

Widener University Delaware Law School

From the Selected Works of Alan E Garfield

June 30, 2011

What's More Important Than Wise Judges? Wise Voters

Alan E Garfield



Available at: https://works.bepress.com/alan_garfield/57/

What's more important than wise judges? Wise voters

After his travels in America, Alexis de Tocqueville famously observed that "there is hardly a political question in the United States which does not sooner or later turn into a judicial one."

It's a provocative quote and people love to use it. But it is also misleading.



BENCH PRESS

ALAN GARFIELD

Most political questions in the United States are not resolved by judges. They are resolved by politicians who are elected to office by citizens.

Sure, the Supreme Court has the final word on interpreting the Constitution. And for some issues, especially individual liberties, the Court's rulings are conclusive.

So for issues like the right to an abortion or to picket a soldier's funeral, the Court reigns supreme.

But the Constitution says little about the most pressing political issues of the day, and when it does, the Court frequently prefers to dodge issues rather than decide them.

The stalled economy, for example, may be the most pressing issue facing the na-

tion. How do we avoid a double-dip recession and reduce the unemployment rate? And looking forward, how do we prepare our children to compete successfully in the global economy?

The Constitution doesn't answer these questions. It doesn't say what type of monetary or fiscal policy is best for the economy. It doesn't say whether we need to lower or increase taxes or whether free market solutions are better than regulatory ones.

And while the Supreme Court has said that public schools may not be racially segregated, it has never said that children have a right to an education. So whether our country has a top-notch educational program or a mediocre one is up to us – the voters – and the people we elect to represent us.

The same is true for global warming, another great challenge of our time. Some states tried to make this political issue a judicial one. They sued the country's largest power companies, claiming the companies' emissions of greenhouse gases were harming the states.

The Supreme Court acknowledged that federal courts can intervene to protect states from harmful pollution. But it said such intervention was inappropriate in this

instance because Congress and the Environmental Protection Agency had begun regulating greenhouse gas emissions and were better qualified to address this complicated issue than judges.

Even when the Constitution speaks directly to an issue, the Supreme Court will sometimes prefer to avoid it. Indeed, the Court has numerous strategies for dodging issues including – notwithstanding the de Tocqueville quote – a judicially created ban on deciding "political questions."

The political question doctrine is notoriously vague. It doesn't mean the Court must avoid politically charged issues. If it did, the Court would not have decided *Brown v. Board of Education* or *Roe v. Wade*.

Instead, the doctrine gives the Court flexibility to pass on issues that are better left to the political branches.

Consider the issue of war powers, something the Constitution specifically addresses, albeit ambiguously. It says that Congress has the power to declare war and to raise and support the army, but that the president is the commander-in-chief.

In 1973, Congress responded to the unpopular Vietnam War, which two presidents had waged without a formal declaration of war, by adopting the War Powers Resolu-

tion. The resolution limits when a president can send troops into hostilities and requires that troops withdraw after 60 days unless congressional approval is given.

Members of Congress have fiercely debated whether President Barack Obama's use of military force in Libya violates the War Powers Resolution. Some even threatened to sue the president.

One might think this would be a welcome opportunity for the Supreme Court to clarify the Constitution's allocation of war powers. But scholars predict the Court will dodge the issue by calling it a "nonjusticiable" political question. The Court would most likely conclude that allocating war powers is beyond the competence of judges not trained in not national security.

So does the Supreme Court play a vital role in our society? Certainly. But "We the People" are the ultimate sovereigns in this country, and the people we elect have the lion's share of responsibility for charting our country's future.

Thus, while it is desirable to have wise and informed judges on the bench, it is even more important to have wise and informed citizens in the voting booth.

Alan Garfield is a professor at Widener University School of Law. The Bench Press column will return in October when the new Supreme Court term begins.