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FACT

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THE GREAT ELECTION GRAB

by JEFFREY TOOBIN

*When does gerrymandering become a threat to democracy?*

With his West Texas twang, loping swagger, and ever-present cowboy boots, Charlie Stenholm doesn't much look like or sound like anybody's idea of a victim. Since 1979, he has been the congressman for a sprawling district west of Dallas, and his votes have reflected the conservative values of the cattle, cotton, and oil country back home. He opposes abortion, fights for balanced budgets, and voted for the impeachment of President Clinton. His Web site features photographs of him carrying or firing guns. Through it all, though, Stenholm has remained a member of the Democratic Party, and for that offense he appears likely to lose his job after the next election.

Stenholm was a principal target in one of the more bizarre political dramas of recent years—the Texas redistricting struggle of 2003. Following the 2000 census, all states were obligated to redraw the boundaries of their congressional districts in line with the new population figures. In 2001, that process produced a standoff in Texas, with the Republican state senate and the Democratic state house of representatives unable to reach an agreement. As a result, a panel of federal judges formulated a compromise plan, which more or less replicated the current partisan balance in the state's congressional delegation: seventeen Democrats and thirteen Republicans. Then, in the 2002 elections, Republicans took control of the state house, and Tom DeLay, the Houston-area congressman who serves as House Majority Leader in Washington, decided to reopen the redistricting question. DeLay said that the current makeup of the congressional delegation did not reflect the state's true political orientation, so he set out to insure that it did.

"This was a fundamental change in the rules of the game," Heather Gerken, a professor at Harvard Law School, said. "The rules were, Fight it out once a decade but then let it lie for ten years. The norm was very useful, because they couldn't afford to fight this much about redistricting. Given the opportunity, that is all they will do, because it's their survival at stake. DeLay's tactic was so shocking because it got rid of this old, informal agreement." But Texas law contained no explicit prohibition on mid-decade redistricting, so the leadership of the state government, now unified in Republican hands, tried

during the summer of 2003 to push through a new plan. Democrats attempted novel forms of resistance. In May, fifty-one House members fled to Oklahoma, to deprive the new leadership of a quorum; in July, a dozen senators decamped to New Mexico, for the same purpose. But defections and the passage of time weakened Democratic resolve, and, on October 13th, the plan sponsored by DeLay was passed.

"They did everything they could to bust up my political base," Stenholm told me. "They drew my farm and where I grew up into the Amarillo district, and they drew Abilene, where I live now, into the Lubbock district." As a result, Stenholm will be forced to run in one of these districts if he wants to remain in the House. The new map creates similar problems for half a dozen other incumbent Texas Democrats, so the reapportionment may add as many as seven new Republicans to the G.O.P. majority in the House of Representatives and shift the state's delegation to 22-10 in favor of the Republicans. "Politics is a contact sport," Stenholm said. "I've been in this business twenty-five years. I will play the hand I was dealt."

In Texas and elsewhere, redistricting has transformed American politics. The framers of the Constitution created the House of Representatives to be the branch of government most responsive to changes in the public mood, but gerrymandered districts mean that most of the four hundred and thirty-five members of Congress never face seriously contested general elections. In 2002, eighty-one incumbents ran unopposed by a major party candidate. "There are now about four hundred safe seats in Congress," Richard Pildes, a professor of law at New York University, said. "The level of competitiveness has plummeted to the point where it is hard to describe the House as involving competitive elections at all these days." The House isn't just ossified; it's polarized, too. Members of the House now effectively answer only to primary voters, who represent the extreme partisan edge of both parties. As a result, collaboration and compromise between the parties have almost disappeared. The Republican advantage in the House is modest—just two hundred and twenty-nine seats to two hundred and six—but gerrymandering has made the lead close to insurmountable for the foreseeable future.

