicago School of Economics. Richard published a response to Senator Warren’s piece on his weekly blog, [Defining Ideas](#). We are here to discuss the Accountable Capitalism Act.

Why have I selected this as the topic for this morning's show? Because it is so gosh darn scary. The fact that a law professor – a United States Senator – could actually write this with a straight face (I don't know how you write with a straight face) is terrifying. She might even believe what she wrote makes sense, and because it comes from a United States Senator – somebody who is being discussed as a presidential candidate in 2020 – it is worthy of at least an hour of time to study both the piece itself, as well as what it tells us about how the political left looks at business life in America.

Richard, welcome to the show this morning.

Richard Epstein: Glad to be here.

Bob Zadek: Tell us the bullet points of what Senator Warren is proposing regarding the management of American business.

Richard Epstein: Essentially, she wishes to convert the American corporation from a shareholder-run operation to a stakeholder-run operation. These two terms are a little bit elusive, at least the second one, so let me explain the way in which this works.

The traditional American corporation – the public corporation – is an organization owned by shareholders. The shareholders create a board of directors, which in turn appoints a CEO. The three groups each have a distinct set of responsibilities and opportunities.

Shareholders can sell their entire share out to somebody else in the takeover market. Each of them individually is entitled to sell their shares into the training market, and all of them have the right to vote with respect to the selection of the board of trustees or the board of directors. The directors are charged with the general oversight of the corporation. They appoint the CEO to run the thing on a day-to-day basis, subject to the general direction that they give.

So, you have these three layers of corporate situation, and the focus of each one of them is to make sure that the corporation will maximize the rate of return that it gets on its investment, consistent with its legal obligations to the states and for the party with whom they entered the contract.

Fiduciary Duties and the “Business Judgment Rule”

Richard Epstein: The key feature of the board of trustees and the CEO is that each of them have “fiduciary duties.” The idea of fiduciary duties is essentially that when the CEO starts to make decisions, they don’t make them in their own interest – their own interest is taken care of by the pay that they receive for the job – rather, they are supposed to look at the class of shareholders and essentially try to do what in their judgment is best for the long-term operation for the company *at large*.

The entire law rests on the following kinds of propositions. First, there is something called the “business judgment rule,” which says that if you are running a corporation and you are trying to maximize the value of your shareholders, you will not be held responsible if it turns out that the guesses that you make do not turn out particularly well. People make good choices and bad choices. If in the long run you’ve got a decent board of directors, the good choices will outweigh the bad choices. The last thing you want is to allow individual shareholders to snipe at the bad outcomes while keeping all the gains from the good outcomes. “Heads, I win. Tails, you lose,” is a recipe for closing down the corporation, because the board gets all the downside and the shareholders get all the upside.

The exception to this rule is in cases of “self-dealing,” whether by members of the board or the CEO. So, if you enter into a transaction with a buddy or a friend, the rule now switches. We no longer think of you as acting as a fiduciary agent for the shareholders, we think of you as trying to deal for your own benefit. If you look at these transactions, it’s not that you invalidate them *per se* (although many corporations have very stringent restrictions on what officers and directors can do by way of transactions), but you subject them to something known as the “fair value test,” which means that if the value which is received by the corporation is as great or greater than the value of the assets that they surrendered. If you put this all together, then everybody is focused on the same thing – maximizing shareholder value.

In order to make this work in a public corporation, you tend to have only single class of shareholders. The moment you start introducing preferred and common shareholders, there are going to be lots of choices. If they’re safe, they will benefit the preferred shareholders and if they’re risky, they will benefit the common shareholders. You don’t want these people to start figuring out, “Well,

which class of shareholders do we wish to prefer, and why?” A single class of shareholders means that everybody is in an identical position to the extent that the law can create it. If you maximize the welfare of one shareholder, at least at a first approximation, you’ve done it for all.

Now, how do you then deal with the rest of the world? Well, the rest of the world is *not* owed a fiduciary duty because if it were owed a fiduciary duty, you would get much more intense conflicts than those that you have with respect to the difference between a preferred and a common shareholder.

All of these arrangements are handled in one of two ways.

If you’re talking about externalities and harms to individuals who don’t trade with the corporation, you have such things as environmental protection laws, which limit emissions and things of that sort. The fiduciary duty requires you to comply as best you can with the external obligation.

If you’re dealing with trading partners – starting with bond holders, employees, suppliers, customers, and so forth, in those particular circumstances – each of them knows that you owe a fiduciary duty to your own shareholders, so you bargain at arm’s length for transactions that would be mutually beneficial. In some cases, there’s going to be a contest as to how this ought to work. Do we have unionized corporations? Do we have contracts at-will with lenders? What kinds of covenants can they put into foreclosure? But the whole model is, “They will take care of themselves, we will take care of ourselves.” The fiduciary duties create win-win arrangements inside the corporation, and if you’re doing voluntary transactions, you then get a win-win on the other side.

It is not that there aren’t other stakeholders – people who are interested in the affairs of the corporation – but we have a very clear way in which they defend themselves.

The Scheme

Richard Epstein: What Elizabeth Warren wants to do – and it’s mindless as far as I’m concerned – is to say that the fiduciary duty model, which applies to shareholders, also requires you to have fiduciary duties with respect to all of these outside stakeholders, such as employees and everybody else.

POWER TO THE STATES

The question is, “how do you discharge that?” If you only have a board chosen by the shareholders, how is it going to act as a fiduciary to people who are non-shareholders?

She comes to the right conclusion. I use the word “right” in quotation marks. She wants to have a federal agency call in every charter that has been issued to every corporation by every state – which means virtually all corporations, a massive move – and tell them that they will get their federal charter only if they agree to put on their board individuals who represent these other stakeholder groups.

Now you have this mess of trying to figure out how this particular corporation’s board is supposed to work. And remember, you have to raise new capital. How are you going to raise equity capital if the guys who are getting it are sworn to make sure that other people can divert it to their own interests?

