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**From the Selected Works of Alan E Garfield**

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September 12, 2011

# The Constitution and Economic Policy

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**CONSTITUTION DAY**

# *The Constitution and economic policy*

If there's one thing Republicans and Democrats agree upon, it's that the economy is in the tank.

But the agreement ends, and with a vengeance, when it comes to the actions needed to revive the economy.

Democrats believe the richest Americans need to pay more in taxes. They agree with billionaire Warren Buffett, who, after discovering that he paid taxes at a lower rate than a secretary in his office, urged politicians to "stop coddling the super-rich."

But for many Republicans, tax increases are off the table. It doesn't matter who's being taxed or for how much. Indeed, 95 percent of congressional Republicans have signed Grover Norquist's pledge never to raise taxes under any circumstances.

Democrats and Republicans are also split on the need for stimulus spending. Democrats believe that spending is essential to avoid a depression and that tax revenues will cover the expenditures once the economy revives. Republicans believe stimulus programs are ineffective and that we should focus on reining in our profligate spending.

And, of course, Republicans and Democrats fiercely disagree over the merits of the new health care law.

Democrats praise the law for barring insurance companies from discriminating against people with pre-existing medical conditions. But Republicans lambaste the requirement that individuals buy health insurance (the "individual mandate"), even though that requirement is arguably essential for the pre-existing conditions bar to work.

Given these diametrically opposed views, it's hardly surprising Washington is paralyzed. Even the threat of calamitous harm from failing to lift the debt ceiling was barely enough to get politicians to overcome their differences.

With the political process in deep freeze, some are looking to the Constitution to solve our economic woes. Some want to amend the Constitution to require a balanced federal budget. Others have challenged the "individual mandate" as an unconstitutional expansion of congressional power.

These efforts to constitutionalize economic policy are the focus of this year's Constitution Day essay collection.

Constitution Day, of course, falls on Sept. 17, the date in 1787 when the Framers signed the Constitution in Philadelphia. To help Delawareans mark the occasion, The News Journal and Widener Law School team up each year to collect essays on a constitutional law theme.

## **ONE WEEK OF ESSAYS ON THE CONSTITUTION**

In honor of Constitution Day – Saturday, Sept. 17 – Widener University School of Law and The News Journal are running essays all this week on how the Constitution affects the economy. Today's essay is by Sen. Orrin Hatch on why he supports a constitutional amendment that would require a balanced budget. Tomorrow, U.S. Rep. Nick Rahall (D-W.Va.) responds. To visit the complete archive of Constitution Day essays, visit: <http://law.widener.edu/constitution2011>.

This year's collection is on the Constitution and the economy. We have four authors discussing the merits of a balanced-budget amendment and three discussing the constitutionality of the individual mandate.

Both subjects are highly topical.

Congress is currently considering proposals for a balanced-budget amendment, and federal appellate courts have split over the individual mandate's constitutionality, making Supreme Court review more likely.

The Constitution Day essays will appear in the newspaper throughout the week. As you read them, stop to consider what it means to constitutionalize economic policies.

After all, we don't need a balanced-budget amendment for Congress to balance the budget. And Congress could repeal the individual mandate without a single judge finding it unconstitutional.

By converting these issues into constitutional ones, we are inviting judges to resolve the issues.

That's because judges have the power to declare government actions unconstitutional, and they are the ultimate arbiters of the Constitution's meaning.

Is it a good idea to involve judges in these economic policy disputes?

Perhaps.

If constituent pressure is preventing elected representatives from making the necessary compromises for government to function, then maybe life-tenured judges are the only ones capable of acting in our nation's best interests.

But federal court judges are not trained economists, they do not have a council of economic advisers, and if they make mistakes, they are not accountable to the people in elections. So why should we think they are more qualified than elected officials to make these decisions?

Could it be that economic policy is just not something the Constitution or judges can resolve for us – that the only way out of the current gridlock is for "We the People" to demand that our representatives find a way to move our country forward or face our wrath at election time?

Maybe, in the case of economic policy, the buck stops with us.

Alan Garfield is a professor at Widener University School of Law and the author of The New Journal's Bench Press column.