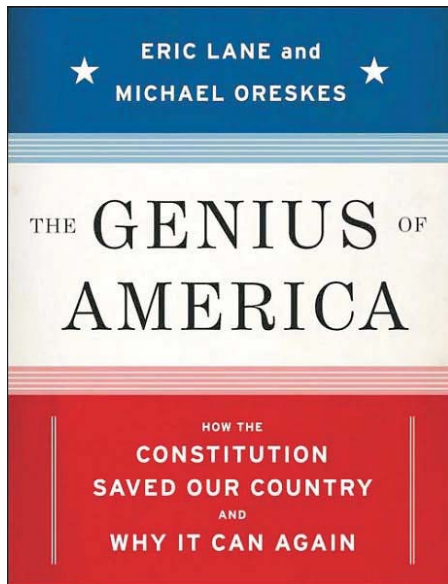




The Nelson A. Rockefeller Institute of Government



The Genius of America: How the Constitution Saved Our Country and Why It Can Again

A Public Policy Forum

Presented by
Eric Lane

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Robert Ward:

Good morning everyone. I'm Robert Ward, deputy director of the Rockefeller Institute. I think most of you know Eric Lane, but let me just point out a couple things about his background that I think are important. He has been involved in not only thinking about but practicing government reform for a very long time here at the state, local, and regional levels. He's been involved in very important studies of big structural reforms at the state level, which ended up not only having an outcome in terms of a constitutional convention, but with major structural reform in New York City as the executive director and counsel to the New York City Charter Revision Commission, which really was one of the most important governmental reform efforts in the country in a long time. As many people know, Eric was counsel to the State Senate Minority for a number of years. He has also been involved very closely with the Brennan Center for Justice, which has done its own critique of the New York State Legislature. More recently, he and Michael Oreskes, formerly of *The New York Times*, produced this beautiful book, *The Genius of America*. Thank you for joining us, sir.

Eric Lane:

Thanks, Bob, for having me. I spent six years here in room 721 at what used to be called the Howard Johnson. Like many people who have spent time in government, I always have the fondest memories of it. And, actually, it's my experience here that's helped my career enormously in terms of opportunities to write about government in the academic world and other posts that Bob mentioned. I also have to note that my entire dream for six years was for the Senate Democrats to finally become the majority so I could ring the bell that assembled people rather than have Jack Haggerty, who was then the counsel, be the person who would ring the bell. Now some lucky person, not me, will have that task starting next year because it looks inevitable that the Senate will switch. It will be a hard battle but the demographics are pretty overwhelming, it seems to me, against the Republicans maintaining their positions. I guess Governor Spitzer has decided to put a lot of bucks into that effort, which of course was always an issue when I was doing it. We got close in 1984 and 1986, but Governor Cuomo always told people he was giving us a lot of help. He once told me that he thought that there should be one house of the Legislature and it should be the Republican Senate. I thought that was a clue that he wasn't really going to deliver very much on our behalf, which he didn't. But he did recommend my book. He wrote a beautiful piece about this book, so what more could I ask for? It's one of those little political stories that were infuriating at the time, not getting his support, but now we all have a drink and laugh about it.

Since Albany, I've done a lot of teaching and a lot of government work, written a couple textbooks on law, and then we ventured into this book about the American Constitution. My coauthor, Mike Oreskes, used to be the bureau chief in Albany for *The New York Times* and then was the Washington bureau chief and then the national political correspondent for the *Times*. It's our Albany experience that actually forced us to think a lot about how government works and to a large extent it's that experience that influences our thinking in this book.

This book is a celebration of the American Constitution as the centerpiece of our 220-year tenure as the longest-existing democracy in the history of the world. Athens was 175 years. Not only are we the longest-existing democracy, but the most populous country, and we argue in the book convincingly that there is a tie-in between that prosperity and this Constitution. When we talk about the Constitution in the book, we're not simply talking about the parchment, but about the ideas and values that had evolved around the Constitution — its ideals in the history of the Constitution. So, for example, in 1787 it was a document that the states

mostly didn't like, but were more scared of chaos than they were of the central government. So they barely passed it and then immediately amended it. Now we come to a document that most people believe is the centerpiece of what makes us Americans. Even President Bush has said, "America's not a country of blood or clan or soil or religion. It's a country of ideals and those ideals are the ideals that float around this Constitution." We've actually created a name in this book after these ideals, what we call "the constitutional conscience." The notion is to catch your attention on how your own conscience works. In other words, we all have our individual needs, wants, selfishness, and by that I don't mean greediness — I mean our selfishness. We're about to do something and the conscience comes in and says, "No, you can't do that, you got to think of the 'we' and not just the 'I,'" which, of course, is the role of the conscience and human development. And so in one sense the constitutional conscience is those values that compel us to say we can't always be tribal or factional. You have some obligations that pull you toward the national interest and there's a "we" and not just an "I." Nobody knows what's in the Constitution, only maybe a rough idea. But they all know that if something's unconstitutional, it's bad and that if something's constitutional, it's good, in the sense that a conscience tells you that same thing.