If you are a lender, how are you going to lend to a corporation if you know, in effect, what they can do is divert the proceeds from the operations of the business to some collateral venture, so there is nothing left after you to take it back?

Her plan is essentially an effort to nationalize all corporations by changing the control mechanism. If, in fact, the Federal Government is there and you’ve got no exit, you are going to have to respect whatever conditions they impose upon you. This means that foreign capital will never come here, and American corporations will never stay here. Any small business which gets over a billion dollars with respect to net asset value is going to find that as it gets larger it is going to be taken from it, because the board of directors is going to be passed into alien hands.

This does not even go into all the crazy difficulties as to who these people are, how they’re going to be compensated, how long their terms of office are going to be, or who is going to select them. This is a scheme which is designed to nationalize every piece of American business in the name of “saving capitalism.”

Motivated by Ignorance

Richard Epstein: Warren thinks there is some inequality in the way in which various markets work. Let's suppose she is right about that. There are still other, better mechanisms like welfare benefits or progressive taxation that you could use to handle these kinds of situations. For the most part she's wrong about that, because if you run an economy in which you heavily regulate corporations, the boards respond to these regulations (knowing that labor contracts are going to be regulated in ways that are often unacceptable) by shifting to overseas operations. They also shift to greater capital intensity instead of labor.

The difficulties that she perceives are essentially a direct product of the kind of legislation that she typically favors – ignorant, I think, of the way this thing works. I know she was a Harvard professor, but the truth of the matter is her work there was never any good, and this stuff is simply off the wall. I think most people who know anything about American business quake in their boots at the thought that somebody this positive, this confident, and this uninformed could push forward a proposal like this, which would shake American businesses to their roots, and leave everybody subject to massive dislocations in pensions, wages, dividends, and everything else.

Bob Zadek: The principal that jumped off the page in Richard's presentation, when he described how corporate governance and the notion of fiduciary duties works, is *accountability*. Where shareholders elect directors, who hire officers who know their job, everybody knows to whom they owe a fiduciary duty. Under our system of law, fiduciary duty is a very high duty. When you show up to work, you're an officer and you know your job – the board requires you to maximize the wealth and the well-being of the corporation. Maximizing the financial wellbeing of the shareholders is your responsibility. The board knows the officers are accountable to the shareholders. Everybody knows their job.

Now imagine sitting at dinner with a dysfunctional family, and you have all of these competing interests – all of whom you now owe an equal duty, as well as to your neighbors. You owe them a duty regarding these environmental issues, but you also owe a duty to people who are in the state in which you operate – to employees, shareholders, and creditors. How in the world could anybody go home from a day at the board meeting and say, "I did a good job today."

It is absolutely impossible, which means everybody has a target on their back. You have no idea if you've done anything right unless there are regulations. It makes it impossible to govern a corporation. It's a lottery.

Richard Epstein: Bob, you are so optimistic. It's even worse than that. Let me mention some of the things I didn't mention in the paper that I wrote, which was short.

One of the things, of course, that boards of directors have is a fiduciary duty. They also have very powerful duties of confidentiality. If you are running a major corporation, you have trade secrets, of course. These concern secret processes, marketing plans, research and development and so forth. Every member of this particular operation knows full well that when that information comes to you, it stops with you. How these things are operated is very complicated, but there are some trade secrets that are so sensitive that you're not even allowed to take the document. You have to go into a room, go through an inspection without any pencils or paper – it is for your eyes only, and you get the one or two things that you need in order to do this.

Take a formula for Coca Cola: nobody who knows the whole thing. There are only people who know bits and pieces. Now you're going to put people on the board who, by definition, are stakeholders and therefore have obligations to other individuals? Are they duty bound now to release the secrets that they get from the corporation to the people that they represent? Can you really expect that they are going to keep their duties of confidentiality even if they swear to it?

Once a trade secret gets out it doesn't bear a pedigree of who managed to leak this thing. You could get somebody who sits on a board meeting – who works for a union and who turns out to be antagonistic to the company he happens to be on the board of – to release information about trade secrets. A billion dollars in potential income starts to disappear.

When you start looking at these duties, you cannot have multiple masters and hope to discharge any and all duties. You send directors to school for a long time to figure out exactly what they can and cannot do, how they interact, which corporations they could work on, what you do with respect to conflicts of interest – all of which is designed to give you structural protections, so that when the fiduciary duties come everybody up knows where they stand.

The Myth of Corporate Greed

Richard Epstein: Does this mean that corporations are selfish? Of course, the reliable bogey man for somebody like Elizabeth Warren is Milton Friedman, who wrote an article in the *New York Times* in 1970 about how the duty of corporations is to maximize profits for their shareholders. Now Milton is no fool. Here we have a fourth-rate mind like Elizabeth Warren, trying to pull her credentials on somebody like a Milton Friedman who knows more as a dead man than she does when she's alive...

What did Milton say? First, he said, "I'm not against charity." In fact, virtually every free-marketeer is in favor of charity. The University of Chicago is founded by John D. Rockefeller. Harvard was founded by John Harvard. Yale by Eli Yale. You take the names of great American universities – Carnegie Mellon, Johns Hopkins, Stanford, and so forth – these are all people who essentially amassed fortunes and then realized that consumption is not their dominant goal after a certain point. They created these massive institutions of huge wealth for the benefit of the rest of the world. Laissez fairists always believed in "imperfect obligations" of charity, which go to help the poor, to advanced medical and scientific research, and to creating and to advancing the institutions of culture and higher learning.

Milton wanted to pose the question that if you are a corporation, to which of these particular charities do you give to and why? His attitude was that this is a classic opportunity, if you're not very careful, for self-dealing, in which the head of the board of directors will give to his favorite charity. That is not what a corporation is supposed to do.

Milton's answer was two-fold.

