

## Contemporary Debates about the US Presidency and Congress: The Electoral College, Legislative Gerrymandering, and Enumerated Powers

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Although US legislative and executive institutions have been remarkably stable over time, several recent developments have given rise to debates about particular aspects of these institutions. The fundamental questions of institutional design have long been settled, such as the choice of a presidential system, with the president selected independently of Congress. There has certainly been no reconsideration of the decision to establish a bicameral Congress, with the states entitled to equal representation in the Senate, and the House of Representatives apportioned among the states by population. Nor are there any challenges to the constitutional arrangement by which Congress possesses enumerated, rather than plenary powers, with other powers reserved to the states. In recent years, though, there has been some discussion about specific aspects of these arrangements, including the presidential selection system, the drawing of district boundaries for the House, and the Supreme Court's enforcement of the limits of congressional power.

The presidential selection system has attracted the most attention of any of these institutions, particularly after the year 2000 election. The framers of the Constitution determined that the president would be selected neither by the legislature nor by a direct popular vote, but rather by an Electoral College. According to this system, each state has a number of electors equal to its numbers in Congress; thus a total of 538 electoral votes are apportioned among the 50 states (plus the District of Columbia), with the smallest states receiving three electoral votes and the largest state, California, receiving 55 electoral votes. Presidential candidates then compete for the 270 electoral votes needed to win the election by campaigning in the various states, which in all but two cases award the entirety of their electoral votes to the winner of a plurality of popular votes in the state. (Maine and Nebraska allow for a division of their electoral votes, with both states awarding two of their electoral votes to the winner of the state-wide popular vote, and then awarding each remaining electoral vote to the candidate who wins the popular vote in each representative district)

This system gives the states a prominent role in presidential selection, but it also encourages presidential candidates to focus almost all of their attention on the 15-20 largest, most competitive battleground states, to the exclusion of the others. More importantly, **a candidate can win a plurality of the popular votes but lose the election to an opponent who captures a majority of Electoral College votes.** This was what happened in 2000, when Al Gore won 500,000 more popular votes than George Bush, but lost the election because Bush won five more electoral votes. Though not the first time that the winner of the popular vote has lost the election, this was the most controversial, and it has generated renewed demands for various alternatives to the Electoral College. A variety of reforms have been proposed – such as instituting a direct popular vote or encouraging more states to allow their electoral votes to be split among candidates – but critics of these reforms argue for the importance of considering the various effects of each proposal on the federal system. In particular, would alternatives to the current system lead presidential candidates to campaign and govern in ways that would be less responsive to state and local concerns? And would these proposals make it easier for candidates to win with the support of much less than a majority of the populace, and thereby encourage the creation of multiple parties, some of which might be geographically based?

Reformers have also focused recently on congressional elections, and particularly on the process by which House districts are drawn. This is not an issue in the Senate, because Senators are selected on a statewide basis. However, House districts are redrawn every 10 years, and this responsibility is vested in state legislatures. To be sure, Congress and the Supreme Court have imposed limits on the redistricting process. Districts must be compact, contiguous, and of equal size. Otherwise, state legislatures enjoy a good amount of discretion drawing House districts.

The concern in recent years is that state legislatures are abusing this discretion by relying on computer technology to draw House districts that are completely safe for incumbents of one of the two major parties, a practice called gerrymandering. Consequently, House races have become increasingly uncompetitive, so that fewer than 40 of the 435 contests are in any doubt each election. House incumbents are already almost impervious to defeat (rarely has their re-election rate fallen below 90 per cent in recent decades), but partisan gerrymandering has worsened this situation, and it has made House members less moderate and less open to compromise once in office. As a result, judges have been called upon to become more involved in drawing district lines, and proposals have been advanced to create independent redistricting commissions or other non-partisan means of restoring competition to congressional elections.

A third issue that has attracted attention in recent years concerns the extent of congressional power in comparison with those of the states. Delegates to the federal convention of 1787 provided that Congress would exercise enumerated powers, and the 10<sup>th</sup> Amendment in 1791 confirmed that powers not delegated to Congress are reserved to the states. The challenge throughout American history has been to determine which acts of Congress are legitimate exercises of these enumerated powers. Since the mid-1990s, the Supreme Court has been aggressive in striking down acts that exceed these powers. Among the statutes invalidated during this period were popular laws prohibiting the possession of guns near schools and providing civil remedies for victims of gender-motivated violence.

Naturally, these Court decisions have generated significant criticism from members of Congress, as well as from groups and individuals who supported these specific statutes. These decisions have also given rise, though, to more general complaints about the role of the Supreme Court in policing the limits of congressional power. Many scholars and public officials have argued that the Court should refrain from issuing decisions of this kind and should leave it to Congress to determine the extent of its enumerated powers. On the other hand, a smaller group of scholars has defended these decisions as an important first step in enforcing the constitutional boundaries between congressional and state power at a time when neither Congress nor the states have shown any inclination to do so on their own.

The debate about legislative and executive governance in the US continues. At this point, the debates are not so much about fundamental questions of institutional design. These have long since been settled, and there have been few significant changes in the structure of government since the founding. Rather, the current debates – whether about the Electoral College, the drawing of House districts, or enforcing the limits of congressional power – raise narrower, but still important, questions about the performance of these longstanding institutions.