The book is a celebration of that idea, but it is also the positing of a worry that we're disconnecting from those values and we're becoming too tribal, too "we." We're losing the sense of "We the people" and that we're more into factions — blue state, red state, this interest group, that interest group. And that we've lost the center of that idea that we have some obligations to the "we" part of our national existence. Ronald Reagan said you have to have a learned patriotism. George Bush's first inaugural speech is really a rich speech about the Constitution and about American ideals and the like. (Quoting George Bush is not that usual for me, especially if you've witnessed eight years of his administration unhappily. If you've witnessed it happily you might think this speech is obvious.) He says in it that you have to learn these ideals, and so the point is that we're losing this connection to the Constitution and it's conscience because we don't teach it anymore. We don't learn it. And, you know, ironically of course, it's not so dissimilar from your own conscience. The values of a conscience are learned. It's easy to fall back on self, but the value of a conscience is learned. School is one of the places that you hope will help educate people about the values and the meaning of their Constitution, the sort of ideals of their society. If you look at the decline, for example, in civic literacy in the country in the last 40 years through any poll, any group that studied this, whether they be on the right or the left, the decline in learning is simply extraordinary. I'm not talking about whether you know the name of the new Russian president or whether you know the name of Franklin Pierce's vice president, I'm talking about the basic constitutional values.



If any of you are teaching, I would suggest you take the new questionnaire that they are using for citizens. They got rid of the questions that said “What are the three colors on the flag?” They actually started to ask some more serious questions about the Constitution’s expression of ideas, its written ideas, not anything about the values behind the Constitution.

So the book is also a sort of warning and demonstration of the loss that’s recognized across the board and the relationship between declining civic literacy and our constitutional democracy, our ability to actually be Americans, since it’s the Constitution that shapes us as Americans.

When I was coming over here today from Columbia County, I was thinking of a couple of things that have happened recently strained through the screen of the ideas in this book. For example, the debate between Romney and McCain. Romney attacks McCain for reaching across the aisle on campaign finance. Or the 14 senators who came together to break off this whole battle of the nuclear option to judicial appointments or reaching across the aisle in order to deal with the immigration issue. The notion of reaching across the aisle is somehow bad. I’m not standing here saying that partisanship’s not important and that’s how we frame ideas. These struggles are okay and we are always going to fight until we reach consensus. I’m not arguing about that. I’m arguing about the idea that this becomes something that should disqualify you from being a president of the United States, if you have this kind of consensus attitude toward trying to reach conclusions to solutions for problems of people to a new society. To me, it shows an ignorance of constitutional values that you could be disqualified. I know that it’s coming up in political rhetoric where people are choosing one side or another. My screen on that is, “Boy I think that’s great. I like McCain because of that. I don’t dislike him because of that.”

Or similarly, this discussion between Clinton and Obama over speeches or solutions. That’s a rhetorical political battle because he’s a wonderful speaker and she’s not, so she has to respond by saying something like, “He’s got nothing to say. Words alone, they don’t mean anything.” I don’t want to be unfair to her because she reaches across the aisle all the time and she’s probably a very good compromiser and consensus builder, but there’s a lot of what he’s saying in a presidential context that is very valuable in my view. I’m not pitching

for him. I've got to be careful here. I didn't make up my mind who I voted for until the last second and I'm not telling you who, but nevertheless, there's a lot in what he's saying that has to do with this idea that you can't continue to be tribal and solve problems. You have to come together and do this.

Now I'm not saying that Hillary doesn't agree with that. I'm sure she does and has acted on that. But I'm just suggesting to you that when the rhetorical response is somehow that you don't get action by talking about compromise and bringing people together in league, that's sort of a disqualification for the presidency. It's bad politically. It's a bad reading of what the Constitution tells us we have to do. But the thing that actually shows you where we are in this country — if I had to choose one example of why we have become civically illiterate — it's the White House and its view of power and Congress's failure to respond to them.

In 1987, a minority congressman wrote a dissenting report to a select investigatory committee studying whether or not Oliver North and John Poindexter had broken the law by shipping arms or resources to the Contras in the battles against the Sandinistas. Now, it's no question that the law is clear. The law says you can't do it, period. The Boland Amendment is so clear, it's one of those things that you couldn't reinterpret unless you were a Martian. It's so clear. You know it is an open and shut case. I mean, they were running a war out of the basement of the White House. They actually named it the Enterprise. That's what they called it. And it owned planes and ships and had billions of dollars in cash and they'd gotten a lot of this through some of the dealings they were doing with Iran. They were supporting this. One of the planes crashed. The whole thing unraveled and Reagan denied any involvement. There's never been any proof that he had any involvement. He fired everybody and brought in James Baker. Clean sweep, all right? Senate and House investigations come. Boom! Obvious there was no way around it, it's not remarkable. They broke the law. So, the Senate finds they broke the law. The House finds they broke the law. So there's a report. And in this report a member of the minority party at the time (the Republicans) writes, "Sometimes the President's conduct can break a statute because of a notion of monarchical prerogatives." Monarchical prerogatives. Try to remember that, king. Nobody paid any attention to that in 1987 because Ronald Reagan himself didn't pay any attention to that. In fact, that same minority member in that report criticized the president of the United States, Ronald Reagan, because he didn't stand behind North and Poindexter and say, "You know, I am a king. I have kingly powers. I can ignore the Boland Amendment. I'm allowed to do that." And so this comment went unremarked upon except for a couple of us who were

amazed that a person from the state of Wyoming could be elected to Congress when he believed in monarchical power. It seemed pretty odd.

