

Don't Cry for the Voting Rights Act. We Can Fix It by Ending Partisan Gerrymandering

So how can a ban on partisan gerrymandering be a solution to the demise of the VRA? Because, in the United States, minority population patterns—often in clusters both in urban and rural areas—are such that lines drawn using well-established good government standards, but without attention to race or party, will tend to include enough minority voters to permit the natural creation of minority-majority districts and minority opportunity districts throughout the country.

By **Gregory L. Diskant**

June 5, 2026

The U.S. Supreme Court's recent decision in *Louisiana v. Callais* was as heartbreaking as it was predictable. The court effectively ended the provisions of the Voting Rights Act designed to protect the ability of minority voters to elect the candidate of their choice. Before *Callais*, minority voters could show their entitlement to a minority congressional district by showing that it was possible to create a district in which nonwhite voters were a majority (a majority-minority district) and that voting was racially polarized so that minority voters tended to vote as a group, and so could elect a candidate of their choice, while white voters tended to do the same and could otherwise defeat a minority-preferred candidate.

This so-called *Gingles* test (after the Supreme Court's decision in *Thornburg v. Gingles*) served vastly to increase the number of nonwhite representatives, exactly as it was intended to do. The number of Black representatives went from six in 1965 when the VRA was passed (none in the Deep South) to 61 in 2025 (10 in the Deep South). But there were problems with the VRA under the *Gingles* test. On the one hand, it explicitly permitted race-conscious line drawing in favor of minority voters, increasing racial tensions in the country. On the other hand, it did not go far enough to achieve its supporters' goal of increasing the number of minority representatives because districts with large minority populations, but less than a majority, were unprotected. Rather than continuing to obsess about *Callais* and the demise of VRA protection of minority voting districts, we should let it rest in peace and turn our attention to a solution that is both politically popular and that better serves the purpose of increasing nonwhite representation—let's end partisan gerrymandering.

First, we should acknowledge the very real limitations of the VRA and the *Gingles* test. Many citizens of goodwill, on the left and on the right, were disturbed by the long-term implications of the law's requirement that congressional districts not be race blind, but be drawn in a way that intentionally benefited minority voters. The notion that our Constitution is color blind still resonates, and for good reason. Liberal icon Justice William Brennan Jr.—who later wrote the *Gingles* test—touched on the issue in a 1977 VRA case, noting that the law required “an overt racial number” be used to draw minority voting districts. Brennan acknowledged that if such racial classifications were “motivated by racial animus,” the court would unhesitatingly

strike them down, but under the VRA the classifications were allegedly “benign.” But Brennan recognized that “even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification.” Resolving that tension in that case, Brennan was “convinced that the application of the Voting Rights Act substantially minimizes the objections to preferential treatment, and legitimates the use of even overt, numerical racial devices in electoral redistricting.” To those (like myself) who favored such devices as a way to offset the continuing adverse consequences of our nation's history of racial discrimination, that was good enough.

But good faith objections to drawing congressional districts based on race remained. As the court said in *Callais*, drawing such distinctions between citizens is “odious to a free people whose institutions are founded upon the doctrine of equality.” And in redistricting, “where the state assumes from a group of voters’ race that they ‘think alike, share the same political interests, and will prefer the same candidates at the polls,’ it engages in racial stereotyping at odds with equal protection mandates.” Without necessarily agreeing with the exact language of this conservative court, it’s hard not to agree that it is making a serious point.

At the same time, as it turned out, the *Gingles* test was not sufficiently robust to fully protect the rights of minority voters. Its core requirement was the identification of a district where a *majority* of voters were minority, seemingly on the assumption that a majority of non-white voters was necessary for a minority candidate to win. That turned out not to be true. As the Supreme Court later recognized, there are many so-called crossover districts, or minority opportunity districts, where minority voters could elect their candidate of choice even without a majority. For example, think of a 60% Democratic district with a 40% Black population. In the Democratic primary, Black voters constitute two-thirds of the voter pool and so can nominate their preferred candidate, who is then likely to be elected by the Democrats in the general election. Today, such districts account for 15 to 20 seats in Congress, but they exist with no help from the VRA.