One part was that when you have your own shares, you can deed some of them over to the charity that you want. Or, if you want to hold the shares, you could make a pledge of money from the dividends or from the value of the shares that you sell. If you do that at the shareholder level, you manage to eliminate all the conflicts of interest which would arise at the shareholder level. If a CEO owns a parcel of shares and wanted to give to the symphony orchestra, he can use those shares as a source of value without having to implicate the entire corporation. Essentially, that means that you get much more powerful giving because it is focused, and donors actually watch over what's going on.

POWER TO THE STATES

The other part was that corporations have to maximize goodwill. This a very tricky situation, but imagine the corporation decided that it has a bunch of excess equipment that it doesn't need, so it puts a funeral pyre out on Sunday and burns the whole thing. People are going to look around and say, "Why did you do that?"

Corporations have typically advanced their goodwill by making a gift of that obsolete equipment to a private or a public school, or a neighborhood center – something which virtually all shareholders agree with. They then encourage members of their staff to work in these organizations as volunteers, and they take that into account in the way in which they think about salaries and promotions and so forth.

There is a certain very sensible limited function of "benevolence" to a corporation, but it is always understood that you give to those organizations such that the image of the corporation will be improved, and that by virtue of your superior reputation you will be able to sell more goods, which will allow you to expand your charitable activities, create more positive reputations, and so forth.

Now, it's very tricky because corporations must ask whether they really want to get involved with certain kinds of issues. If you're the head of a corporation, do you want to start giving to gay rights groups or do you want to give to traditional marriage groups?

Bob Zadek: I have always been of the belief that corporations should think long and hard before giving even one penny to charity because, after all, once a corporation sees its role as to benefit society as a whole, then we lose that accountability that I spoke about earlier. That is, the directors now are no longer simply accountable to shareholders to maximize the value of the shares and the officers are no longer accountable to the board to do a good job at maximizing the value of the shares. Now, they see themselves as having a duty to society as a whole, a duty which is impossible to define and impossible to quantify.

Therefore, as an investor, I'd be quite circumspect about investing in a corporation which was somewhat generous in its charitable giving. I would not want the cooperation to be giving away my money (in part, it is my money. since I own a *pro rata* share). I wouldn't want a corporation giving away my money to a charity that perhaps I wouldn't support if I was going to support a charity.

Please corporation, give me back some of my money by dividend or stock repurchase, and I will give it to the charity that I wish, thank you very much.

Elizabeth Warren, in her proposal, seeks to invite charities and the public at large as the “stakeholder” – a key defined term in her piece – to the table, so they will be sitting around the boardroom yelling and screaming and lobbying for their fair share. Oh, how we hate those words, “fair share.” They will be lobbying for their fair share, leaving an impossible decision for directors and officers to have gotten it right. So, the area of charitable giving is a tricky one, if that.

Federalizing the Corporation: The Race to the Bottom

Bob Zadek: Another concept in Elizabeth Warren’s proposal, as Richard explained, is to require corporations with over a billion dollars in assets to have a federal charter. That, of course, is reverse federalism. That is moving power, once again, from the states (states now issue corporate charters) to the Federal Government.

Richard Epstein: This is an extremely important issue. One of my good friends, Jim Copland at the Manhattan Institute, wrote a blog which looks at this federalism issue, and it turns out there is something very important here³. The traditional argument with respect to corporations had the following issue: when you have competition amongst states that issue corporate charters, is this a race to the bottom, or a race to the top?

The theory of the critics, of which Elizabeth Warren is one, is that it is always a race to the bottom – that people will start to go to those jurisdictions in which they can get the best rate – to hell with the shareholders and anybody else inside the business.

³ [Senator Warren’s Bizarro Corporate Governance](#), *Economics21*, James Copland, 16, 2018

POWER TO THE STATES

But the answer on the other side is much more powerful. It says that if you go to one of these places – sure, you can pick the place to incorporate, which is going to give to the insiders all the advantages that they could possibly hope for. But there is one little hitch in that argument: you still have to make sure that you’re going to be able to sell those shares to somebody else.

When there is competition in this market – so long as there is a buyer – the company picks the jurisdiction where the charter terms are optimal regarding the total value that is generated. Then the shareholders figure out what the respective portions of that value will be – for the founders of the corporation on the one hand, and for the public people working in these kinds of arrangements on the other.

Ask yourself, “Why do we have so many Delaware Corporations?” The answer goes back to another progressive, Woodrow Wilson, who was Governor of the State of New Jersey around the turn of the century. Before he became President, he made New Jersey a pioneer in corporate law, and he decided to essentially change the way in which corporations were going to be taxed, regulated, and so forth. All of these corporations went *en masse* to Delaware, which is quite literally across the river, because the terms they got there were going to be much better.

Delaware has been able to maintain a dominance in corporate law, because it has a system of rules on the one hand, and courts on the other, which are exquisitely attuned to the basic problem of how to maintain the proper balance between shareholder management and the corporate governance issues. People are confident that when they go there that a) the legislative rules are going to be pretty good, b) the regulations under them are going to be pretty good, and c) the judges that interpret the law are going to be pretty good.

Once you put all of these people into the Federal Government, then everything starts to become insane, because now you’ve got only one set of guys, and if it turns out that they are politically chosen with a span of responsibilities so broad that they can’t possibly discharge them, then you’ve got no place to go. The reason we like federalism is because of competition.

Are there reasons why we don’t like federalism? The answer to that question is yes, but they are very different situations, starting in the late 19th century when railroads became very powerful. These are network industries. The only way in which you can effectively operate is to make sure that you can ship your goods

from San Francisco to New York by going through 15 states. Under those circumstances you are worried that each state will try to be opportunistic and block the free movement of goods back and forth across state lines, at which point federalism – instead of creating competition – now creates blockades. It was for exactly those reasons that a form of federal regulation, embodied originally in the Interstate Commerce Act of 1887, was started.