The story would have gone unknown except that the theory now of “monarchical prerogative” to justify presidential actions is the dominant theory in the White House to justify the argument that the president can ignore acts of Congress with respect to a series of matters, mostly in the security area. Now we have the president of the United States, though he’s never articulated this as his doctrine, but the Office of Legal Counsel and the vice president have, rationalizing and justifying actions on the basis of kingly powers. One of the parts of the Glorious Revolution of 1688 was to get rid of the monarchical prerogatives in order to ignore Parliament. But the point is it’s simply ridiculous. And I’m not just talking from a Democratic point of view. As most of you know, I am a Democrat. Finally, the Office of Legal Counsel, the independent inspector general of the Attorney General’s Office, is doing a review now, not whether they acted illegally, but to see whether or not they were legitimately opinions of the Justice Department. Had they followed precedent? Was this real law? Was it ideology? So, there’s a whole investigation going on in the Justice Department about this right now.

My opinion is they offer this view and then they do these things and Congress does nothing. Congress acts like a Parliament. At least the Republican Congress acts like a Parliament responding to the prime minister. I must say I don’t think the Democrats have yet proven any more mettle in this area. It may be changing right now with what’s going on with the Patriot Act, but in both times before with the Patriot Act they’ve passed it overnight. I’m not talking of the merits with whether you want the Patriot Act or not. I’m not arguing against more security. There’s always a balance with freedom and freedom always gets limited a little bit; it’s inevitable. I’m talking about the process by which we do these things. We can say that this is justified on a monarchical basis and not everybody is laughing about it, right? Because if you look at American history, and many of you have, the Revolution is both calling on the king to solve the problems and it’s rejecting the king. The Constitution features the separation of power, refusal to allow royalty, and all that stuff. You can’t make the argument that there was a desire for a king. We have moments in our country when we’ve called for kings. Nathaniel Gorham, of Massachusetts, who was the head of the Continental Congress during Shays’ Rebellion, wrote to Prince Henry of Prussia, and said, “Would you come over and be our king?” And Prince Henry said, “Are you crazy? You just threw out a king.” There’s actually this correspondence going back and forth. And certainly some of you know that after Franklin Delano Roosevelt (FDR) got elected, or during that

period of time, Walter Lippmann, Henry Hazlitt, and people who had real importance suggested that he might have to change the Constitution and become a dictator in some form. *Barron's* magazine ran this whole editorial saying we need a dictator with a smiling face. And so, I mean, the notion of authority to solve our problems without democracy is not new in American history. It's just bizarre in this case that they're talking about kingly power in the Constitution that justifies these acts.

One of the reasons it's not being seen as ridiculous is, of course, fear. It is the great unstated anxiety this society is feeling. If it's a strong enough fear this year in the presidential race you may see an outcome that we don't expect. People who think that the Democrats are easily going to win may be quite surprised because we have this great anxiety. The idea that there's a single person, a king, who can help solve your problems, that's natural to human beings when you're nervous. That's when most people start to believe in God more strongly, as you know.

But, more importantly, why is the Senate not saying, "Look, this may be a good way to go, but we're not bowing down to you." Senator Byrd said, "You know why they're doing this? They don't know anything about the Constitution. They've never even read it." This is about his colleagues. And again, why is the American public not pushing back on this? Why are we taking seriously the notion of monarchical power? One answer is nervousness, but another is that we don't have a context anymore. We don't understand our history. We don't understand the context or our obligations to our own democracy. I'm not suggesting this, but if you elongate this notion of a war against terror for a long time, you can take the idea that you need a king. None of these candidates have retreated from this position. In fact, nobody feels a need to ask about it, although in *The New York Times* the other day there was an article where a number of people were asked what questions they would like to still ask the president. Charlie Savage, who is a young Pulitzer Prize-winning reporter from the *Boston Globe*, had several questions about executive power and monarchical powers, the questions that have not yet been asked that ought to be. I'm sure all of you know that the older you live doesn't guarantee your immortality. The same thing is true in a democracy. The fact that it's long doesn't guarantee its continuing existence. While I'm a very optimistic person, I do see warning signals that if we keep being disconnected from the democracy and we're always in a period of security concern that there are possibilities that really threaten the democracy that are inherited.

The principles of what you have to know about the Constitution are pretty simple. One is representation and participation together. The great vision of Madison, which he talks about in Federalist 10 and throughout letters, he calls it the "pivot." Representation is the pivot. The vi-

sion is that everybody and every interest is represented and comes into this body. Nobody's left out of the discussion. Madison was saying, as we understood in 1787, that everybody means "white men." But if you look at this history of the Constitution, almost every amendment, not all, goes to the expansion of representation. This is justified on Madison's notion that representation is pivotal to making the government legitimate. You have to be represented. And then the theory is you bring everybody into these two rooms, it can't be one room, because that's what separation of power is about, separation of legislative power, because the other goal of it is we want everybody in there but we never want majority rule. Now that's the real counterintuitive thing. By majority rule I mean 50 percent plus one. Because the experience of the framers during the 11 years between Revolution and the Constitution was that a majority of one was a mob. And a majority of one was unstable and was leading the country to chaos and allowing these predatory states that were surrounding us (France, England, Spain) to start to try to pick off the states because there was so much chaos. Every state legislature had one house during that period of time. Most of them had no gubernatorial power, although some did. Even when a governor had power there were very few who had veto power. North Carolina's governor, by the way, still doesn't have veto power.

The notion was to get everybody in and let them fight. And the currency of success is how you're going to protect freedom. The original notion of the Constitution is protection of liberty, the most critical value, which was to not allow the majority to trump the minority. You needed consensus. And the way you get consensus is through compromise. What forces compromise obviously is bicameralism and an executive who can veto, and later on the court plays a role in declaring something constitutional or unconstitutional. So, the values that become simply representation, conflict within consensus, consensus, and compromise, are the constitutional values. That's all they are. In 1791, with the Bill of Rights and then a couple of later amendments, we added the value of the autonomous individual to the mix. The Bill of Rights is a deal. Without it, there is no Constitution, as Madison was clearly informed by the Baptist minister who he met on his way back to Virginia. He said, "If you don't support us, we're not supporting you." So they made a deal, basically, to sponsor a Bill of Rights if the Constitution was passed. They favored autonomy with the individual. They just didn't think that the Congress would have the power to interfere with that, so they left that out of the consideration in the Constitution.

