For three days in October of 2003, Tom DeLay left his duties as majority leader of the House of Representatives and worked out of the Texas state capitol, in Austin. During the previous year, DeLay had led his Republican colleagues there in an effort to redraw the boundaries of the state's congressional districts. For more than a century, congressional redistricting had taken place once every decade, after the national census, but the Texas Republicans were trying to redraw lines that had been approved just two years earlier. Several times during the long days of negotiating sessions, DeLay personally shuttled proposed maps among House and Senate offices in Austin. Once, when reporters glimpsed DeLay striding through the corridors of the state capitol, they asked him about his role in the negotiations. “I’m a Texan trying to get things done,” he said.

Before the end of the month, the Republicans had pushed their plan through both houses, and it paid off in November of 2004. The Texas delegation in the House of Representatives went from seventeen to fifteen in favor of the Democrats, to twenty-one to eleven in favor of the Republicans. Martin Frost was the third-ranking Democrat in the House when the Republicans eliminated the district he had represented for twenty-six years. “I knew what DeLay was doing,” Frost told me. “I didn’t like it, but he wasn’t just trying to get me, he was trying to get as many Dems as possible. I went ahead and ran in one of the other districts. It was almost impossible to win, and I didn’t. But I went out with my boots on.”

The struggle over redistricting amounted to a Promethean display of political power by DeLay, and his subsequent downfall has been similarly epic. DeLay’s recent travails, which include a criminal indictment in Texas last year and his resignation as majority leader, can be traced to the redistricting fight. Today, his victory in that battle looks fragile. On March 1st, the Supreme Court will hear a challenge to the Texas congressional map, and the outcome is by no means clear. In the first major case to be heard by the two new Justices, John G. Roberts, Jr., and Samuel A. Alito, Jr., the Court will weigh the constitutionality of the Texas plan, which represents just one of the partisan gerrymanders that have transformed Congress in recent years. The Republican majority in Texas and the Bush Justice Department are asking the Court to preserve the Texas plan. But DeLay’s political fortunes have changed so much that, paradoxically, the best thing that could happen to him now may be for the Court to strike down the plan he created.

In cases of extreme partisanship in gerrymandering, it is often difficult to identify the original sin. The current controversy in Texas dates to the period just after the 1990 census, when Democrats still controlled both houses of the Texas legislature. Even though Texas was by that time trending strongly Republican in statewide and Presidential races, the Democrats drew district lines that enabled their party to win twenty-one seats in the House in 1992, compared with just nine for the Republicans. By the time of the next census, in 2000, the Republicans were understandably eager to redress the balance. “Republicans had been on the receiving end of what was known as the shrewdest gerrymander of the nineteen-nineties,” John Cornyn, a former Texas attorney general who is now a U.S. senator, said. “There are those who thought that what happened next was payback.”

By 2000, Republicans controlled the governorship and the State Senate, but Democrats still had a majority in the Texas House. A deadlock between the two legislative bodies prevented Texas
from adopting any redistricting plan, and the conflict ended up in federal court. The following year, a three-judge panel, ill-disposed to take sides in a political fight, ratified a modified version of the 1991 map, with two new seats awarded to high-growth districts. "The court essentially carried forward the 1991 Democratic gerrymander of Texas, which is increasingly problematic, given the over-all Republican tilt of the state," Samuel Issacharoff, a professor at New York University School of Law, told me. "The status-quo ante looked like a distortion."

In the 2002 elections, DeLay set out to give the Texas House a Republican majority and thus remove the last obstacle to full Republican control of the state. That year, he created two PACs, which raised and spent $3.4 million on twenty-two races for the Texas House. The law firm of Jack Abramoff, the lobbyist whom DeLay has described as one of his "closest and dearest friends," contributed twenty-five thousand dollars to the cause. On October 4, 2002, the DeLay PAC known as Texans for a Republican Majority sent a hundred and ninety thousand dollars to seven candidates for the State House. The following month, all seven were elected, and Republicans became the majority party in the Texas House.