There is, it appears, just one chance to change the cycle. On December 10th, the United States Supreme Court will hear arguments in a case that could alter the nature of redistricting—and, with it, modern American electoral politics. The court has long held that legislators may not discriminate on the basis of race in redistricting, but the question now before the court is whether, or to what extent, they may consider politics in defining congressional boundaries. "There is a sense of embarrassment about what has happened in American politics," Samuel Issacharoff, a professor at Columbia Law School, said. "The rules of decorum have fallen apart. Voters no longer choose members of the House; the people who draw the lines do. The court seems to think that

something has to be done.” The case could well become the court’s most important foray into the political process since *Bush v. Gore*. As Ronald Klain, a Democratic lawyer in election-law cases, puts it, “At stake in this case is control of Congress—nothing more, nothing less.”

The off-cycle timing of the Texas redistricting fight, as well as the farcical drama of the fleeing Democratic legislators, made the saga look like a colorful aberration. But the results of that altercation merely replicated what happened, after the 2000 census, in several other states where Republicans controlled the governorship and the legislature. Even in states where voters were evenly divided, the Republicans used their advantage in the state capitals to transform their congressional delegations. In Florida, the paradigmatically deadlocked state, the new district lines sent eighteen Republicans and seven Democrats to the House. In the Gore state of Michigan, which lost a seat in redistricting, the delegation went from 9-7 in favor of the Democrats to 9-6 in favor of the Republicans—even though Democratic congressional candidates received thirty-five thousand more votes than their Republican opponents in 2002. (The Michigan plan was approved on September 11, 2001, so it received little publicity.) Pennsylvania, which also went to Gore, had one of the most ruthless Republican gerrymanders, and it is the one being challenged before the Supreme Court.

After 2000, Pennsylvania lost two seats in Congress, and its legislature had to establish new district lines. Republican legislative leaders there engaged in no subterfuge; they candidly admitted that they intended to draw the lines to favor their party as much as possible. In the midst of the battle over the Pennsylvania plan, DeLay and Dennis Hastert, the Speaker of the House, sent a letter to the Pennsylvania legislators, saying, “We wish to encourage you in these efforts, as they play a crucial role in maintaining a Republican majority in the United States House of Representatives.” The Republicans in Harrisburg used venerable techniques in redistricting, like “packing,” “cracking,” and “kidnapping.” Packing concentrates one group’s voters in the fewest possible districts, so they cannot influence the outcome of races in others; cracking divides a group’s voters into other districts, where they will be ineffective minorities; and kidnapping places two incumbents from the same party in the same district.

Frank Mascara was kidnapped. A Democrat first elected to Congress in 1994, Mascara represented a district in the rugged industrial country south of Pittsburgh. “My district had been more or less the same for about a hundred years,” Mascara told me on the porch of his house in Charleroi, which overlooks a glass-making plant on the banks of the Monongahela River. The son of a steelworker and the first member of his family to go to college, Mascara worked his way through county politics until he won his seat in the House. “A lot of people couldn’t believe that a congressman lived in a house like

mine," he said, noting its aluminum siding and probable resale value of about thirty-five thousand dollars. "But that's the kind of guy I am," he said. "I go to church down the street. I represent the average person."

With the Republicans in charge in Harrisburg, Mascara knew he would be little more than a spectator to the redistricting process. "I still thought my district would for the most part remain intact," he said. "That didn't occur." Mascara had met me at a McDonald's in Charleroi's ragged downtown, and then led me to his home on a quiet street called Lincoln Avenue, where we parked because he has no garage. From his porch, he pointed to our cars. "The cars are in the twelfth congressional district, and my house is in the eighteenth," he explained. "When they drew the new lines, they started in Allegheny County, which is north of here, and made, like, a finger out of that district, and the finger went down the middle of the street where I live. The line came down to my house and stopped." The Republicans' meticulous line-drawing through Charleroi was designed to force Mascara into a primary battle with his fellow-Democrat John Murtha, which it did. Murtha defeated Mascara, ending his congressional career and reducing the Democratic presence in the House by one.

The Republicans carved up Pennsylvania into many strangely shaped districts, which won monikers like the "supine seahorse" and the "upside-down Chinese dragon." Such nicknames for gerrymandered districts go back to the origin of the term, which was coined as an epithet to mock Massachusetts Governor Elbridge Gerry, who in 1811 approved an election district that was said to resemble a salamander. Like most gerrymanders throughout history, the Republicans' creation in Pennsylvania produced the desired results. Even though a Democrat, Ed Rendell, won the governorship in 2002, Republicans in that election took control of twelve of the nineteen House seats.