So, those values, as I said earlier, are pretty simple. You can fight. Nothing happens without a compromise or a consensus. In 1930, the federal government barely existed for most human beings. It fought wars, but it barely existed in the regulation of our day-to-day conduct, its

tax base was small, it was not spending tons of money. The focus of people's attention was state government and local government. And then the Depression hits and Roosevelt came in. Then 30 or so years went by and we had the Nixon inaugural speech, which said that people have great expectations about government and they ought to. And then he talked about the environment, about why that was a nonpolitical issue. I'm sure there wasn't a lot of forethought on that issue. So, in the early years he passed the environmental provisions — the last of the really sweeping pieces of legislation that brought the federal government from a distant star in a distant firmament, as Coolidge said, to this everyday player in our life. Now, one of the consequences of that is we have great expectations as a people about what the federal government can do for us. "Great expectations" as Nixon said, and we ought to. So we have these great expectations of what it can do; we expect it to do everything. But for it to work we need consensus. It won't work. Look at Social Security. Look at Hillary's original health plan. Let's see what happens with health care this year. There are a million issues that if you can't get a political consensus on it, it's not happening. And not only that, it's not intended to happen. Government is intended to fail. Or it succeeds by not allowing these things to go forward in terms of the framers. So the consequence of this has been great expectations, great frustration, great anger at government, and huge civic illiteracy, with a failure to appreciate that this is what the value of government is, forcing you to constantly go back and build a consensus for your outcome. The existence of such civic illiteracy leads us to this real problem, which is nobody appreciates what the government's doing. We're not buying into this idea that if you get a fair chance and you're represented, if you don't get your way, you may be angry but you go back to fight another day, and then we blame the government. We withdraw all these types of things.

You know, the forefathers taught us a lot of very valuable lessons that we're disconnected from and that democracy actually requires us to remain connected to. But how we remain connected to them when we don't require schools to teach anything with respect to this is a very iffy question, I think. The tradition of farewell speeches is not just say what good I did, but to warn the nation about what's coming. I join President Reagan here when he said in his farewell, "An uninformed patriotism is our greatest threat going forward." So, I'll end on that note.

Robert Ward:

Thank you very much, Eric. I'll start with a question. You said you're an optimist and you pointed to civic illiteracy and a number of other problems that are a real cause for concern for many of us in terms of the decline and concern about authoritarianism, if that's not too

strong a word, which is exacerbated by people's lack of understanding of what government is supposed to be about in the division of powers and so on. I was trying to think of an optimistic way to look at that. One thought that comes to mind is that young people today are much more likely to be skeptical of government and institutions. They're much more individualistic, at least this is what we're told, and I think there's some indication of it. They're more likely to be libertarian in their outlook. Is that any cause for optimism? Of course, that doesn't get at the issue of civic illiteracy.

Eric Lane:

I think skepticism about government is a very good trait, period. But if skepticism about government ends up simply being passivity or withdrawal, then it's not a good trait because it just takes you out of the game. The more you're out of the game, the more aggregated power goes to people who are in the game. So I have to say I don't know what the consequences of that will be. And it doesn't address the civic illiteracy question. Part of the civic illiteracy issue is not simply the schools. In the book I talk a lot about the decline in civic literacy, but I don't talk a lot about what that actually means. So we don't know the constitutional story, that's clear, and we're losing our way in the American story. It's too much about "us." There's a wonderful novel by Wallace Stegner called *Angle of Repose*. I really recommend it. It's a beautiful story of this guy's grandmother who wanted to be an artist and then ended up instead helping to settle the West. But in the beginning, the lead up is a professor and he's talking about his son. He says, and I'm paraphrasing, "My son is an existential man. He believes history began with his birth. You know, I am someone that believes in the ashes of my..." You know, I forget how he goes into it, but you know that's a very important point because if you see the world only contemporaneously, right now, then the idea of executive authority in a moment where it sounded good, it may be good. You're going to get saved. But if you know about history and what the values that the Constitution has run, you might say to yourself, "I better push back on this a little bit. I have to do something about this, and I can." And so I think skepticism without education, without some base, is not sufficient. I think you need both here. Skepticism, of course, is good.

Joel Margolis:

I'm a private citizen. I wish to pick up on the point that you were making at the end. One of the key aspects of the system that the founders created was that the federal government

would have a very small role in our society. I think that's one of the ways that you protect against tyranny. If the federal government can't do very much, then you're protected in a sense because the state and local governments will have a considerable amount of authority. As you pointed out, in the 20th century that bottle has sort of been tossed into the trash bin of history. And so, picking up your last point, the more demands you put on the federal government and the more conflict there is, the monarchical view becomes a not completely unreasonable expectation of some people. "Hey, I've got all these demands. I want clean water. I want clean air. I want Social Security. I want Medicaid. I want good schools. And those guys in Washington, what are they doing? They're arguing, they're not doing much. If we had something like a king in a constitutional form, he could get things done."