"After the 2000 census, we never had a chance to vote on a congressional redistricting plan, because the court did it," Tom Craddick, a close ally of DeLay’s, who became Speaker of the Texas House after the 2002 election, told me. "When we took over, we decided that we ought to do congressional redistricting. If we hadn’t taken control, we wouldn’t have gone ahead with it. Tom pushed to do it." It was true that a court, and not the legislature, had drawn the congressional maps after the 2000 census, but that had also occurred in several other states where the political branches couldn’t agree on a plan.

DeLay’s and Craddick’s idea—to redistrict in the middle of a census cycle—had never been attempted in any state. As Cornyn put it, "Everybody who knows Tom knows that he’s a fighter and a competitor, and he saw an opportunity to help the Republicans stay in power in Washington."

In the spring of 2003, Texas Republicans, who were now dominant in both the State House and Senate, proposed a new congressional map that promised to add between five and seven new Republicans to the Texas delegation. At the time, DeLay said that, with fifty-seven per cent of Texas voters backing Republicans for Congress, it was only fair that the G.O.P. control more than fifteen of the thirty-two seats in the U.S. House. If a mid-census redistricting was necessary to align the seats with the popular vote, the Republicans argued, so be it.

Pete Laney, the Democrat who preceded Craddick as Speaker, helped lead the opposition to the DeLay plan. "We couldn’t believe what they were trying to pull," he told me. "They were looking to create chaos. Every time the legislature changed hands, they could have redistricted, every two years if they wanted to, and we didn’t think it was right." Texas law required that two-thirds of the hundred-and-fifty-member body be present in order to conduct legislative business; the Democrats, who numbered sixty-two, could stop the legislation simply by not showing up. So most of them took off for Oklahoma.

There was some precedent for this kind of action in Texas. In 1979, a group of liberal state senators, known as the Killer Bees, fled the state to deprive the majority of a quorum in a dispute over the date of the Texas Presidential primary. This time, in 2003, the House Democrats were dubbed the Killer Ds.

Laney was on his cotton farm, in the Texas panhandle, on May 11th when he and his Democratic colleagues decided to leave the state for the Oklahoma town of Ardmore, just across the border. Most of the legislators travelled from Austin by bus, but Laney flew in his private plane, a seven-seat Piper Cheyenne. The following day, the clerk of the Texas House issued arrest warrants for the missing politicians, and DeLay’s staff decided to find them.

On the afternoon of May 12th, a senior aide to DeLay called an official with the Federal Aviation Administration and asked the agency to track the location of tail number N711RD, Laney’s plane. The staffer didn’t say why he wanted the information, and F.A.A. officials later said that they assumed there was a safety issue involving the plane. According to a subsequent report by the Inspector General of the Department of Homeland Security, a DeLay staffer also contacted D.H.S., requesting assistance in determining the location of an aircraft believed to be overdue. By the end of the day, the F.A.A. had told DeLay’s staff that local officials had traced the plane to Ard-
more. (The same day, DeLay’s staff also contacted a senior official at the Justice Department, asking whether federal law-enforcement authorities would assist in arresting the missing legislators. The Department’s Inspector General later issued a report saying that another Justice official had decided that the request was “wacko,” and the Department refused to get involved.)

“It didn’t bother me that the F.A.A. was looking for me, because I want them to know where I am when I’m in the air,” Laney said. “The chance of me surviving to know where I am when I’m in the air,” was looking for me, because I want them (the law-enforcement authorities would assist in arresting the missing legislators. The Department’s Inspector General later issued a report saying that another Justice official had decided that the request was “wacko,” and the Department refused to get involved.)

“It didn’t bother me that the F.A.A. was looking for me, because I want them to know where I am when I’m in the air,” Laney said. “The chance of me surviving if I put one of those things down at three hundred miles per hour is a lot better if they find me fast. The problem was that they misled the F.A.A. about why they were looking for me. And what really bothers me is that they had Homeland Security, the F.A.A., and the whole federal government looking for me, but it was a reporter for the Dallas Morning News who found us first anyway.”

The Killer D’s remained at the Ardmore Holiday Inn, dining at the adjoining Denny’s, through May 15th, the last day that new bills could be considered. But on June 30th Governor Rick Perry convened a special session on redistricting, and, with the Democrats back in the state, DeLay’s plan finally passed the House. However, eleven Democrats in the Senate, determined to deprive that body of a quorum, also decided to flee the state, this time to Albuquerque. “We considered every nearby state except Louisiana,” one Texas Democratic legislator said. “They’ve got legalized gambling there, and riverboat casinos, and we didn’t want anybody who wasn’t paying attention to what they were doing.”

