

# Viewpoint: How Silicon Valley Powers Political Redistricting and Partisanship

*Ben Feuer, The Recorder*

November 19, 2014 |



Everyone hates Congress, right? Just before the 2014 election, national polling put the congressional approval rate at 14 percent, so you'd be forgiven if you thought so.

If election results are any indication of voter satisfaction, however, you'd be wrong: a whopping 96 percent of congressional incumbents won re-election this year, a year in which the balance of power shifted.

In reality, despite the pomp, circumstance and billions spent, U.S. elections are spectacularly uncompetitive. Part of that is Americans choose to live among the politically like-minded. But an equal part is the rigging of election markets through political gerrymandering.

In 2012, Democrats won 1.4 million more congressional votes nationwide than Republicans. But in the House of Representatives, the branch of government designed to most closely track popular will, Republicans won 234 seats, and control, while Democrats took only 201. In 2014, according to calculations by *The Nation* magazine, Republicans needed only 45 percent of the congressional vote to retain a 51 percent majority of seats. They won about 52 percent of the vote and took 57 percent of the seats.

Likewise, in Pennsylvania this year, House Democrats as candidates won 44 percent of the vote but only five of 18 seats. In Maryland, House Republicans as candidates received 42 percent of the vote, but only one of eight seats. You wouldn't expect the proportions to be exact, but they should be a lot closer. What gives?

The answer is gerrymandering run amok. In Pennsylvania, Maryland and many other states, legislatures have redrawn district maps to divide the minority party's support and solidify the majority's. Gerrymandering is a strong enough force to shift the balance of power in Congress on its own, and some party faithful have advocated tying congressional seats to the electoral college vote—a scheme that would have delivered the White House to Mitt Romney in 2012 despite a 5 million vote advantage for Barack Obama.

## Thank the Techies

In practical terms, political gerrymandering is one of the causes of the particularly acrid style of partisanship that's permeated Washington since 2010. Gerrymandered districts that are "safe" for one party or the other tend to be more partisan, because the biggest electoral contest occurs in the party primary—a ballot at which only the most ideological voters tend to participate.

This phenomenon has increased in recent cycles, as partisan redistricting has become more sophisticated. In part, that's Silicon Valley's fault. In the 1990s, technology firms began developing advanced mapping tools capable of integrating GPS, detailed block-by-block census data and voter registration tables. Today, Autobound Redistricting Software used by Connecticut, RedAppl used by Texas and Maptitude used by Minnesota lead the charge.

As a direct result of this software, political gerrymandering has become exceptionally effective. Legislators controlling the process can look not only at past electoral results, but at demographic trends and immigration probabilities, almost down to the individual household. The techniques are so advanced that, as comedian Stephen Colbert observed, instead of voters picking their leaders, leaders are now able to pick their voters.

## **There Must Be a Law Against That**

In 1986, in *Davis v. Bandemer*, 478 U.S. 109, a majority of justices on the Supreme Court agreed for the first time that redistricting based on political party can be a justiciable violation of the equal protection clause where there's an intent to discriminate against an identifiable political group and the state actually discriminates against that group. But the justices didn't agree how *Bandemer* should work in practice and as a result, the court failed to come up with any kind of practical standard.

The court's political gerrymandering jurisprudence since *Bandemer* has been incoherent. In 1999, the court held that only gerrymandering with a racial animus is impermissible. *Hunt v. Cromartie*, 526 U.S. 541. In 2004, a plurality held that partisan gerrymandering is a political question and not justiciable at all. *Vieth v. Jubelirer*, 541 U.S. 267. That same year, however, the court held that intentionally overpopulating districts based on political party, which sounds a lot like gerrymandering, violates the Constitution's one person, one vote principle. *Cox v. Larios*, 542 U.S. 947. And in a 2006 case, the justices fractured so badly on a Texas political gerrymandering case that they issued six separate opinions. *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

The court is trying again this term. In *Alabama Legislative Black Caucus v. Alabama*, the court is considering a 2010 Alabama redistricting plan that created supermajority districts of minority voters, limiting their influence in other districts. Reports of the oral arguments, which took place on Nov. 12, described the justices as "divided" and "stumped." Expectations should be low.

But non-judicial answers are out there. One is at work in ballot initiative states like California, Arizona and, after the 2014 election, New York. In these states, voters created special independent redistricting commissions which, the idea goes, draw districts more fairly and with less self-interest than elected legislators looking out for their own political careers. In California, the redistricting map implemented by the state's Citizen's Redistricting Commission following the 2010 census was a widely touted success, with a study by the independent James Irvine Foundation declaring it "transparent, democratic and nonpartisan."

Redistricting commissions like California's are facing an existential threat, however— one more dire than the Legislature's perennial efforts to defund the group, which is a good a sign as any that it's doing its job. This term, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court will

hear a challenge by the Arizona Legislature, which is controlled by Republicans, to a ballot initiative passed by voters there in 2000 to create a redistricting commission similar to California's. The Legislature's Republicans, who want control over the redistricting process themselves, contend the initiative violates the U.S. Constitution's Elections Clause (Article I, Section 4), which states that the "Times, Places, and Manner of holding Elections" should be "prescribed in each State by the Legislature thereof." It's difficult to predict how the justices will go—is a state's districting part of the "manner" of "holding elections"?—but the court hasn't been particularly warm toward ballot propositions in recent years, finding in the marriage equality cases, for example, that proposition backers lack standing in federal courts to defend state statutes even if they have the approval of the state to do so.

If redistricting commissions go the way of the line-item veto, Congress could always lift the cap on the number of elected members in the House—435 members is a statutory rather than constitutional limit. Doing so would immediately render the House more representative, but that seems like a big change for a historically gridlocked Congress.

## **Looking to the Valley to Right its Wrongs**

Should the court kill independent commissions, perhaps the solution will lie with the same Silicon Valley entrepreneurs whose technology enabled sophisticated modern gerrymandering in the first place. Several new startups have developed free, open source redistricting applications that let the public play with powerful mapping and demographic tools.

Look at the Los Angeles Redistricting Commission for an example. That body has licensed a program called DistrictBuilder, available online for any members of the public that want to try their hand at designing more heavenly districts for the City of Angels; an option exists to send map designs directly to the commissioners. Plus, the Washington Post recently reported on a computer programmer who created an algorithm that automatically draws districts based on public census data, ensuring fairness based on size, shape and neighborhood boundaries. The idea is the public won't stand for outrageous redistricting when they realize the other, better options.

Whether through technological innovation, independent commissions or constitutional doctrine, good-government groups have painted a target on political gerrymandering's back. Is that enough to make a difference? With Supreme Court doctrine exhibiting as much cohesion as a Jackson Pollock painting and redistricting commissions under legal threat from their own state legislatures, the path to fair and robust democracy remains a climb.

The Recorder *welcomes submissions to Viewpoint. Contact James Cronin at [jcronin@alm.com](mailto:jcronin@alm.com).*

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