Eric Lane:

You're right, that's true. You see, part of that is because we're not making it clear to people. We're not even attempting any longer to try to make it clear through our educational systems. What's wrong with that picture? You could posit that to a group of students. I do that in an honors class. You know, what's wrong with that picture? Can it end up being a dictator? What's going on there? You need history in context as a buffer against that kind of instinct, but that is the very instinct I'm identifying. I have a perfect example of this. I got an e-mail yesterday from a very smart young woman who's a student at the Gallatin School at NYU. I had done this television show and she had watched me. She said, "You know, that's great and I really accept what you're saying," which is not dissimilar from what I'm saying today, "but take global warming. Isn't it possible that the kinds of problems we confront today require a different form of government? A deliberative government can't contend with them?" Nero fiddles, Rome burns. Right? That's the imagery that's in her mind when she writes me that question. So I wrote her back and I simply said, "Well, which dictator do you want?" Imhoff? The Republican guy from Oklahoma who was the head of the committee that didn't believe in global warming? It didn't happen?

I think that what you're saying is right — there is an instinct. And I think there's always an instinct. Humans have it too. You know, we regress. We feel worried. But I don't think that taking the federal government out of the picture is going to solve anything. First, it's not realistic. The reason the federal government is so big and so involved is because democratically the people of the United States of America put them there. All of us.

Joel Margolis:

I'm not arguing with that. But you're saying that we need to have an understanding of the Constitution as it was created. But we have, as you pointed out, a very different system now. You're making representation a key element to the constitutional system. But small government was also a key element and that's been completely...

Eric Lane:

Well, but small government is actually not so true, historically. Small government, a limited government, over a very large space can do a lot more than any local government did. So the argument's right from the get-go. Right by the election of 1800, but even before that the argument's right there. This government is huge. It's going to destroy freedoms. Madison was the father of the Constitution, the person who drove home politically and intellectually its backbone. Within five or six years he was questioning what he did because of the debate over the bank and some of these other issues. I don't think that contextually the argument's actually any different in the sense that they saw this as an amazingly large government and we see it as an amazingly large government. I think what you're identifying is the problem I'm identifying and I think you articulated it very well. A king looks pretty good when you have a lot of problems, and can that undermine the Constitution? And I think the answer to that is yes. So my argument is that the one way you can help, I'm not saying that you'll always succeed, is at least reconnect Americans to the American story.

John DeGraff:

I'm an attorney. Do you have an opinion on whether President Bush has the authority to send the troops into Iraq without the permission of Congress?

Eric Lane:

I don't believe he would have had the power to send the troops to Iraq without permission of Congress. But I do think that even though he didn't get a declaration of war, he had a two-week debate where he effectively got a resolution of support. I think Congress totally acceded to this effort. They didn't declare war, but they passed a resolution of support.

John DeGraff:

He sent them over there in the beginning without anything.

Eric Lane:

If you get the retroactive resolution, just like if it was a war declaration, that cleans it up.

John DeGraff:

He just said that there were weapons of mass destruction over there, so we got to go. It was a lot of baloney.

Eric Lane:

The scholarship line on this is obviously if there's an immediacy to the need.

John DeGraff:

Which there wasn't.

Eric Lane:

Right. It turns out that it was not true, although there's no proof. Let me step backwards. The president of the United States takes an oath not to defend the country, but to defend the Constitution. Now at first glance you say, "Well, same thing," right? So if you get invaded, you can defend. But when we get into this discussion, it's hugely different, actually. So you're not allowed to take liberties away from people to defend the soil. Bush himself says, "Country, America is not its soil, its clans, its religions, its ideals, which are the Constitution." So, for example, "if" the president were to lie to Congress about weapons of mass destruction that lead us to war, I think Democrats and Republicans at that moment could say that he broke his oath, right? That's clearly an impeachable offense, one of the clearest impeachable offenses you can imagine. But what they did was they probably had false information, but if you defend, then you have to extend your defense assuming it. But even if you don't defend, even if you send troops there and then Congress approves you,

there's no argument that the declaration of war has to come before. And you can make the argument the Constitution has no answer to that constitutionally. It's like when Lincoln violated the writ of habeas corpus. He went to Congress and he said, "I don't have the power to do this, but I did it because I felt the country needed it." So he clearly violated his oath. He violated the Constitution for the country and for the land. But then he violated his oath and said to Congress, "Look, you can punish me or you can *post facto* authorize what I did," which they did. Congress then said, "Grant him the power under the article."

John DeGraff:

But you're saying though that just sending the troops over there...

Eric Lane:

I don't think that's legal, alone. But I think that it was made legal. I think that as much as I'd like to say that Bush acted without Congressional support and that Congress was responsible, I guess I don't want to say that he acted without authorization. I think that the combination of his presentation to Congress, and the big debate they had, that was the resolution on supporting the war.

Steven Elliott:

My name is Steve Elliott. The parties, as you know, are not contemplated by the Constitution and yet they have key constitutive roles in government. And they're not going to be ever, as far as I can see, institutions that are based on shared civic republican principles. They're basically groups of coalitions of people who have tribal, group, class, and all sorts of narrow interests who have to come together to create a coalition. How do you make the leap if you're in a party situation? From the civic constitutional point of view to the actual mechanism that constitutes government?