The second holdout lasted for forty-five days, but the Democrats’ unanimity cracked when Senator John Whitmire, of Houston, decided that the effort had become futile, and returned to Texas for the Labor Day weekend. That gave Republicans a quorum in the Senate, and a few weeks later DeLay went to Austin. Under his guidance, and with the upcoming Texas-Oklahoma football game in Dallas as an incentive to wrap up business, the Senate ratified the new congressional districts on October 13th. (“DELAY, LOOMING FOOTBALL WEEKEND PUT PRESSURE ON PARTY,” read a headline in the Austin American-Statesman.)

Since the passage of the Voting Rights Act, in 1965, most legal fights about redistricting have concerned the rights of racial minorities. DeLay expected such a challenge to the 2003 Texas map, and he was ready with a preemptive defense. “Minority rights have been protected,” he said at a press conference after the plan was ratified. He asserted that the number of Hispanic representatives could grow from six to eight, and the number of African-Americans from two to three. (These predictions were, for the most part, accurate.)

From the beginning, it was evident that the agenda of the Republican mapmakers in Texas was more political than racial. Shortly after the redistricting plan passed, Joby Fortson, an aide to Representative Joe Barton, a Texas Republican, sent a candid e-mail to a group of colleagues that makes this point more clearly than any public statement issued by the participants. The memo, which was disclosed in the course of subsequent litigation, offers a “quick rundown” on each of the seats in the delegation. Fortson begins his description of the district where Martin Frost, the senior Democrat in the state, would have to run with the words “Ha ha ha ha ha ha ha ha. . . . His district disappeared.” As for another Democratic incumbent, Nick Lampson, Fortson says, he and a G.O.P. incumbent “are drawn together in a Republican district.” (Lampson lost, too.) “This is the most aggressive map I have ever seen,” Fortson concludes. “This has a real national impact that should assure that Republicans keep the House no matter the national mood.” (Fortson, who now works for Apple Computer, declined to comment.)

On October 14, 2003, Texas Democrats challenged the new congressional districts under the Voting Rights Act, but three months later a three-judge panel ruled that the rejiggering of the lines had not diluted the voting power of African-Americans or Hispanics. Then, in a major surprise, the Supreme Court issued an opinion that may have changed the rules of the redistricting game for good.

The Constitution established the House of Representatives as the branch of government most closely attuned to changes in the national mood. James Madison, in “The Federalist Papers,” wrote that the House was conceived as a “numerous and changeable body,” where smaller districts and two-year terms were sure to generate regular turnover, especially compared with the Senate. Of course, the framers also understood the rough-and-tumble of politics; even in Madison’s day, the practice of gerrymandering for partisan adva-
Ed Rendell, was elected governor. So a

nal seats—even though a Democrat,

a direct challenge to the practice of par

nia presented the Supreme Court with

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Henry had tried to gerrymander Madi

tage was familiar. In the late seven-

eighties, there were claims that Patrick

nason himself out of the First Congress.

The term was coined during Madison's

Presidency, to mock Elbridge Gerry,

the governor of Massachusetts, who in

1811 approved an election district that

was said to look like a salamander. But

the frequency and boldness of contem-

porary partisan gerrymandering make

its nineteenth-century antecedents look
gentle.

As a practical matter, Madison's con-

ception of the House is now obsolete.

Partisan gerrymandering has become a

precise science, where mapmakers use

computer data from census and election

returns to design the political makeup of

each congressional district. "It used to be

that the idea was, once every two years

voters elected their representatives, and

now, instead, it's every ten years the rep-

resentatives choose their constituents," 
Pamela Karlan, a professor at Stanford

Law School, told me. Republicans cur-

rently hold a 231 to 201 advantage in the

House, which means that Demo-

crats would need to win only seventeen

new seats—or about four per cent of the

Congress—in order to regain the major-

ty. But the extreme gerrymandering in

most states makes the Democrats' chal-

lenge nearly impossible, even in a year

when national political trends may favor

them. Outside Texas, only two incumb-

ents lost in the 2004 congressional elec-

tions, and only in twenty-one seats did

the winner have less than fifty-five per

cent of the vote. "Congressmen are more

likely to die or be indicted than they are
to lose a seat," Karlan said.