Democrats accomplished less in the 2000 redistricting cycle only because they controlled fewer states and thus could do less to protect their interests. DeLay's mid-cycle reapportionment may be without precedent, but Democrats have their own inglorious history of gerrymandering. Before the Texas coup this year, the most notorious redistricting operation in recent years was the one run by Representative Philip Burton, following the 1980 census in California, which transformed the Democrats' advantage in House seats there from 22-21 to 27-18. In 2002, a Democratic plan in Maryland turned that delegation from being evenly divided to a 6-2 Democratic advantage, and Georgia Democrats gained two seats in the House even though in the same election voters rejected a Democratic governor and a Democratic United States senator. In California, where Democrats also controlled the process, they settled for protecting incumbents of both parties. There, in 2002, not one of fifty general-election House challengers won even forty per cent of the total vote.

There is no doubt, though, that on balance the 2000 redistricting cycle amounted to a major victory for Republicans. Even though Al Gore and George W. Bush split the combined vote in Florida, Pennsylvania, Ohio, and Michigan, Republican control of the process meant that, after redistricting, the G.O.P. now holds fifty-one of those states' seventy-seven House seats. "The important thing to realize was in 1991 the Republicans had control of line-drawing in a total of five congressional districts," one G.O.P. redistricting expert told me. "In 2001, it was almost a hundred seats. Both parties made the most of it.

The transformation of congressional redistricting began long before the 2000 census, and the crucial issue was race. In the early nineteen-sixties, the Supreme Court, under Chief Justice Earl Warren, transformed American politics by enforcing the principle of one man, one vote, and requiring that all legislative districts contain the same number of people. Before these decisions, which started with the famous case of *Baker v. Carr*, in 1962, Southern (and some Northern) states had designed districts so that black voters had no meaningful say in Congress. Later in the decade, the Voting Rights Act established the principle that not only did blacks have the right to vote but they had to be placed in districts where black candidates stood a good chance of winning. The act, which was one of Lyndon B. Johnson's most important civil-rights initiatives, led to the election of many more black members of Congress—and was a classic demonstration of the law of unintended consequences.

"When the civil-rights movement started, you had a lot of white Democrats in power in the South," Bobby Scott, a congressman from Virginia who was first elected in 1992, said. "And, when these white Democrats started redistricting, they wanted to keep African-American percentages at around thirty-five or forty per cent. That was enough for the white Democrats to keep winning in these districts, but not enough to elect any black Democrats. The white Democrats called these 'influence' districts, where we could have a say in who won." But Republicans sensed an opportunity. "They came to us and said, We want these districts to be sixty per cent black," Scott, who is African-American, said. "And blacks liked that idea, because it meant we elected some of our own for the first time. That's where the 'unholy alliance' came in."

The unholy alliance—between black Democrats and white Republicans—shaped redistricting during the eighties and nineties. Republicans recognized the value of concentrating black voters, who are reliable Democrats, in single districts, which are known in voting-rights parlance as "majority-minority." As Gerald Hebert, a Democratic redistricting operative and former Justice Department lawyer, puts it, "What you had was the Republicans who were in charge for every redistricting cycle at the Justice Department—'81, '91, '01. And there was a kind of thinking in the eighties and in the

early nineties that if you could create a majority-minority district anywhere in the state, regardless of how it looked and what its impact was on surrounding districts, then you simply had to do it. What ended up happening was that they went out of their way to divide and conquer the Democrats.” The real story of the Republican congressional landslide of 1994, many redistricting experts believe, is the disappearance of white Democratic congressmen, whose black constituents were largely absorbed into majority-minority districts.