Like everything else in the world, federalism is a mixed bag, but if you get the distribution of powers wrong, as Mrs. Warren always seems to do, it could be a catastrophe to nationalize. On the other hand, if you have the blockade issue, then absolute devolution of power to the state is going to be a big mistake.

In fact, if you go back and look at the original Constitution, one of its chief aims was to make sure that states could not barricade trade across state lines in order to create a national market for goods and services. They did a pretty darn good job of that. The Supreme Court, although it gives much too much power to the Federal Government to nationalize charters, for example, has done a very good job under the Dormant Commerce Clause to make sure that no state can impose burdens upon other individuals in ways that would make it impossible to have the free shipment of goods and services.

Bob Zadek: One observation, Richard. Elizabeth Warren and others worry about the phrase you used, “a race to the bottom.” That phrase, in my opinion, doesn’t really apply. It’s not the bottom, it’s the top. Because, if states don’t have good corporate governance statutes, they will lose the businesses. A “race to the bottom” is a politically-motivated, when it really doesn’t do that at all.

Richard Epstein: Amen. The thing about Mrs. Warren and virtually everybody like her is the kind of intellectual impatience they have. They are so sure they are right that they don’t try to understand anything before they figure out whether something ought to be condemned in the most categorical terms. Mrs. Warren has never been on the board of a corporation and doesn’t know anything about how to put together a business plan. She is a politician down to her fingertips. She is going to tell every single corporation in the United States, which are all filled with experts who have been in business their whole lifetime, “You do not know what you are talking about ladies and gentlemen. I’m going to tell you how every corporation in America should run, because I was once a professor.”

American businesses have created the greatest profits in the history of the world. It is just mind-boggling that you would ignore these successes in every relevant dimension of life, from life expectancy, product safety, medical practices, to pretty much anything that you wish to look at over the last 40 years. The downsides in terms of safety and environmental risks that she talks about are down 75, 80, 90 percent. As you get these improvements, why would you attack the system that managed to generate them? I simply do not understand how that makes sense.

Collectivism and Confusion

Bob Zadek: One of the many fatal flaws of society today is that you have lots of organizations, each of which specializes in what they do. The police are specialists in controlling crime. The SEC is a specialist at what it does. Businesses are specialists in another thing. Therefore, if I want to make money, I will give money to a corporation because I like the history and how well they've done it. If I want to build a house, I'll hire an architect. If I want police protection, I will hope the police will do it. When you start to blur the lines, like giving the corporation the job of looking after the environment, enforcing the laws, protecting labor laws, looking after workers, and managing some kind of artificial minimum wage laws, everybody has every job.

Look at what has happened in the educational system. When we expanded the task of the schools to become nannies, so that they would also have to teach morality, the schools suddenly do not have enough resources and end up doing a poor job at all of them. Elizabeth Warren takes corporations, because they have a lot of money, and she appoints them to be the guardians of the rules of society – the rules that government has selected. It blurs everybody's assignment, so nobody knows which way is up. That to me is the scariest part of her present proposal.

Richard Epstein: You have restated the issue about the diffusion of knowledge throughout society. If you have centers that pick their own areas of expertise and are allowed to change, you solve the knowledge problem by assigning a high risk to the people that have the greatest knowledge of what is going on. So, if you want to buy a good from a corporation, you don't have to know anything about how it manufactures that good or procures it. All you have to do is look at the final product – you see that it has got a warranty with

it, you can inspect it – you pay a price, and you’re done. You can make your decisions without going internal.

The moment you start having this collective situation with these great big corporations, it is going to be much more difficult to do those things if in fact there is always going to be an administrative process which is going to challenge the way in which the corporation has decided to put these things together.

The “Amazon Effect:” Maximizing the Size of the Pond

Richard Epstein: I do disagree with you on one thing. American corporations have been able to survive amazingly well notwithstanding the fact that they’re burdened by various kinds of labor laws. I am against all of them. Minimum wage rules, overtime rules, family-leave rules and anti-discrimination laws, and so forth – these corporations are so adroit that they actually can, given their fiduciary duties and their expertise, minimize the risk associated with external regulations. This is an incredible achievement.

I think one can say that if you were to remove all of these things, corporations would instantly adjust. We would see higher levels of productivity, which in turn would lead to higher wages. Donald Trump is attacked for many things, and of course Elizabeth Warren is one of the people who hates him the most. I certainly disagree with him on any issue in which he takes a stance against free trade and voluntary exchange. On a domestic front, his willingness to lower taxes and to back off on the existence of new regulations and on the enforcement of old regulations has created a huge upward draft in the stock market. Those stocks are owned by lots of people, including many pension funds and so forth. If it turns out that the rich get money in the short run, they give more money away, they hire more people, and do all sorts of things.

When you’re doing general public policy, you should always spend your time initially worrying about maximizing the size of the pond rather than trying to figure out what the size should be for each particular slice. The Warren approach is the exact opposite. Without any basis whatsoever, she knows what ought to be done and what ought not to be done.

An example of this pond analogy is called the “Amazon effect.” Amazon hires large numbers of relatively low-wage workers to work in filling orders, shipping goods, etc. The company is quite different from Apple, whose U.S. employees

POWER TO THE STATES

tend to be high-tech. If you, in fact, hire another 100,000 people who had no jobs whatsoever and pay them, say, \$35,000 a year, as opposed to what Jeff Bezos gets (several billion), then the ratio between his salary and that of his average employee is going to go up and people are going to say, “Oh my God, this guy is an exploiter!” But that is exactly what you want – somebody who is willing and is able to create thousands of jobs for thousands of people who had no jobs whatsoever. He is the hero. The ratio between how much he earns and how much they earn is utterly unimportant. What you are trying to do in American capitalism is have people with marginal skills put back into the workforce.

Interestingly enough, with the decline in corporate taxes and the softening of regulations, all of a sudden youth employment is up, and people with criminal records are now able to get jobs.