Eric Lane:

Well, I want to argue with one point. Perhaps parties as you now understand them are these sort of quasi-private corporations subject to some kinds of regulation. Morality is what is contemplated by the Constitution. Civic virtue is the Declaration of Independence and

Thomas Paine said, “America is a blank slate. All we need to do is get rid of England and we will be able to write our own picture of ourselves.” By 1787, what Federalist 10 was telling us is that humans are self-interested and passionate about their self-interest; they think they’re right about everything, and not only that, they think they’re right for you. So take a look at Federalist 10 or listen to Benjamin Franklin, who said that most Americans think that anyone who disagrees with them is in error and in sin. That is not what they were thinking. They already understand factionalism. They didn’t understand factionalism as parties yet, although parties are beginning. Within a day of the signing of the Constitution on September 17, 1787, there were the antifederalists and the federalists. They were already at war and somewhat organized. So, I don’t think that’s correct historically. I understand the basis of saying that there were not these organized parties, but I don’t understand the basis of saying there were not parties. In 1800, there was already a party election. In 1796, John Adams got elected by a party.

Steven Elliott:

But they’re not part of the constitutional scheme?

Eric Lane:

Factionalism is part of the constitutional scheme; that’s why we separate power and have checks and balances. The whole point of that is so no faction prevails over another faction. They force consensus. I do think, however, with respect to the second part of your question, this is very hard. So, my complaint when I give you the Romney/McCain dichotomy is that I think the president’s top responsibility is greater than his party’s needs. And I think that slipped in thinking. But I also think the majority party in Congress’s responsibility is greater than its party needs. It’s not a parliamentary system. It’s simply not. And to the extent that we allow ourselves to slide into the parliamentary model, which is the red/blue model, to that extent I think we undermine the Constitution. Franklin Roosevelt said, “The Constitution is like the Bible. You have to read it every several days.” So that would be my optimistic remedy. If people don’t understand it and we don’t put pressure on people to do it, it’s a downward spiral because it’s so easy.

This just shows you where I’m so much about process and less about product. When the Democratic majorities in the House of Representatives told Hillary Clinton that her health

care plan was dead on arrival, I thought that was one of the most healthiest gestures I've ever seen in politics. Similarly, when Robert Dole broke with Nixon and the old-fashioned politicians who saw their institutional responsibilities beyond their party responsibilities, I thought that was important. Or the view of Tom DeLay in his book, *No Retreat, No Surrender* — that's the view of a political leader. That's a bad view and I find that worrisome.

Tarky Lombardi:

Thank you, Eric. I'm with Gilberti, Stinziano, Heintz and Smith, P.C. In keeping with the questions from the last gentleman, historically there have been a number of other events. I'd like to know how you would distinguish. Franklin Roosevelt had the Lend-Lease program before we entered World War II. John F. Kennedy had the Bay of Pigs in the Vietnam War. Lyndon Johnson had the Vietnam War. Harry Truman had the Korean War, which was a police action. The Vietnam War was a war of training and assistance. None of them were declarations of war.

Eric Lane:

I have no quarrel constitutionally. I might have a personal policy quarrel, but that's not what we're talking about. I don't think there is much difference. In fact, in some ways the Vietnam War got started with far less authority than the Iraq war.

My answer was I thought there was authority in the Congress by the discussion they had even though they didn't quote a declaration of war. They had a vote. Hillary voted. Remember, we hear about it every day? Who voted yes, who voted no. Had I known what I know now I wouldn't have voted yes. But it's a ridiculous discussion, actually. The Vietnam War is what led to the War Powers Resolution. It's called a resolution, which you will appreciate because Congress says, "We're not going to make this a statute because this is already what the law is, so we're going to reaffirm the law. We don't want to call it a statute. We're going to call it a resolution." And then the president signs it. If the troops are committed for more than a certain time, the Congress says it has to come back to Congress for approval. And that's the compromise that got made in the modern world where engagements overseas are not so hard to contemplate in that kind of emergency setting.

There is no question that the president of the United States in his role as commander in chief has the power to defend us. So if we're attacked, he can. And later on we'll discuss whether it's excessive or not excessive, but it's within his discretion. And there's no standard that says it's excessive. It's simply a political debate. The question then becomes when is something a defense and when is something a war? When are we starting a war? Or when are we not defending? And so distance and time are always issues, so many people think that Iraq was a very tenuous relationship but the president covered himself on that by Congress approving it. I don't like that from a policy perspective. I'm sympathetic to Hillary at the time saying, "Based on what I knew I..." It's a complicated problem, but that's my answer.

John DeGraff:

But there's no threat to our country...

Eric Lane:

I think his legal advisors were telling him, "You cannot sustain this war in Iraq without the congressional approval. It's not sustainable. They don't have any money." The war on terror, which is real, in my view, is going to make us rethink all of these provisions. We don't have this easy target. And so it's very tricky what's going to happen here.

William Seyse:

I'm with the staff in the State Assembly. I agree with what you're saying about citizenship not being discussed by society as much as it once was and that is probably a growing problem. Maybe the Boy Scouts and the 4-H Clubs still talk about it, but their numbers are dwindling. But our idea of liking our Constitution and liking our country, it seemed to be a thread in the Vietnam War: "We're waiting for free elections. We have to be there so they can hold free elections." Somehow we seemed to nod, yes, we want them to have free elections. And in Iraq we seem to be saying, "We're bringing in democracy" or "We're restoring democracy." Somehow part of the public wants to say, "Oh, yeah, that will be good because it's good here," without really thinking more of what it means or what it really would ever be.

Eric Lane:

I have no more expertise on this than anybody else but the experience with this historically has been this long ideal that democracy is special. The truth of the matter is it's true, right? It's not that everybody doesn't want democracy; they do all want democracy. They just define democracy differently. So the Sunnis want to be democratic. They just don't want the Shiites to be democratic. Like everything about government, on one level we totally agree. We want government to respond to us. We want to be all brothers and sisters. We're Americans. We live here. We love our country. Our families came here and afforded us opportunities no other country in the history in the world ever afforded people without class. We've stumbled along the way, but you know it's a phenomenal place. And we share that view.

