



July 5, 2018

**The 2018 Midterm Elections:  
Context and Cross Currents**

**Andrew H. Friedman  
Jeffery B. Bush**

The different and constantly changing polls make it difficult at this point to reach a definitive conclusion regarding the midterm election results. Moreover, future events – particularly those occurring in late October and November – almost certainly will have an outsized influence on the outcome.

But even now we can consult certain metrics to determine which party heads into the election with tailwinds, and which party is likely to have to overcome headwinds to win. This white paper examines these cross currents below.

*The Senate*

As an initial matter, it is important to remember that the party that controls the White House almost invariably loses seats in the midterm elections. This result is true regardless of whether a Republican or Democrat prevailed in the prior presidential election. Of course gaining seats is not the same as taking over a chamber. The minority party must acquire sufficient additional seats to overcome the number of seats by which the majority party holds its advantage.

In this election, the Democrats need to pick up a net two seats to take control of the Senate. Currently the Republicans hold a 51-49 seat majority in that chamber. A Democratic pickup of two seats would flip the 51-49 majority. (A Democratic pick-up of one seat would result in a 50-50 Senate, with Republican Vice President Pence breaking ties.)

A two seat gain seems eminently possible given the tendency of the party out of power to gain seats. This result is bolstered by the current party affiliations, which appear to favor the Democrats:

	2016	2017
Democrat (including leaners):	44%	44%
Republican (including leaners):	42%	37%
Independent (no lean):	10%	14%
Uncertain:	4%	5%

*See Democratic Party Maintains Edge in Party Affiliation, Gallup (December 4, 2017)*

But the 2018 election is unusual given the party make-up of the candidates running for reelection. Incumbent Senators running this year were last voted into office in 2012, in confluence with President Obama's victory that year. Many of those Senators are running from states that now lean Republican.

In total, 35 Senators are up for election this year. Of those 35, 26 are Democrats running for reelection. Of those 26, ten are running from states that voted for President Trump in 2016 (Florida, Indiana, Michigan, Missouri, Montana, North Dakota, Ohio, Pennsylvania, West Virginia, and Wisconsin). Conversely, Democrats have a chance of picking up Republican seats in Arizona, Nevada, Tennessee, and perhaps even Texas.

Although there are many permutations, the Senate math basically comes down to this: to take the Senate, Democrats must win two seats currently held by Republicans *as well as* the ten states that voted for Trump *and* the additional 16 states where they are incumbents (or pick up enough additional Republican-held seats to make up any difference). That is not impossible, but it's much harder than saying the Democrats merely need to pick up two seats to produce a majority.

### *The House*

Democrats need to pick up 24 seats to control the House. Past midterm elections suggest that such an increase is certainly possible.

To understand fully the House elections, however, it is necessary to look back to 2010, when state legislatures were tasked with redrawing their congressional districts in the wake of the census that year. Then, as now, Republicans controlled the bulk of the state legislatures. These Republican-led legislatures proceeded to draw the lines of their states' congressional districts in a manner that maximized the number of districts voting Republican, a process called "gerrymandering". Democratic-led legislators did the same in states they controlled. Gerrymandering produces convoluted districts with creative boundaries, aimed at ensuring that the majorities of as many districts as possible vote the same way as that state's controlling party.

Gerrymandering results in a bias toward the incumbent party in most congressional districts. Two non-partisan organizations concluded respectively that the Democrats must win the popular vote in this year's House races by at least 7%, or at least 11%, to overcome the effects of

gerrymandering. *Brennan Center for Justice, Partisan Gerrymandering, reported in Washington Post (June 6, 2017) and (March 31, 2018).*

Opponents of the gerrymandering process have been waiting with anticipation for a Supreme Court decision in a novel case, brought by citizens of Wisconsin and Maryland, challenging the constitutionality of gerrymandering. Past Supreme Court decisions have overruled gerrymandered districts where the lines drawn disenfranchised a protected class, such as African Americans. But the Court has never considered the constitutionality of district lines drawn solely to give one party a political advantage in the election result.

A Court decision that gerrymandering is unconstitutional presumably would vacate the existing congressional map in favor of districts drawn with straighter lines. Such a holding would have a profound effect on the make-up of the House, perhaps changing the body from a Republican to a Democratic majority.

In its decision, though, the Supreme Court ducked the gerrymandering question. The Court held that the Wisconsin plaintiff did not have standing to challenge the full state districting process because he lived in only one of the districts. The Court held for Maryland summarily without opinion, so that the result may not be cited as precedent. The Court again ducked the issue in a subsequent challenge brought by citizens of North Carolina, remanding that case to a lower court to determine if the plaintiff had standing to bring the action.

The Supreme Court left the door open for later challenges to the gerrymandering process. But it is fair to assume that the Court is reluctant to wade into the gerrymandering debate, which would require courts to decide which districts pass constitutional muster and which do not. In any event, it will take a number of years for a new challenge to work its way through the lower courts. Thus, for the time being, the current district lines stand – at least until redistricting after the next census in 2020.

Although not a federal case, the Pennsylvania Supreme Court held the district map in that state to be unconstitutional under Pennsylvania law. The Pennsylvania decision has no formal bearing on cases outside that state. But it could be a harbinger of how other states might view the issue.

In the meantime, a modest Democratic advantage in a generic House race (as many polls show) likely is not sufficient to portend a shift in House control. Rather, the margin of victory must be larger for Democrats to overcome the effects of gerrymandering and take over the institution.

### *Governors and State Legislatures*

Normally we do not comment on state elections. We do so now to explain why the outcome of this year's state elections could have a profound effect on which party controls the House in the years ahead.

Following the 2020 national census, state legislatures will embark on the next redrawing of the House district maps, to be in effect for the succeeding decade. In many, if not most, states the

governor will play at least an informal role in this process. Governors and many state legislators elected this year will still be in office in 2020.

Control of the House depends crucially on which party has the upper hand in the bulk of the state legislatures and governorships. As noted above, currently Republicans control a significant majority of the state governments. If that situation persists after the 2020 elections, then the next map will look similar to the current one, with Republicans controlling the House. But if the Democrats make meaningful inroads into state governments this year and in 2020, then the House map for the next decade would be markedly different, perhaps even flipping House control to them. Thus, this year's state elections are worth watching from a federal perspective.

### *Conclusion*

Election metrics show that, to take over one or both houses of Congress, Democrats must overcome headwinds. In the Senate these headwinds arise from the disproportionate number of Democratic Senators running for reelection. In the House the headwinds result from the effects of gerrymandering. The headwinds suggest that it will not be sufficient for Democrats to win the popular vote by a modest amount; a greater margin of victory will be required.

Whether the Democrats can muster sufficient support to overcome these headwinds is a question that must wait for another day.

*Andrew H. Friedman is the founder and principal of The Washington Update LLC and a former senior partner in a Washington, D.C. law firm. He and his colleague Jeff Bush speak regularly on legislative and regulatory developments and trends affecting investment, insurance, and retirement products. They may be reached at [www.TheWashingtonUpdate.com](http://www.TheWashingtonUpdate.com).*

*The authors of this paper are not providing legal or tax advice as to the matters discussed herein. The discussion herein is general in nature and is provided for informational purposes only. There is no guarantee as to its accuracy or completeness. It is not intended as legal or tax advice and individuals may not rely upon it (including for purposes of avoiding tax penalties imposed by the IRS or state and local tax authorities). Individuals should consult their own legal and tax counsel as to matters discussed herein and before entering into any estate planning, trust, investment, retirement, or insurance arrangement.*

*Copyright Andrew H. Friedman 2018. Reprinted by permission. All rights reserved.*