In order to make yourself rich you have to try to make somebody else richer than they were. Suppose you have two people. One has say \$10 in income and the other has \$100. Now what we do is we give them a little change and one guy goes from \$100 to \$200 and the guy with \$10 goes to \$20. You can say, as Mrs. Warren has, that a terrible thing has occurred by this expansion of the difference, but it is a Pareto improvement⁴.

You have to remember that in the corporate world there is not just one guy going from \$10 to \$20 as the rich guy goes from \$100 to \$200. You have 200,000 people in that group who are going from \$10 to \$20. So, it turns out that most of the gain goes to people at the bottom end of the income distribution even though the percentage gain for the one guy at the top is larger than everybody else’s.

You don’t want to kill that kind of motion by saying to the guy at the top, “You have a billion dollars. Now we are going to basically knee-cap your business by

⁴ An outcome in which both parties to an exchange are left better off than before, with no one being left worse off than before.

giving you a series of board members, all of whom are antagonistic to everything that you want to do.”

Bob Zadek: There is a wonderful YouTube series of interviews with Milton Friedman on the subject of corporate greed. I did a show about 10 years ago on corporate greed. Since greed is an emotion, I wondered how a corporation can experience an emotion. What a wonderful job opportunity for a psychiatrist, since corporations can now have emotions, to be a psychiatrist for corporations. They might be depressed and fearful and insecure also.

Corporations cannot be greedy. Besides, everybody in America is greedy in the sense that everybody wants to do the best they can for themselves, financially and otherwise, unless they are self-destructive. Greed is something which drives the engine of American business and it should be encouraged and praised. People who talk about greed are really talking about the manner of acquiring wealth, not the fact of it. Everybody wants stuff. It's how you get it that makes it praise-worthy or not.

Richard Epstein: Corporations are not greedy in the sense that we say ordinary individuals are greedy.

Imagine you have a bunch of people sitting around the table. The greedy person is the one who goes and takes more than his proportionate share, leaving less for everybody else. The source of greediness is indefinite property rights, which you get with a commons. The reason that corporations have successfully eliminated greed is that these roles are so heavily specified that you are not allowed to say that some property rights are indefinite and just simply take your largest share.

I don't think that it's wrong to say that people are greedy. I think it's wrong to say that the institutional arrangements that corporations put into effect are not very powerful counterweights to the kind of greediness that ordinary people engage in their daily live

8 – OR TO THE PEOPLE

Guest: Honorable Clint Bolick, 44th Justice of the Arizona Supreme Court

Date: [September 23, 2018](#)

The Promise of Federalism

Bob Zadek: This morning's guest is a gentleman who has been so important in my intellectual and political life as a radio show host that I have to be careful to not let the emotional part of my being come out too much.

Justice Clint Bolick is a judge on the Arizona Supreme Court. He is a co-founder of the [Institute for Justice](#), an organization which I have featured in countless shows, and which I wish I had a chance to discuss more. They are warriors in the battle for economic freedom and freedom in general. They have been successful in state and federal courts, often including the U.S. Supreme Court.

Clint Bolick has written a fascinating book called *Grassroots Tyranny: The Limits of Federalism*. As my friends out there know, federalism was such an important concept to the founders that it became one of the cornerstones of the Constitution. It is more important today than ever before.

Grassroots Tyranny explains what federalism is and why it is both a savior as well as a cautionary tale. It is all about liberty and the importance of the power of

the individual over the collective. What could be more important to each of us than dominion over our own lives?

Clint, welcome to the show this morning.

Clint Bolick: It is great to be with you.

Bob Zadek: To set the stage for our friends out there, most of whom have a general understanding of federalism, explain how the principle of federalism fits into the blueprint for our country the founders gave us.

Clint Bolick: The idea of federalism is to devolve authority to the very lowest level that you possibly can. It is one of the most important innovations of the American system of government and safeguards of our freedom. Obviously, that begins with the individual and extends to the family and the community, to the local government and state government, and then finally to the national government, which is a government of very limited powers – it can only do those things that cannot be done locally.

The theme of the book, however, is that devolving power to the lower levels of government does not remove the prospect for tyranny.

Local governments, of course, have greater impact on our day-to-day lives than the national government does. Even the framers recognized that the more you devolve power, the more it is susceptible to influence by special interest groups. The book embraces federalism very strongly, but at the same time warns that we have to be very mindful that government at any level is capable of violating our rights. We have to keep a very watchful eye on government that is closest to home.

Bob Zadek: You mentioned that federalism is the concept involves the devolution of power down from the Feds to the state, to the county, to the towns, and to the individual. That begins the story of power in the middle. By that I mean that power starts with the individual. I think most people subscribe to the theory of natural rights, whether they know it or not, because they believe they have dominion over their own lives. If you believe that, then power – in this round trip that it makes – moves from the individual to the family, and then to the town or city, upstream again to the state, and upstream to Washington.

POWER TO THE STATES

The reason power moves “up” is only for practicality. There are certain things as a practical matter in the enjoyment of liberty that you cannot do by yourself. Citizens and groups conclude that we had better get together and do it collectively. That is just nature.

Our system of government started off assuming that power was at the local level, but because of the operation of the political process we ended up with power moving upstream to the Feds. In federalism we remind people that we need to get power back down where it belongs – ultimately, back to the individual.

Clint Bolick: I think you’re right. In our system, all power resides in the people. National defense, the regulation of interstate commerce, and all of the things that gave rise to the creation of a national government were absolutely practical. We, and the states that we lived in, ceded only a very limited amount of power to the national government. That was the system that was intended.

Of course, if we look at things from the standpoint of 2018 rather than 1787, that is obviously a far-off description from where things are today. I actually see some very encouraging signs that we are returning to the idea of federalism that the framers brilliantly gave us. While there has been a steady accretion of power at the national level, I am very optimistic that we are beginning the long process of slowly reversing that.