Everybody wants freedom. But like everything else, what happens when we go into these countries where you actually have to *do* something. We all want freedom. We all want to be Americans, but we don't all agree on what it means to be an American, right? So, it's the same thing as you go over to these countries. First of all, they don't want you to hang out there. You go over and you have these great visions. But then you have to say, "Well, how do we work that out?" Now these governments have to work it out and they don't agree. That's the end of the story. And that's what happens. And so I don't recommend it. I used to be a great devotee of this notion. Vietnam took that out of my thoughts.

Robert Freeman:

I'm with the Committee on Open Government. You struck so many chords that I have to deal with every day. To my mind, the worst element of the Bush administration is the general sense that we've heard in so many instances, "If you're not with us, you must be against us." Yeah, I don't know that people can seriously disagree with that, at least in many contexts, but I see it filtering down to the local government level. I see it all the time and you mentioned the key word, representation. I think that a critical element of representation is dissent. What I see every single day is the majority saying to the dissenter, "Shut up and go away." Or they do whatever they can to eliminate dissent through the electoral process, maybe in a valid way, maybe not. And from my perspective, the threat, if you will, involves the absence of knowledge for implementation of First Amendment rights. People don't get it. They don't understand the notion of freedom of speech. The commissioner of education

has issued a decision saying that if a board member divulges what was discussed during a private session, he or she can be removed from office. There are any number of board members who are afraid to express themselves based on this fear of being removed. I think that the commissioner is wrong on the law. I think he's wrong on the Constitution. But it's there and as a consequence, in too many instances, we have silence where there should be the kind of debate that you're talking about, which I think breeds good government. So, it's not only Washington. I think that it's here in local government.

In so many instances the schools are absolutely the worst offenders. I've said too many times in public that I think that there are a lot of superintendents of schools, not all, who dream of having a school board that consists of members who are deaf, dumb, and blind.

Eric Lane:

There are a lot of governors who would like that, too.

Robert Freeman:

That way they could do whatever they want to do. And I don't know exactly what we can do about that other than making more noise, constructively.

Eric Lane:

It goes to civic illiteracy. Certainly the First Amendment, the notion of debate in the country, is among the most critical notions for maintaining the democracy. It's just that people don't do it. You see plenty of town meetings where people really do stand up and raise hell. Democracy depends on its people, truthfully. If you want it to be a democracy, people have to take part.

Michael Szydlo:

I'm with the office of Assemblyman William Parment. Do you think increasing voter turnout will help alleviate some of these problems or is the problem of civic illiteracy?

Eric Lane:

I think that increasing voter turnout will reflect more civic literacy, perhaps. I think that if people feel they have a stake in the government, it might interest them more in what their stake is, so I think that's obviously an overall good sign. I think that the decline in participation absolutely parallels the decline in civic literacy from the late 1960s onward. Hopefully, people will get interested again and demand to talk about it. In both my law school and in the undergraduate school where I'm teaching some courses there's a lot of talk about government. In the best ways. Arguing over it, talking about it, robustly. Over the years, I've had to drag it out of the students, so I think this is very helpful. And I think that the candidates for president, all of them, have articulated views in one form or another. I think they actually understand their constitutional obligations better than what we've seen in the past.

Let me just make one more point about it. I got myself into trouble because I have this academic and policy interest, but then I've been pretty tightly associated with Democrats in the state. I don't know if any of you know Doug Musio at Baruch College. He interviewed me and he really got me going because he's unbelievably prepared. So he said, "Who's a Madison right now in public life?" I said, "I'm going to regret this, but it's McCain." Based on what I've seen him do, not what he's said. He's a compromiser.

Barbara Bartoletti:

I'm with the League of Women Voters. In the decades that I've been working for the organization we have consistently been concerned with the issue you talked about first, which is civic illiteracy and voter turnout. I think you know that despite many years of doing this, we just can't seem to get people interested. They'd rather talk about pop culture; they'd almost rather talk about anything else. But all of a sudden — and I think this is what it takes throughout the history of our government — we have a war going on. A war that is very unpopular. We have an economy that is beginning to tank. We have gas prices that are through the roof. And it comes down to people's gut level, what is going on in *my* life. All of a sudden they seem to get interested in government. I think an example is all of the people who have turned out for these different primaries all across the country. But is that what it consistently takes throughout our history in order to have civic engagement? How do we do that when things seem to be going along okay, as in the 1990s when, with a few ups and

downs, people were fairly secure? The terrorist attacks hadn't happened yet, etc. How do you keep people engaged?

Eric Lane:

Well, I guess the answer to that is, comparatively speaking, our public engagement in our democratic system is far lower than other Western democracies. Are Americans born to not like politics? I doubt it. So, something's going on there and I don't know what the secret answer is. What I focus on is people being taught that they have obligations to participate in the political process. Democrat, Republican, Working Party, Libertarian, who cares? I can't teach *you* that. Teaching that has to start very early and we do not commit resources. Public education is founded on the principles of teaching people about democratic theory and what the values of their government are. What's the point of it? Is the entire point of education to teach people to read and write? That's it? Goodbye? We haven't done a good job on that. We've given up on that. Where do people learn this? It's got to get taught and we don't do it. It's a tragedy.

