



UNC
SCHOOL OF LAW

NORTH CAROLINA CIVIL RIGHTS LAW
REVIEW

Volume 2 | Issue 1

Article 2

4-1-2022

***Gingles* Unraveled: Hispanic Voting Cohesion in South Florida**

Nicholas Warren

Follow this and additional works at: <https://scholarship.law.unc.edu/nccvlrts>



Part of the [Law Commons](#)

Recommended Citation

Nicholas Warren, *Gingles Unraveled: Hispanic Voting Cohesion in South Florida*, 2 N.C. CVL. RTS. L. REV. 1 (2022).

Available at: <https://scholarship.law.unc.edu/nccvlrts/vol2/iss1/2>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Civil Rights Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

GINGLES UNRAVELED: HISPANIC VOTING COHESION IN SOUTH FLORIDA

NICHOLAS WARREN**

The Voting Rights Act protects the ability of racial and language minority groups to elect candidates of choice by prohibiting states and localities from diluting those groups' votes when drawing electoral districts. The Fair Districts provisions of the Florida Constitution include a similar ban on vote dilution, plus further protections against diminishing (retrogressing) existing minority voting strength. A key element of proving vote dilution or retrogression is that the minority group votes cohesively. Historically, minority voting cohesion has often been uncontested or easily proven in VRA suits. But in South Florida, Hispanic citizens are voting less cohesively than they used to.

This Article investigates the legal issues that arise when the assumption of cohesion unravels. First, this Article examines to what extent the Hispanic community in South Florida is cohesive. It then proposes several alternative approaches to the vote dilution and retrogression framework to better align doctrine with the real-world conditions of voters and communities.

INTRODUCTION	2
I. HISTORICAL BACKGROUND	6
II. THE SOUTH FLORIDA HISPANIC COMMUNITY TODAY	10
III. LESSONS FROM THE LAST CYCLE	16
IV. APPLYING THE COHESION STANDARD	19
V. ALTERNATIVES AND CONSEQUENCES	22
A. <i>Hispanics as One Group</i>	23
B. <i>Subgroups Under the Voting Rights Act</i>	25
C. <i>Subgroups Under the Fair Districts Amendments and a Coalitional Approach</i>	28
CONCLUSION	30

INTRODUCTION

Section 2 of the Voting Rights Act of 1965 (VRA), as amended, prohibits “a denial or abridgement of the right . . . to vote on account of race or color”¹ or membership in “a language minority group.”² After voters approved a pair of citizen-initiated amendments in 2010, the Florida Constitution includes a similar ban on legislative and congressional redistricting plans “drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process.”³ Echoing the language of the VRA’s now-dormant Section 5,⁴ Florida also bars redistricting plans drawn “to diminish [racial or language minorities’] ability to elect representatives of their choice.”⁵

* © 2022 Nicholas Warren.

** Staff Attorney, ACLU of Florida. I wish to acknowledge the contributions and mentorship of Professor Rick Pildes and Justice Barbara Pariente, as well as the guidance and support of Kira Romero-Craft and Quinn Yeargain.

¹ 52 U.S.C. § 10301(a) (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .”).

² *Id.* (“[O]r in contravention of the guarantees set forth in section 10303(f)(2) of this title . . .”); 52 U.S.C. § 10303(f)(2) (“No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.”).

³ FLA. CONST. art. III, §§ 20(a), 21(a) (“[D]istricts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice . . .”).

⁴ *See* *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013).

⁵ FLA. CONST. art. III, §§ 20(a), 21(a); 52 U.S.C. § 10304(b) (“Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote . . .”). “[T]hese provisions were modeled on and ‘embrace[] the principles’ of key provisions of the federal Voting Rights Act of 1965, section 2 (vote dilution) and section 5 (diminishment, or retrogression).” In re Senate Joint Resol. of Legis. Apportionment 100 (*In re 2022 Apportionment*), No. SC22-131, 2022 WL 619841, at *4 (Fla. Mar. 3, 2022) (quoting *In re Senate Joint*

Since the landmark U.S. Supreme Court decision *Thornburg v. Gingles*,⁶ plaintiffs claiming minority vote dilution under Section 2 must prove, among other things, that the minority group is “politically cohesive” and that the “majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”⁷ A redistricting plan’s compliance with Section 5 also depends on the preconditions of minority voting cohesion and white bloc voting.⁸ The presence of these two preconditions (collectively, “racially polarized voting”) has often been uncontested in VRA suits, or treated as a given by the trial courts hearing the claims.⁹ This is partly so

Resol. of Legis. Apportionment 1176 (*Apportionment I*), 83 So.3d 597, 619 (Fla. 2012)).