It was a version of the unholy alliance which may doom Charlie Stenholm and his fellow Texas Democrats. All the congressmen who are likely to lose their jobs in the new DeLay plan are white. Many of their black constituents have been transferred to safe Democratic seats, where they can’t harm Republicans. The unholy alliance has had the additional side effect, especially in the South, of making the Democrats the party of blacks and the Republicans the party of whites—which presents daunting long-term political problems for the Democratic Party. Many Democrats can’t help but express a perverse admiration for the cleverness of the strategy. Benjamin Ginsberg, a Republican redistricting operative who helped to construct the unholy alliance during the 1990 cycle, referred to the initiative as “Project Ratfuck.”

Since the 2000 cycle, these Republican gains have locked in and even expanded. To see how this was done, I asked Nathaniel Persily, a genial assistant professor of law and political science at the University of Pennsylvania, to visit my office and bring his laptop. Persily, who is thirty-three, has built a reputation as a nonpartisan expert and occasional practitioner in the field of redistricting.

Before 1990, most state legislators did their redistricting by taking off their shoes and tiptoeing with Magic Markers around large maps on the floor, marking the boundaries on overlaid acetate sheets. Use of computers in redistricting began in the nineties, and, as Persily demonstrated, it has now become a science. When Persily opened his computer, he showed me a map of Houston, detailed to the last census block. (The population of each block usually ranges from fewer than a dozen to about a thousand.) “This is the same map that DeLay’s people used to redistrict,” Persily said. Indeed, DeLay’s political operation purchased ten copies of the software, which is called Caliper’s Maptitude for Redistricting and costs about four thousand dollars per copy. The software permits mapmakers to analyze an enormous amount of data—party registration, voting patterns, ethnic makeup from census data, property-tax records, roads, railways, old district lines. “There’s only one limit to the kind of information you can use in redistricting—its availability,” Persily said. (In Pennsylvania, Republicans used Carnegie-Mellon University’s mainframe computer, which would have allowed them to add even more data, such as real-estate transactions.)

With a few clicks, Persily changed the map from one that showed party registration in each census block to one that revealed voting results in each block. The colors ranged from dark red, for heavily Democratic votes, to dark blue, for strongly Republican. He showed voting results in about two dozen races, from President to governor and from congressman to local offices. "The whole process has got much more sophisticated," Persily went on. "Party-registration data are not the only kind of data you want to use. You want to use real election results. That's a big change from ten years ago. We have become very good at predicting how people are going to vote. People's partisanship is at a thirty-year high. If I know you voted for Gore, I am better able to predict that you are going to vote for any given Democrat in a future election."

I asked Persily to give me a demonstration of how to draw district lines. He moved his mouse to the border between two congressional districts. A ledger on the top half of the screen showed that one of the districts, as currently configured, had about forty thousand more people than the other one. "The Supreme Court has said that the requirement of one man, one vote means that each district must have exactly—exactly—the same number of people," Persily explained. An early version of the Pennsylvania plan was rejected by the courts because the districts were just nineteen voters apart, in districts of about a half million people. Requirements for that sort of precision virtually mandate the use of computers for redistricting.

Persily zeroed in even more closely, and a little donkey popped up inside one of the census blocks. "That's where the local congressman lives, a Democrat," he explained. "We have little elephants for the Republican incumbents." The program seemed easy to use, justifying the boast, on the software company's Web site, that you could "start building plans thirty minutes after opening the box." Persily chuckled. "At a certain point, you admire the video-game appeal of all this.

"There used to be a theory that gerrymandering was self-regulating," Persily explained. "The idea was that the more greedy you are in maximizing the number of districts your party can control, the more likely it is that a small shift of votes will lead you to lose a lot of districts. But it's not self-regulating anymore. The software is too good, and the partisanship is too strong."

The effects of partisan gerrymandering go well beyond the protection of incumbents and the guarantee of continued Republican control. It has also changed the kind of people who win seats in Congress and the way they behave once they arrive. Jim Leach, a moderate Republican and fourteen-term congressman from Iowa, has watched the transformation. Leach agrees with Richard Pildes on the numbers: "A little less than four hundred seats are totally safe, which means that there is competition between Democrats and Republicans only in about ten or fifteen per cent of the seats.