Barbara Bartoletti:

And it's got to be taught in a way that gets people's attention.

Eric Lane:

Well, of course. But first you've got to make the commitment before you get to the techniques. We have No Child Left Behind. Maybe we should put civics into it. Or whatever we call that now.

John DeGraff:

But if we're spending \$5 billion a week or something like that in Iraq, if we stop the war right now and brought everyone back, we'd have all that money in here.

Eric Lane:

No. First of all, we're borrowing it. We have a free war going on, if you want to see something that really does violate constitutional principles. Free war in the concurrent

tense. Americans are promised that we don't have any drafting, so it won't be your kids. Although, ultimately, it does become our kids. And you don't have to pay much for it because we're not going to increase your taxes for it. It gets blown away because after President Bush said, "mission accomplished," it turns out it's not. The Democrats won Congress, not simply because people are antiwar. I think the Democrats understand this in Congress better than the public does because a lot of people are voting against the Republicans in Congress because we failed on succeeding in the war. Not that they were opposed to the war in the beginning, but that we messed it up.

We are spending money but we're not paying for it. We're going to pay for it in our future. It's like moving your business to a brand new building somewhere and you took out a mortgage that you're going to be paying over the years. That's what we're doing with this. I'm overstating this, but it's almost all borrowed money that we're buying and paying for it with. So, that's why your tax bills aren't going up. So if we stop in Iraq tomorrow, you're not getting \$5 million a week in. We're going to hopefully cut off borrowing money that we shouldn't be borrowing.

Robert Ward:

We have a few minutes left. Let me turn the conversation to New York State. You have been a strong critic of a lot of things that are done in state government. Over recent years there have been kind of two extremes of criticism of New York State government and you've been involved in both. One of those says New York State government won't do anything. This was the thread of the commission that you were involved with that Governor Cuomo appointed. The Commission said, "New York State government won't attack the big problems that it should attack. Therefore, we should create action panels of smart leaders who will come up with good ideas." The second stream is that in the Legislature in particular we have too little democracy.

Eric Lane:

That I'm very much behind.

Robert Ward:

I looked up the article you wrote in the *City Journal*. It turns out to have been eleven years ago now, which seems like a long time ago. My question is whether there is something contradictory in those two criticisms? Because people would say that strong leaders in the Legislature are necessary to get anything done given the inherent variety of interest in New York State. Secondly, has anything changed in the eleven years since you wrote that article?

Eric Lane:

I think strongly, notwithstanding that I am very critical of the New York State Legislature, Democrats and Republicans, about the way that they do business, that strong leaders are necessary. My debate is how strong a leader should be. I think that the New York State Legislature, by concentrating so much power in the leadership, has basically stripped from the process a real functioning committee system. To a large extent, some committee chairmen function. They make deals with the leadership. But for the most part it's a nonfunctioning committee system and to me it means you don't really have a participatory legislature. You don't get any energy for new ideas because you can't build momentum. You can't build momentum because there are no committees. There's no way to start the process of enacting legislation. You get a bill introduced, it goes to a committee, and then unless there's an agreement with the leadership to do something, it doesn't get done. Beyond that, if you look at the history of legislation, almost all major legislation gets introduced and enacted within one to five days. Even if the legislators know what's going on, which I doubt, the public has no bloody idea what's going on. So to me, it's just falls on its face. I don't have to explain all the reasons that doesn't work and I think that's remedial. I think you need strong leadership. You cannot have a chaotic house that is going to be functional. I think there has been too much ceding of power to the leadership. I think there has to be a way to have committee hearings and more independent staff. The New York State Legislature is filled with smart people. They're ambitious, but they funnel themselves where there are opportunities. So if there are committees and opportunities, some people will do and some people won't, but it will start to change the ether in the place. That's my view.

Regarding the Temporary State Commission on Constitutional Revision, we were having a battle on the commission over whether or not we ought to call for a constitutional convention, supporting the governor and a number of staff members' view, or whether we

ought not to, supporting my views ultimately. These views were based on hearings we had around the state about what people wanted to talk about in the Constitution and what they wanted to change. Everybody wants everything in the Constitution. We had done a study where it showed that everybody thought that the Constitution was too long. But when we asked them what they wanted to take out, they said nothing. No matter what, everybody came back with a larger state Constitution. So we'd gone around the state and held hearings on what the people wanted. A lot of us got a sense that there was a lot of anger and if we did call for a constitutional convention, it wasn't going to be pleasant. If there were good committees working, some issues could get some traction in the Legislature. In a sense, the panels were kind of committees.

Robert Ward:

We're now closer to the next automatic vote on the convention than we are to the last one. Nine years to the next one. At that time, should voters vote yes or no?

Eric Lane:

Well, let me say this to you, I think that the Democrats are going to take the Senate this year, although there may be people who disagree with that. I think that if they do, there is a chance they will do a number of rules reforms and other political things. If they do, I think that the pressure for constitutional reform will be reduced. But there's going to be this one moment of real opportunity. If they do take the majority, on rules day, the first day of the session, there's going to be a lot of pressure applied to the Senate Democrats to change the Senate rules to a more participatory place although still with a strong leadership. If that works, it will put a lot of pressure on the Assembly to make similar changes and there will be a number of reforms. If this fight between Governor Spitzer and Bruno hadn't broken out, there would be campaign finance reforms. Campaign finance reform in the state of New York is such a low-hanging fruit that they would have done something and called it a victory by now if this battle hadn't broken out. I have to wait and see what happens before I answer that question.

Robert Ward:

Thank you very much.