⁶ 478 U.S. 30 (1986).

⁷ *Id.* at 51.

⁸ *Texas v. United States*, 831 F. Supp. 2d 244, 262 (D.D.C. 2011); *League of Women Voters of Fla. v. Detzner (Apportionment VIII)*, 179 So. 3d 258, 287 n.11 (Fla. 2015).

⁹ *See, e.g., De Grandy v. Wetherell (Wetherell I)*, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992) (“The parties agree that racially polarized voting exists throughout Florida to varying degrees.”); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-CV-5337-SCJ, 2022 WL 633312, at *54 (N.D. Ga. Feb. 28, 2022) (“All the parties agree that there is an extremely large degree of racial polarization in Georgia elections.”); *Singleton v. Merrill*, No. 2:21-CV-1291-AMM, 2022 WL 265001, at *66 (N.D. Ala. Jan. 24, 2022) (“[T]here is no serious dispute that Black voters are ‘politically cohesive,’ nor that the challenged districts’ white majority votes ‘sufficiently as a bloc to usually defeat [Black voters’] preferred candidate.’ ” (quoting *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017))), *prob. juris. noted, sub nom. Merrill v. Milligan*, 142 S. Ct. 879 (2022)); *Thomas v. Bryant*, 366 F. Supp. 3d 786, 805 (S.D. Miss. 2019) (“It also is undisputed that African-American voters in District 22 are politically cohesive.”), *aff’d*, 938 F.3d 134 (5th Cir. 2019), and *reh’g granted en banc*, 939 F.3d 629 (5th Cir. 2019), and *vacated as moot en banc sub nom. Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020); *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm’rs*, 950 F. Supp. 2d 1294, 1312 (N.D. Ga. 2013) (“[I]t is undisputed that Fayette County’s African-American population is politically cohesive.”); *Lopez v. Abbott*, 339 F. Supp. 3d 589, 609 (S.D. Tex. 2018) (defendant’s expert agreed Hispanics voted cohesively); *Arbor Hill Concerned Citizens Neighborhood Ass’n v. Cnty. of Albany*, 281 F. Supp. 2d 436, 448 (N.D.N.Y. 2003) (“[N]o one has raised a question in this case concerning the political cohesiveness of the black community in Albany County.”); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1235 (C.D. Cal. 2002) (“There is little dispute that Latinos in SD 27 vote cohesively.”); *Goosby v. Town Bd. of Hempstead*, 956 F. Supp. 326, 334 (E.D.N.Y. 1997) (“There is no dispute that the black voters in the Town are politically cohesive.”); *Vecinos de Barrio Uno v. City of Holyoke*, 960 F. Supp. 515, 518 (D. Mass. 1997)

because the paradigmatic minority group Congress had in mind when drafting the VRA, and which the Supreme Court had in mind when interpreting the law, was African Americans—who still today vote extremely cohesively in most elections in most jurisdictions, just as they did decades ago when *Gingles* was decided and when the VRA was enacted.¹⁰

In South Florida,¹¹ one minority group—Hispanics¹²—are voting less cohesively than they used to. What once was a solid Republican bloc comprised mainly of Cuban immigrants has diversified both ethnically and politically.¹³ This fact came to the attention of the courts during the last

(“The question [of] whether the Hispanic voters in Holyoke are politically cohesive is relatively easy.”).

¹⁰ Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L.R. 1833, 1838 (1992) (discussing the goals of the Voting Rights Act and the early history of its enforcement); Peyton McCrary, *Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom*, 14 SOC. SCI. HIST. 507, 508 (1990) (discussing the goals of the Voting Rights Act at increasing Black votership); John M. Powers, *Statistical Evidence of Racially Polarized Voting in the Obama Elections, and Implications for Section 2 of the Voting Rights Act*, 102 GEO. L.J. 881, 901–07 (2014) (discussing high Black voting cohesion); Jeffrey Penney et al., *Race and Gender Affinities in Voting: Experimental Evidence* 4 (Queen’s Univ. Econ. Dep’t, Working Paper No. 1370, 2016), <https://www.econstor.eu/bitstream/10419/149096/1/873819381.pdf> (same).