Ninth and 10th Amendments: Safeguards of Unenumerated Rights

Bob Zadek: We have all heard the phrase “enumerated powers.” The founders of our country – those 65 men who met in Philadelphia for four and a half months in 1787 to draft the Constitution – assumed that almost all power resided in the states and localities. This was beyond question, because it was so obvious to them. Nobody discussed it. Then, in this grudging fashion, they began ceding power to Washington.

It was like they said, “Okay, if we are to form a nation and prosper and live free, certain stuff is just not practical or sensible to do at the colony or state level.” As a matter of practicality, they assigned these tasks to Washington. As a reminder of that, after the Constitution was ratified, Congress drafted the Bill of Rights and the Ninth and 10th Amendments in its first session.

These are called “amendments,” but most of them aren’t amendments in that they don’t amend anything. They state principles, but because they are somewhat of an afterthought, the appropriate noun is “amendment.” The first ten amendments were basically reminders. Tell us about these amendments.

Clint Bolick: That is a really good insight. The argument Madison initially made against having a Bill of Rights at all was precisely what you mentioned – that we don’t need a “bill” of rights because we already have them. We had not delegated those powers to the national government, and therefore, we retained those rights. Nonetheless, a number of states were saying that they might not ratify the Constitution without a Bill of Rights, so we ended up with them.

The Ninth and 10th Amendments remind us that the power resides in the individuals and that any rights that were not necessarily articulated in the first eight amendments or elsewhere in the constitution, if these are not explicitly enumerated, that does not mean that they do not exist.

Basically, more rights exist in the individual, whether they are articulated or not. It was a reminder that if a right was not enumerated, that should not be construed to mean that individuals do not possess it.

The 10th Amendment is also a reminder that only those powers that are expressly delegated to the national government belong to the national government. There is no inherent power in the national government that is not expressly delegated elsewhere in the Constitution. Also, all proper powers of government that were not delegated to the national government remain in the states and in the people. These are two very important provisions of the Bill of Rights that are sometimes forgotten.

The Ninth Amendment was dismissed by the U.S. Supreme Court as a truism in the 1940s. Basically, they said it doesn’t really mean anything. Nonetheless they were extremely important in understanding the framework of our government

Bob Zadek: One of the most important phrases you mentioned in describing the 10th Amendment was “or to the people.” In other words, there is a large swath of rights that the Constitution keeps for the individual. It says that under this document the people have not lost very many of their rights, but rather retain them. Therefore, the document reminds us that Congress does not have

POWER TO THE STATES

the power to take rights from the people except for the stingy list of powers that are given to Washington.

This phrase, “or to the people,” should be cited every morning as a reminder to the government that they do not have the power to take away our rights.

The Supreme Court has eroded this phrase over 200 years or so.

Congress has also eroded it.

However, this was the starting point. Power has not been taken away. It sits where it always has been – with the people. When you described federalism, you said that it devolves power back down to the states and to the cities and to the people. That is true. But why did the power leave to begin with?

Clint Bolick: That is absolutely right. Just to give you one example to show how this would work in practical effect. There are some powers that no government rightfully possesses. This is important both in the context of the Ninth Amendment and the language that you’re citing in the 10th Amendment, this phrase “or to the people,” which ends the amendment.

We would look for these rights back in the English common law. The rights of English people, which we brought over to the United States when our country was initially settled as English colonies. For example, under common law, the government has no power to create monopolies. That right is not mentioned anywhere in the United States Constitution, but I would argue that because the power to create monopolies was never delegated to any government, especially the national government, that that power does not exist. That is the kind of power that is being referred to in the Ninth and 10th Amendment.

Basically, these are powers that were never ceded to government, and which were not thought to be necessary to include in the Bill of Rights because it was so well understood that certain rights were so obvious that they didn’t need to be listed. Certain powers, equally obviously, were not delegated to the government.

Bob Zadek: Do our listeners feel they have, for example, a right to travel from state to state? Well, of course they do. No one would question that for a moment. You have a right to travel from New York to New Jersey. However, nowhere in the Bill of Rights is there the right to travel. You have the freedom

of association, religion, free speech, etc., but you don't have the right to travel? Nobody would argue that because the Constitution does not grant government the power to deny you the right to travel that it is not an inherent right that you have. Or, for example, the right to raise your children the way you wish – nothing in the Bill of Rights mentioned that, but everybody of course has the right to raise their children as they wish, subject to safety and other issues like that.

Therefore, there are an infinite number of rights that exist, although they are not “enumerated.” The Ninth Amendment reminds us that this list of rights is not an exclusive list. So, it is beyond question – it is too obvious to discuss – that there are countless unenumerated rights. You don't have to find a right in the Constitution. We all know they exist.

Clint Bolick: The U.S. Supreme Court has subsequently recognized those rights even though they don't explicitly appear in the constitution. There are many conservative theorists – Robert Bork is probably most prominent among them – who have basically said that if a right is not explicitly listed in the Constitution, then the subject matter is completely subject to democratic decision-making. I think that view turns the Constitution entirely on its head.

When we look at the Constitution, we are not looking for whether a right exists. We are looking to see whether a *power* exists. That is, a government power. If we do not find that power, then it doesn't exist, since the Constitution is all about conferring a limited number of powers on the national government and reserving all of the rest of the legitimate government powers to the states, and all rights to the people.

Grassroots Tyranny: A Tyranny at the State and Local Level

Bob Zadek: In your book, which explains federalism and warns us that federalism – while very important as this principle to move power back down to the individual – does not end the battle. Then we get to this idea of “grassroots tyranny.” Once we succeed – bloodied and battered, having won the battle to get the power back down where it belongs from the feds to the local government (maybe you haven't gotten it to the individual) – the battle continues.