In 2004, Democrats in Pennsyl-

via presented the Supreme Court with

da direct challenge to the practice of par-

tisan gerrymandering. Following the

2000 census, Republicans controlled

the governorship and both houses of the

state legislature, so they essentially had

a free hand in shaping congressional
districts to their liking. The common-

wealth has become more Democratic

in recent years, but the G.O.P. gerry-
mander showed the power of creative
drawings. In 2002, the first elec-
tion to reflect district lines, Republicans

won twelve of the nineteen congressio-
nal seats—even though a Democrat, Ed

Rendell, was elected governor. So a

group of Democratic voters filed a law-
suit, claiming that such pervasive distor-
tions of the popular will amounted to a
violation of the Constitution's guarantee
of equal protection of the laws.

The case, Vieth v. Jubelirer, reached
the Supreme Court, which responded
with one of its most significant, and
most baffling, decisions in recent his-
tory. On April 28, 2004, the Court
ruled five to four that the Pennsylva-
nia plan could stand. But in more than
a hundred pages of opinions, written by
five Justices, there is neither a major-
ity opinion for the Court nor an agree-
ment on the larger issues in the case. As
a lower-court judge in the Texas case
later wrote of the ruling, "The light
offered by Vieth is dim, and the search
for a core holding is elusive."

The lead opinion in the case, by Jus-
tice Antonin Scalia, at least has the advan-
tage of clarity. Writing for himself,
Chief Justice William H. Rehnquist, and
Justices Sandra Day O'Connor and Clar-
ence Thomas, Scalia acknowledged that
the Pennsylvania plan came about be-
cause "prominent national figures in the
Republican Party pressured the General
Assembly to adopt a partisan redistrict-
ing plan as a punitive measure against Dem-
ocrats for having enacted pro-Democrat
redistricting plans elsewhere." But Sca-
lia said that partisan gerrymandering
was not a subject that belonged in federal
court; rather, he wrote, the Constitu-
tion entrusts the issue to the political branches
of government and "involves no judicially
enforceable rights." In other words, the
Scalia quartet advised the Pennsylvania
Democrats to try harder to win elections
instead of running to the courts with
their complaints.

Four other Justices dissented, argu-
ning that the Pennsylvania Democrats
deserved their day in court. John Paul
Stevens, David Souter, Ruth B. Gins-
burg, and Stephen G. Breyer said, in
effect, that partisan gerrymandering had
got so out of hand that it was up to the
courts to restore a measure of fairness.
In Stevens's view, the courts should weigh
in because "when partisanship is the
legislature's sole motivation—when
any pretense of neutrality is forsaken
unabashedly and all traditional districting
criteria are subverted for partisan
advantage—the governing body cannot
be said to have acted impartially."

And the problem, Souter wrote in his
dissent, keeps getting worse: "The in-
creasing efficiency of partisan redistrict-
ing has damaged the democratic process
to a degree that our predecessors only
began to imagine."

One Justice, Anthony M. Kennedy,
tried to split the difference. Kennedy
joined the result of Scalia's opinion but
not his reasoning. Unlike Scalia, Ken-
nedy wrote, "I would not foreclose all
possibility of judicial relief if some lim-
ited and precise rationale were found
to correct an established violation of
the Constitution in some redistricting
cases." Kennedy made clear his
disdain for the way that redistricting
had become a partisan slugfest, not-
ing the words of a North Carolina legis-
lator in the midst of one such fight:
"We are in the business of rigging elec-
tions." But Kennedy also identified the
main problem facing those who would
have the courts get involved in the
redistricting process. "Because there are
yet no agreed upon substantive princi-
ples of fairness in districting, we have no
basis on which to define clear, manage-
able, and politically neutral standards,"
he wrote.