¹¹ In this paper, “South Florida” refers to Miami-Dade County, unless otherwise noted. Often, social science research analyzing South Florida voting patterns covers additional counties, usually the others that have overlapped with South Florida’s three majority-Hispanic congressional districts: Broward, Monroe, Collier, and Hendry.

¹² This paper uses this term to refer to people of Hispanic, Latino, and Spanish origin, because (1) principally, polling has consistently found it to be the preferred term of a plurality of group members, Justin McCarthy & Whitney Dupré, *No Preferred Racial Term Among Most Black, Hispanic Adults*, GALLUP, Aug. 4, 2021, <https://news.gallup.com/poll/353000/no-preferred-racial-term-among-black-hispanic-adults.aspx>; Luis Noe-Bustamente, Lauren Mora, & Mark Hugo Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, PEW RES. CTR., Aug. 11, 2020, <https://pewrsr.ch/2XNrKfR>; Jeffrey M. Jones, *U.S. Blacks, Hispanics Have No Preferences on Group Labels*, GALLUP, July 26, 2013, <https://news.gallup.com/poll/163706/blacks-hispanics-no-preferences-group-labels.aspx>; (2) the class of people the VRA protects is “persons who are [] of Spanish heritage,” 52 U.S.C. § 10310(c)(3); (3) the State of Florida collects race/ethnicity data from registered voters using the term, Fla. Stat. § 97.052(2)(g); and (4) the Census Bureau similarly collects information including the term.

¹³ Matt A. Barreto & Angela Gutierrez, *Taking a Deeper Look at Hispanic Voting Patterns in South Florida*, UCLA LATINO POLICY & POLITICS INITIATIVE (Mar. 3,

redistricting cycle, but its legal implications for the Voting Rights Act remain murky. In a 2015 ruling adopting new congressional districts for the state, the Florida Supreme Court found “a lack of Hispanic voting cohesion” in the region.¹⁴ However, the brevity of the court’s analysis and a lack of record evidence invite more inquiry into the matter. Indeed, the parties in that high-profile case took the position that minority voting cohesion was irrelevant to the legal question at issue, and the court’s discussion was relegated to a footnote.¹⁵

This article explores the legal issues that arise when the assumption of cohesion—on which the VRA and *Gingles* rest—unravels. Building upon prior scholarship regarding the goals and theoretical foundations of the VRA, as well as social science research on the electoral and social behavior of South Florida Hispanics, this paper investigates to what extent that unraveling has happened, and the implications. By probing how the history and present conditions of South Florida’s Hispanic community intersect with the purposes of the Voting Rights Act, this article seeks to draw attention to weaknesses in the VRA’s doctrinal framework. Those weaknesses recommend both statutory and doctrinal changes to better align the law with the VRA’s goals.

In particular, Hispanic non-cohesion recommends a shift in how the law defines the protected class. While “Hispanics” as a whole may not vote cohesively, subgroups within that umbrella might—voters of Cuban, Venezuelan, or Puerto Rican heritage, for instance. It is now time to confront what the law means by “the” Hispanic community, by “persons of Spanish heritage,” and by “language minorities” more broadly.

This article proceeds as follows: Part I gives a brief history of South Florida’s minority communities, including early voting rights litigation. Part II brings the story forward with an examination of present-day conditions in

2022), <https://latino.ucla.edu/research/voting-in-south-florida/>, at 1–2; Heike C. Alberts, *The Missing Evidence for Ethnic Solidarity Among Cubans in Miami*, 7 J. IMMIGRANT & REFUGEE STUD. 250, 251 (2009); Pamela S. Karlan, *Our Separatism: Voting Rights as an American Nationalities Policy*, 1 U. CHI. LEGAL F. 83, 100 (1995).

¹⁴ *Apportionment VIII*, 179 So. 3d at 287.