POWER TO THE STATES

Judge Bork believed that the majority ruled, as you explained, which is why he is labeled as a “majoritarian.” Essentially, 51 percent controls everything and there is no other guiding principle. He basically would tear up the Constitution in saying that everything on earth is subject to a majority vote. But of course, that doesn’t work. Madison and the other founders warned us and desperately feared the tyranny of the majority. It was observed that if you are going to be dominated and cruelly ruled, it does not feel any better if the cruelty is dispensed by a majority rather than by a despotic king, since it is still tyranny either way. The evils of majority rule still exist at the local level.

Democracy, which is often taken to mean “majority rule,” has its shortcomings. Just because we can move power back down to the county, or the town, or the locality does not mean we have won the fight. There can be as much tyranny at the local level as at the federal level because, after all, once you cede power to any group power – and by power, I mean power over you – that power is the ultimate intoxicant. It is hard to control oneself when you are given power.

Clint, you have spent your life fighting the misuse of that power. Give us some examples of how power over the individual has been abused by the collective at the local level, and the battles that had to be fought to bring it back to the individual.

Clint Bolick: The insight about the potential abuse of government power at the local level goes all the way back to Madison. He argued that one of the benefits of having a national government is that it is more difficult for special interest groups, which he referred to as “factions,” to execute their “schemes of oppression.” At the local level, unfortunately, small groups with outsized influence can often operate the machinery of government and essentially turn the power of government toward their own ends rather than toward the ends of good government and equal opportunity.

You see this in the area of occupational licensing and government monopolies. I mentioned that no government was intended to have the power of monopoly. But when you look at taxi-cab monopolies, they exist at the local level and they prohibit local entrepreneurs from opening competing cab companies.

We have seen the power of occupational licensing – where the government’s regulatory powers go beyond protecting public health and safety to focusing on protecting the people who are already in the profession against those who might

wish to enter it. For example, in the area of cosmetology we have seen all sorts of restrictions on people entering the profession, from hair stylists who braid African hair, to fish spas. There was actually a case I litigated here in Arizona a few years ago where a cosmetologist brought fish into her salon to nibble on people's feet. This is something that happens in a lot of Asian and European countries. And the board of cosmetology said, "Nope, we are not going to allow that to happen."

Bob Zadek: I should mention that the fish were not piranhas. They were just little fish that make the skin healthier. There was no danger involved. This was simply a case in which the people with the license didn't want the competition.

Clint Bolick: That is absolutely right. There are millions of people who have these procedures around the world. Unfortunately, when I took on the case the fish had already been banned. So, I have never been able to have that procedure. I understand that it is quite a fun experience. Unfortunately, Arizonans will now have to leave the country, or at least leave the state, in order to have that kind of experience.

You also have government subsidies of businesses and of labor unions. For example, another issue that I had litigated here in Arizona was the issue of union release-time. People in the police and fire departments and other areas of local government are paid by the taxpayers to do a particular job like being a police officer, but they show up for work every day at union headquarters and report to the union even though they are paid a pension by taxpayers.

The list goes on and on of these sorts of abuses of individual rights. There are violations of people's free speech, of private property rights, the abuse of eminent domain power, etc. It would take longer than a show to document all of them. This underscores another insight of our Constitution – the purpose of federalism is to protect freedom and it always has been. The idea in our original Constitution was that local and state governments were more reliable in protecting individual freedoms. Sometimes that is true. In fact, oftentimes that is true. But it is not *always* true.

We discovered that in the early years of our Republic with the institution of human slavery and the many abuses of individual rights that were necessary to sustain slavery. When the Civil War was over, we enacted the Civil War amendments, including the 14th Amendment, which forbids state (and local)

governments, from violating the civil rights of the people. So, we now have a double security against the abuse of rights. We have the Bill of Rights, which protects us against abuses of individual rights by the national government, and the 14th Amendment, which gives us protection against the violation of our individual rights by state and local governments.

In my opinion, the 14th Amendment completed the tapestry of federalism, and that is the framework that we have now, where we have protections of our rights both against the national government and the state and local governments.

State Tyranny and the Need For the 14th Amendment

Bob Zadek: The need for the 14th Amendment shows the profound bias the founders had. The founders naturally assumed that the states will treat their citizens fairly. The states are not the problem. The founders had colonies for more than 100 years and they worked just fine. Therefore, they thought that what they had to fear was what we do not know about. Since they were creating a new governmental organism in the Federal Government, and didn't know how this was going to behave, they created it with a very tight rein. So, the Constitution was drafted to create this new Leviathan – the Federal Government. They created it with a tight leash in the form of the enumerated powers doctrine. But nobody felt the need to control the states.

They thought that the states could take care of themselves and that the voters would look after them. Slavery, however, showed that they gave the states too much latitude. When we achieved a national identity and wanted to present ourselves to the world, we felt the obvious need of at least subjecting the states to the constraints set forth in the Bill of Rights, via the 14th Amendment. The founders' assumption was, therefore, a bit naive.

Speaking of local tyranny, I should mention I speak to all my friends out there from California, the very citadel of local tyranny. We invented the product here in California, and should copyright it – and yet other states want to emulate us.

The rights you have so passionately and effectively defended are economic rights. Many of our listeners may not understand the subset of what we mean by “economic rights,” why they are so important, and how they have often been in Supreme Court jurisprudence a kind of rights-stepchild. Explain to us the

subset of economic rights because that has been so important to the Institute of Justice.

Clint Bolick: These rights can be traced back to a time before we were a nation. We brought these rights to the United States from England. There are essentially two rights. First, there is the right to contract, or free labor, which is your right to contract with another person to perform work at an agreed upon salary without the government interfering or intruding into that relationship. Second is freedom of enterprise, which is the right to establish a non-harmful business without extensive government interference.

These are bedrock American rights and yet they are among the rights that do not explicitly appear in the United States Constitution. They were so widely accepted and taken for granted that no one thought it necessary to explicitly enumerate those rights.