Kennedy's temporizing drew a mock-
ing rejoinder from Scalia, who wrote,
"Justice Kennedy's opinion boils down
to this: 'As presently advised, I know of
no discernible and manageable standard
that can render this claim justiciable. I
am unhappy about that, and hope that I
will be able to change my opinion in the
future.'" But Kennedy may yet have the
last word, because the Texas case gives
him, and the four dissenting Justices in
Vieth, an opportunity to rein in partisan
gerrymanders once and for all.

D eLay's problems began to accumu-
late even before he could savor the
Republican gains in the 2004 elections
in Texas. On October 6, 2004, the
House Ethics Committee, in a unani-
mous vote of its five Republicans and
five Democrats, admonished DeLay for
asking the F.A.A. to track Laney's air-
plane during the redistricting fight the
previous year. The committee's report
on the incident cited House rules that
prohibit members from taking "any
official action on the basis of the parti-
san affiliation . . . of the individuals
involved." DeLay's role in the matter
“raises serious concerns under these standards of conduct,” the report said. (It was the third time that the commit-
tee had reprimanded DeLay for breaking
House rules.) DeLay was defiant,
declaring in response that the complaint
“should have been thrown out immedi-
ately.” He went on, “For years Demo-
crats have hurled relentless personal at-
tacks against me, hoping to tie my hands and smear my name. All have fallen short, not because of insufficient venom, but be-
cause of insufficient merit.”

With the new congressional districts in place, Republicans gained five seats in Texas the following month. The net increase was actually six seats, because one incumbent Democrat, Ralph Hall, switched parties. But in the days imme-
diately after the election the district at-
torney in Austin, a veteran Democrat
named Ronnie Earle, stepped up his in-
vestigation of DeLay’s fund-raising ac-
tivities before the 2002 elections to the Texas legislature.

On September 28, 2005, DeLay and two close associates were indicted on charges of conspiracy and money-
laundering in connection with the last-
minute contribution of a hundred and
ninety thousand dollars from the Tex-
ans for a Republican Majority PAC to
House candidates before the 2002 elec-
tions. Texas law prohibits corporate
contributions to state political cam-
paigns, and the indictment charges that
DeLay steered money that he knew was
from corporations to the local candid-
ates. His co-defendants are James W.
Ellis, who runs DeLay’s main national
fund-raising PAC—Americans for a Re-
publican Majority—and John Colyan-
dro, the former director of Texans for a
Republican Majority—and John Colyan-
dro, the former director of Texans for a
Republican Majority. All three defen-
dants pleaded not guilty, and DeLay
denounced Earle, the prosecutor, as “an
unabashed partisan zealot.” Still, under
House rules the indictment meant that
DeLay was required to step down as
majority leader. (That blow was soft-
ened somewhat last month when House
Republicans awarded DeLay a coveted
seat on the Appropriations Com-
mittee, which was left vacant last Novem-
ber when Randy “Duke” Cunningham,
a California Republican, resigned after
pleading guilty to taking $2.4 million in
bribes from military and other govern-
ment contractors.)

DeLay will probably go to trial on
Earle’s charges sometime early next year,
but he also remains under the scrutiny of
Justice Department prosecutors in the
investigation that led to the guilty plea in
January by Jack Abramoff, the Republi-
can fund-raiser and lobbyist. (The Appr-
opriations Subcommittee, of which
DeLay is also a member, sets the budget of
the Justice Department.) Earle, too,
has issued subpoenas in order to examine
Abramoff’s role in the 2002 Texas legis-
slative elections. Yet the greatest threat to
DeLay may be political, not legal.

The 2003 redistricting plan was im-
plemented at a time when DeLay still
looked invincible in Texas, so in redraw-
ning his own congressional district in the
Houston suburbs he was magnanimous
toward his Republican colleagues. As the
Hill aide Joby Fortson put it in his e-mail
analysis of the new district lines, DeLay
“gives away enough R’s” to help his neigh-
boring Republican congressman Ron
Paul. As a result of his generosity, DeLay
won in 2004 with only fifty-five per cen-
t of the vote, against an underfunded and
obscure Democratic opponent.