So the VRA required race-conscious state action that many found problematic even while it failed to elect all possible minority candidates. Not a perfect solution. But the *Callais* decision and the political response to it point the way to a solution. On the way to interring the VRA, the *Callais* court noted what it called the “entanglement” problem—that Black voters tend to be Democrats and that States have defended against claims of racial gerrymandering by claiming that districts were drawn for partisan political reasons, not racial ones. With the VRA effectively ended by *Callais*, states in the Deep South raced to redistrict—discriminating against Democrats they said, not Blacks. And poof, the minority-majority districts in the South, once mandated by the VRA, began to disappear, one by one.

This torrent of partisan gerrymandering is hugely unpopular. In effect, politicians are selecting the voters to place in their districts rather than allowing the voters to select the leaders they prefer. Recent polling finds that 88% of U.S. voters believe it is a serious problem when states

deliberately draw congressional districts to favor one party. The Supreme Court agrees. It has called excessive partisan gerrymandering “incompatible with democratic principles.” Even *Callais* acknowledged that “disapproval of partisan gerrymandering dates back to the founding.” But in *Rucho v. Common Cause*, in which I served as co-counsel to Common Cause, the court determined that, however distasteful partisan gerrymandering might be, the issue was not suitable for resolution by the courts. It kicked the question back to Congress, noting that “the Framers gave Congress the power to do something about partisan gerrymandering in the elections clause” and that “the avenue for reform established by the Framers, and used by Congress in the past, remains open.”

So how can a ban on partisan gerrymandering be a solution to the demise of the VRA? Because, in the United States, minority population patterns—often in clusters both in urban and rural areas—are such that lines drawn using well-established good government standards, but without attention to race or party, will tend to include enough minority voters to permit the natural creation of minority-majority districts and minority opportunity districts throughout the country. That was my intuition upon reading *Callais*, and that was confirmed by a fascinating analysis by the New York Times published on May 17. The Times performed thousands of computer simulations of hypothetical congressional districts, drawing districts using traditional redistricting criteria, but excluding race and politics. The conclusion: “A race-neutral, nonpartisan redistricting process could create just as many House districts where the candidate preferred by nonwhite voters—usually a Democrat—would be favored to win.”

The results were dramatic. With the help of the VRA, Democrats—many of them Black—won 24 seats in the Deep South in the 2024 election. With race and politics both excluded from consideration, the *Times* predicted that Democrats would win 23 seats in those same states under a neutral process. The *Times* pointed to Memphis as an example. After *Callais*, Tennessee broke up the majority-minority district in Memphis, breaking county lines and splintering its Black voters into three different congressional districts. The result was elimination of a Black (Democratic) district required by the VRA and the creation of three (white) Republican districts permitted by *Rucho*. Black voters in Memphis lost their political power. But Memphis lies in Shelby County, which is majority Black and contains enough people to be its own congressional district. It would not be fragmented under traditional districting standards in which county lines must be respected if possible. Using those standards—and ignoring race and party—a Black majority or opportunity district in Shelby County emerged in over 99% of computer simulations.

So that’s the solution to the demise of the VRA: Ban partisan gerrymandering and require the use of well-known good government standards to create electoral districts, thereby protecting minority voters as a necessary side-effect. Maybe not this year, but not out of the question. Eliminating partisan gerrymandering has been a top priority of Democrats and they have introduced bills to ban it—and to require the use of independent redistricting commissions—in 2018, 2019, 2021, 2024 and 2025. At least two of those bills have received a favorable vote in the House. Some are even considering whether a constitutional challenge to *Rucho* could be

brought. Whatever the avenue, this year's embarrassing collapse of good government standards and the redistricting race to the bottom may sicken enough voters to revitalize the campaign against partisan gerrymandering. Advocates of greater minority representation should move away from unpopular, insufficient and constitutionally suspect race-based arguments and embrace politically popular arguments against partisan gerrymandering that achieve much the same results.

Gregory L. Diskant is of counsel to *Patterson Belknap Webb & Tyler* and was co-counsel for *Common Cause in Rucho v. Common Cause*.

Reprinted with permission from the June 5, 2026 edition of the *National Law Journal* © 2026 ALM Global Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-256-2472 or asset-and-logo-licensing@alm.com