It turned out that states over time became great violators of these rights, particularly after the Civil War when blacks were emancipated and began using their labor and the skills that they had acquired for themselves. They went into business for themselves and would offer their labor at competitive wages and so forth. This was very annoying to the white gentry in the southern states who no longer had a labor supply, so southern states enacted “black codes,” which were aimed at suppressing black labor by suppressing their freedom of contract to negotiate wages.

They also imposed occupational licensing laws and other restrictions, such as restrictions on private property rights. These laws – these black codes – were outlawed by the Civil Rights Act of 1866, which was then incorporated into the 14th Amendment through the very first provision of the 14th Amendment – “the privileges or immunities clause.” Sadly, that clause was more or less erased from the Constitution in the Slaughterhouse Cases.

Since that time the courts have relegated economic liberty to not second-class status, but to third or fourth-class status. They have virtually given no protection to economic enterprise and liberty even though these rights were intended to be very robustly protected against governmental abuse. As a result, these laws have become particularly harmful to people with very little education and very little capital. They often prevent these individuals from creating

enterprises and from working in occupations where they could earn an honest living.

Bob Zadek: Economic rights are so clear. It is all summed up in a very simple phrase. Two adults ought to have the right to agree on a transaction that only affects those two people, and the transaction is voluntary and mutually beneficial. I agree to do something for you if you do something for me. I will build you something and you will pay me this price. There is no coercion. It is a voluntary exchange and it is mutually beneficial.

Yet we have countless statutes that Clint has fought against in his career, that say, “No, two consenting adults who are competent to contract and want to enter into a beneficial transaction are prohibited for reasons of policy.” If ever there was a case of government substituting our judgment for its judgment about what is best for you and me, that is the example.

Our government says that until the seller of labor passes certain standards that we have created, you cannot sell your services as an electrician or a cosmetologist or a doctor. You cannot sell your services unless you are given a license.

I find “license” to be the one of the most hateful words in politics. Permission to do something. Oh, how I dislike it!

Situational Federalism: A Federalism of Convenience

Bob Zadek: Federalism, or the devolution of power from Washington to states and localities, is often seen as a conservative issue. Republicans, if they are in fact conservative (and I question that), historically conservatives have embraced the idea. Now, federalism has become simply a rationalization to support any policy you wish. There are some instances when conservatives embrace federalism in that they want to take power away from Washington. However, in many instances conservatives want the power to move *towards* Washington. Federalism has become a convenient justification for any principle you favor.

To give you one example, take the minimum wage. We have a federal minimum wage. First of all, there should be no minimum wage. It violates the principle that Clint has explained to us regarding economic liberty. However, if you grudgingly admit that a minimum wage is constitutional (which I don't), why in

the world do we need a national minimum wage? Well, those who oppose the minimum wage say, “no federal minimum wage under principles of federalism.”

Then you have social issues, for example, like abortion, where the conservatives want to criminalize abortion on a national level, which is the opposite of federalism. So, Clint, is it not the case that federalism has become “cheapened”? It is not an end in itself, but merely the rationalization for supporting any principle that a politician favors?

Clint Bolick: I refer to this as “situational federalism.” That is, you support federalism when it supports your views, but not when it supports someone else’s. So long as federalism is used to expand freedom, I think that we all need to support it. We need to support “blue state” federalism when it expands freedom and we need to support “red state” federalism when it expands freedom.

Federalism is not going to be with us forever if we don’t agree that there are certain things that states ought to be able to do, free from the interference of the national government.

Bob Zadek: Clint, how can our friends and listeners out there follow your thoughts.

Clint Bolick: Yes. I just started a website called AZjustice44.com. I am the 44th justice of the Supreme Court of Arizona. There is a collection of my opinions and my articles since I have been a member of the State Supreme Court, and it also provides a contact area where folks can contact me as well.

APPENDIX I – ORIGINAL SHOWS

Power to the States (Robert Alt on State-Based Policy Strategy)

Show Date: [October 29, 2017](#)

The Anti-Federalists Strike Back (William Watkins, Jr. on America's First Constitution)

Show Date: [February 5, 2017](#)

Winning Legislatures (Cliff Maloney on Operation Win at the Door)

Show Date: [June 17, 2017](#)

California Discovers Federalism (Joe Mathews on Immigration Federalism in the Wild West)

Show Date: [July 22, 2018](#)

How Money Walks (Travis Brown on How America is Voting with its Feet)

Show Date: [April 28, 2013](#)

No Strings Attached (Sen. James L. Buckley on Ending Federal Subsidies to States)

Show Date: [July 26, 2015](#)

Elizabeth Warren's Surreptitious Socialism (Professor Richard A. Epstein on the Federalization of American Business)

Show Date: [August 26, 2018](#)

Local Leviathan (Honorable Clint Bolick on Grassroots Tyranny)

Show Date: [September 23, 2018](#)

APPENDIX II – FEATURED BOOKS

Grassroots Tyranny: The Limits of Federalism, by Clint Bolick

How Money Walks: How \$2 Trillion Moved Between the States, and Why It Matters, by Travis Brown

Crossroads for Liberty: Recovering the Anti-Federalist Values of America's First Constitution, by William Watkins, Jr.

ABOUT THE AUTHOR

Bob Zadek is the host of The Bob Zadek Show, a libertarian talk show broadcast live on stations throughout the country, every Sunday at 8am Pacific, and livestreamed on the web. He talks about the issues that affect our lives on a daily basis from a purely libertarian standpoint. Bob has been practicing finance law for over 50 years, is listed in “The Best Lawyers in America,” and has been awarded the highest rating for Ethical Standards and Legal Ability by Peer Reviewed Martindale-Hubbell. He holds a law degree and a Master’s degree in Law from NYU School of Law and is a Charter Fellow in the American College of Commercial Finance Lawyers.. As an entrepreneur, he created and now manages a specialty finance company, making and participating in loans to small business.

He lives in total bliss in Coronado, California with his wife Anne.