But DeLay has a serious Democratic
opponent in 2006, Nick Lampson. As a
congressman from 1997 to 2005, Lamp-
son represented an adjacent district, which
was eliminated in DeLay’s 2003 gerry-
mander. Lampson has capitalized
on DeLay’s notoriety in his fund-raising
efforts; in February, Lampson had $1.29
million on hand, DeLay $1.44 million.
(DeLay told George Will that he expects
Paul. As a result of his generosity, DeLay
won in 2004 with only fifty-five per cen-
t of the vote, against an underfunded and
obscure Democratic opponent.

The question remains, though,
whether the Supreme Court will
approve the current district lines, and
whether DeLay and Lampson will wind
up facing each other in November. The
Court has already signalled a special in-
terest in the case: the Justices have al-
lowed two hours for the oral arguments
on March 1st, the first time the Roberts
court has set aside so much time for a
case. (One hour is customary.)

The Democrats, in addition to chal-
 lenging the gerrymander on the ground
that it is excessively partisan, have as-
serted that the new lines of a congressio-
nal district in the Dallas–Fort Worth
area dilute African-American voting
strength, in violation of the Voting
Rights Act. (In his e-mail, Fortson says
of this district, “This is the D’s best legal
challenge, as inner-city Ft. Worth will
now be outnumbered in a Republican
suburban district.”) Still, the core of
the case remains the Democrats’ claim that
the systematic use of redistricting to deny
them a viable chance of victory violates
the Constitution.

The new Justices, Roberts and Alito,
have modest public records on voting-
rights matters, and neither had much to
say on the subject during the confirma-
tion hearings. In Alito’s now famous
1985 application for a promotion at the
Justice Department, where he asserted
his belief that “the Constitution does
not protect a right to an abortion,” he
also briefly addressed voting rights.
“In college, I developed a deep inter-
est in constitutional law, motivated in
large part by disagreement with War-
ren Court decisions, particularly in . . .
reapportionment,” he wrote. At the
confirmation hearings, Alito rebuffed
suggestions by Democrats that this
statement meant that he opposed the
principle of “one man, one vote,” which
was at the heart of the Warren-era ap-
portionment decisions. “I do not see any
reason why it [‘one man, one vote’]
should be reexamined, and I do not
know that anybody is asking for that to
be done,” Alito testified. “Every legisla-
tive district in the country and every
congressional district in the country has
been reapportioned, has been redistricted numerous times in reliance on the principle of ‘one person, one vote,’ and the old ways of organizing state legislatures have long been forgotten.” Nevertheless, Roberts’s and Alito’s conservative orientations suggest that they may vote the way their predecessors, Rehnquist and O’Connor, did on this issue, and the decision will turn on Kennedy’s vote.

The Democrats’ lawyers hope that they can win over Kennedy by pointing out differences between the Pennsylvania and Texas cases. In Pennsylvania, there was some ambiguity about the legislators’ motivations for drawing the district lines where they did. The state had lost two seats because of the 2000 census, so the legislators had no choice but to rework the earlier map, and, inevitably, politics played some role in those decisions. But the Texas case is purely a matter of political gerrymandering; the Court-ordered plan of 2001 had the right number of seats, and had already gone into use, so the only reason for the 2003 reworking was to help the Republican Party. “There is little question but that the single-minded purpose of the Texas legislature in enacting [the 2003 plan] was to gain partisan advantage,” the lower court in the Texas case found. “The newly dominant Republicans . . . decided to redraw the state’s congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents.”

In other words, as the Democrats see it, the Texas Republicans punished their opponents solely because of their political views. “It’s a well-established idea that the government shouldn’t discriminate against people because of their partisanship,” Paul M. Smith, the lawyer who will present the oral argument for the Democrats, said. “The government can’t refuse to hire someone for a civil-service job because of their partisanship.”

Ultimately, DeLay’s extremism may turn out to have been a national service, if it compels the Supreme Court to confront the problem of uncompetitive congressional elections. “I think that everybody knows this is a national scandal,” says Samuel Issacharoff, of N.Y.U., who has filed a brief in support of the Democrats in the Texas case. “Every Justice has at some point said the situation is deeply wrong. They may disagree about whether the courts can do anything about it, or about how to fix the problem, but not a single member of the Court is willing to say that this is how our democracy is supposed to work.”