"So the important question is who controls the safe seats," Leach said. "Currently, about a third of the over-all population is Democrat, a third is Republican, and a third is no party. If you ask yourself some mathematical questions, what is half of a third?—one-sixth. That's who decides the nominee in each district. But only a fourth participates in primaries. What is a fourth of a sixth? A twenty-fourth. So it's one twenty-fourth of the population that controls the seat in each party.

"Then you have to ask who are those people who vote in primaries," Leach went on. "They are the real partisans, the activists, on both sides. A district that is solidly Republican is a district that is more likely to go to the more conservative side of the Republican part of the Party for candidates and platforms. Presidential candidates go to the left or the right in the primaries and then try to get back in the center. In House politics, if your district is solidly one party, your only challenge is from within that party, so you have every incentive for staying to the more extreme side of your party. If you are Republican in an all-Republican district, there is no reason to move to the center. You want to protect your base. You hear that in Congress all the time, in both parties—'We've got to appeal to our base.' It's much more likely that an incumbent will lose a primary than he will a general election. So redistricting has made Congress a more partisan, more polarized place. The American political system today is structurally geared against the center, which means that the great majority of Americans feel left out of the decision-making process."

Scholarly research gives some support to Leach's impressions. "Partisan gerrymandering skews not only the positions congressmen take but also who the candidates are in the first place," Issacharoff, of Columbia, said. "You get more ideological candidates, the people who can arouse the base of the party, because they don't have to worry about electability. It's becoming harder to get things done, whether in Congress or in state legislatures, because partisan redistricting goes on at the state level, too." Among members of the House, partisan redistricting has also bred an almost comic sense of entitlement to landslides. In a hearing on the post-2000 reapportionment in New York, Representative Benjamin Gilman, an upstate Republican, said that during the 1982 redistricting he was promised by the majority leader of the state senate that "if I accepted that challenge of a fair-fight district, I would never again be asked or forced by the state to face that prospect of a fair fight once again. . . . I think it would be unfair not only to myself and my district to face that divisive prospect once again."

With partisan gerrymandering, House members in effect pay a penalty if they reach out too much to members of the other party. "What is laughable is the basic premise of what is going on," Charlie Stenholm, the endangered Texan, said. "The great sin I committed is that I won the last election 51-47 in a district that went 71-28 for President

Bush. But I am a conservative Democrat, and that's why these people vote for me. There shouldn't be a penalty for reaching out across party lines." If Stenholm and his ilk disappear, they will be replaced by reliable Republicans—who won't have to worry about their own chances for reelection.

The question before the Supreme Court later this month is not whether partisan gerrymandering is wise but whether it is constitutional. The issues are strikingly similar to those faced by the Warren Court in the early sixties—and the stakes may be as large as well. The framers of the Constitution designed the House of Representatives to reflect the popular will. James Madison, in the Federalist Papers, said the House was meant to be a "numerous and changeable body," where the members would have "an habitual recollection of their dependence on the people." While the House was supposed to be impetuous, the Senate was intended to be stable. Madison said that senators would serve six-year terms as a defense against "the impulse of sudden and violent passions" of the House, and the members of the Senate were to be elected by state legislators, providing a further level of insulation from the popular will. (The Constitution was amended to require direct election of senators in 1913.) The Senate had to remain stable, Madison wrote, because "every new election in the states is found to change one half of the representatives."

Today, the House and the Senate have precisely flipped roles. Senate races, which are not subject to redistricting, are decided by actual voters, who do indeed change their minds with some regularity. Control of the Senate has shifted five times since the nineteen-eighties. The House, by contrast, has changed hands just once in the same period, in the Republican takeover of 1994. In 2002, only one out of twelve House elections was decided by ten or fewer percentage points, while half of the governors' and Senate races were that close. In 2002, only four House challengers defeated incumbents in the general election—a record low in the modern era. In a real sense, the voters no longer select the members of the House of Representatives; the state legislators who design the districts do.

The question, then, is what, if anything, is unlawful about that? The legal debate on that question is especially stark. In the case now before the Supreme Court, Pennsylvania Democrats argued that the Republican gerrymander denied them equal protection of the laws, asserting in their brief that it is "unconstitutional to give a State's million Republicans control over ten seats while leaving a million Democrats with control over five." The Republican response is to say, in effect, "Welcome to the big leagues. State legislatures have always played this kind of hardball, the courts ought to stay out of the game altogether, and there's no such thing as a nonpartisan solution." Justice Sandra Day O'Connor, a former Arizona state senator herself, may have put the argument best

when, in the mid-eighties, the Supreme Court last considered a political-gerrymandering case. According to Justice William Brennan's notes of the court's internal debate, O'Connor said that any legislative leader who failed to protect his party's interest in redistricting "ought to be impeached."

In that case, a challenge to the congressional-reapportionment plan in Indiana following the 1980 census, a plurality of the justices said for the first time that a partisan gerrymander might, in theory, violate the equal-protection clause. But in the 1986 decision the court ruled that the Indiana plan did not violate the Constitution. Indeed, the court said that the Constitution was not violated unless one political party was "essentially shut out of the political process." According to Heather Gerken, of Harvard, "The court set the bar so high for constitutional violations that no one has ever successfully fought a partisan gerrymander anywhere since 1986. Political parties are never totally 'shut out' of the process—they raise funds, put up candidates, make speeches. So these challenges have always lost. By taking the Pennsylvania case, the court seems to be saying that it's time to get back in the process."

The best argument for Republicans in the Pennsylvania case, it seems, is that it's simply not the court's business to scrutinize legislative maps for partisan gerrymandering. "Redistricting deals with inherently political questions," J. Bart DeLone, the senior deputy state attorney general who will argue for the case for Pennsylvania, said, "and those questions should be left to the political branches of government, where they belong, not to the courts. Then you are trying to measure things that have no standards unless you are making political judgments." Still, this is a Supreme Court that has not hesitated to tell politicians what to do. "It's an extremely confident court," Gerken said. "They second-guess Congress, states, state judges all the time. They are deeply engaged in the democratic process. I can't imagine that this is anything but an effort to pull in the reins of partisan gerrymandering."

But how? The Democrats propose a rule based, in part, on the Court's race jurisprudence. In a series of cases in the nineties which challenged some of the majority-minority districts, the Court held that it violated the Constitution for states to gerrymander congressional districts exclusively for racial reasons. "The rule now is, You can't draw ugly districts if it's purely for race," Sam Hirsch, one of the lawyers for the Pennsylvania Democrats, said. "The rule should be, You can't draw ugly districts if it's purely for politics, either." But Hirsch's adversary, DeLone, pointed out, "There is a fundamental difference between race and politics. Racial classifications are inherently suspect. If you are doing something specifically because of race, we are always going to take a hard look at it. Not only are political judgments O.K. but we expect them." Since it's been so long since the Supreme Court addressed the issue, most election-law

experts see the Pennsylvania case as difficult to handicap, and the key factor may simply be how bad the justices believe the problem of partisan gerrymandering to be.

In any case, the situation appears to be getting worse, even as the Pennsylvania case has been pending. While Texas was shifting its districts, the governing Republicans in Colorado did their own mid-cycle reapportionment, to solidify their hold on the one House seat in the state that produced a close election in 2002. (Legal challenges to the new Texas and Colorado districts are now pending.) At one point, the Democrats who control Oklahoma and New Mexico threatened retaliation, but the Party lacks a DeLay-like figure to press the issue. One state that has gone its own way is Iowa, which turned redistricting over to a nonpartisan civil-service commission after the 2000 census. Consequently, four of Iowa's five House races in 2002 were competitive, so a state with one per cent of the seats in the House produced ten per cent of the nation's close elections. The rest of the country will follow only, it seems, if the Supreme Court requires it.

When it comes to drawing political boundaries, there never was a golden age of statesmanship. "When we Democrats controlled the legislature, sure we protected Democrats," Charlie Stenholm said. "But we didn't do harm to the Republicans who were in office. This thing today is a whole different order of magnitude." On his porch in Charleroi, Frank Mascara said the issue is a lot bigger than he is. "I'm through, I'm done, out of politics," he said. "It won't affect me one way or the other. But the system is now totally out of whack, and that matters to a lot of people. It's not about me, it's about power on a national scale."