¹⁵ Oral Argument at 9:58, *Apportionment VIII*, 179 So. 3d 258 (No. 14-1905), <http://thefloridachannel.org/videos/111015-florida-supreme-court-oral-arguments-the-league-of-women-voters-of-florida-etc-et-al-v-ken-detzner-et-al-sc14-1905/>; *Apportionment VIII* at 287, n.11

the Hispanic community. Part III reviews and critiques the redistricting litigation of the 2010 cycle, which provides some of the richest recent research and analysis of Hispanic voting patterns in South Florida. Part IV applies the appropriate cohesion analysis—overlooked or misapplied in recent cases—to the data available. Lastly, Part V explores what non-cohesion means for implementing the VRA and what approaches courts and lawmakers might take in response. In brief, those approaches are (1) staying the course and treating “Hispanic” as the sole category of relevance for voting rights; (2) treating each national-origin subgroup individually, under either the an amended VRA or Florida law; and (3) doing a combination of those two, disaggregating at first but recombining subgroups where voting patterns allow. These alternatives are examined in light of the VRA’s role as a “common law statute” and Congress’s aim to stamp out discrimination in all its evolving forms.¹⁶

I. HISTORICAL BACKGROUND

Over the past sixty years, South Florida has undergone dramatic changes in its racial and ethnic makeup. Between 1960 and 1990, the Hispanic population of Dade County skyrocketed from less than 5% of the total, to a majority.¹⁷ Today, the county is 69% Hispanic.¹⁸ Hispanic population growth and immigration are the primary demographic storylines of the largest county

¹⁶ See generally Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 376 (2012); S. REP. NO. 89-162, at 18 (1965), as reprinted in 1965 U.S.C.C.A.N. 2508, 2543 (invoking the 15th Amendment’s prohibition of “sophisticated as well as simple-minded modes of discrimination” to justify the VRA); S. Rep. No. 97-417, at 10, as reprinted in 1982 U.S.C.C.A.N. 177, 187 (noting that since the VRA’s adoption, discrimination has evolved from “direct, overt impediments to the right to vote to more sophisticated devices”)

¹⁷ Guillermo J. Grenier & Max J. Castro, *Triadic Politics: Ethnicity, Race, and Politics in Miami, 1959–1998*, 68 PAC. HIST. REV. 273, 275 (1999).

¹⁸ *QuickFacts: Miami-Dade County, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/miamidadecountyflorida/POP060210>. Dade County changed its name to Miami-Dade County in 1997. The two names are used here interchangeably. Luisa Yanez, *Miami-Dade Leaders See Magic in New Name*, S. FLA. SUN-SENTINEL, Nov. 15, 1997, <https://www.sun-sentinel.com/news/fl-xpm-1997-11-15-9711150484-story.html>.

in the nation's third-largest state.¹⁹

Since the mid-20th century, Cuban immigrants were at the core of that Hispanic population growth. The first wave of Cuban exiles fled Castro's revolution in the late 1950s and early 1960s. Those "golden exiles," as well as the second wave of "freedom flights" in the mid-1960s through the mid-1970s, were largely drawn from Cuba's white, urban middle class.²⁰ These immigrants faced distinct challenges from other minority groups in the United States, but also enjoyed distinct advantages. Unlike many other immigrants, Cuban exiles were officially welcomed to the United States and had an easy path to citizenship.²¹ Importantly, they did not experience political exclusion and historic discrimination to nearly the same degree as other minority groups, such as African Americans and Mexican Americans.²² The Cuban community quickly became well integrated into the economic and political life of Dade County.²³

The Miami these immigrants arrived in was not racially monolithic to begin with. Dade County had a substantial Black population, which by the 1960s was strong enough to flex real political power, thanks in part to the Voting Rights Act.²⁴ In 1968, for example, Dade County elected Florida's first African American legislator since Reconstruction as well as its first Black county commissioner ever.²⁵

¹⁹ *County Population Totals: 2020–2021*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/popest/2020s-counties-total.html>.

²⁰ Grenier & Castro, *supra* note 17, at 275, 279; Alberts, *supra* note 13, at 251; Andrew Lynch, *Expression of Cultural Standing in Miami: Cuban Spanish Discourse About Fidel Castro and Cuba*, 7 REVISTA INTERNACIONAL DE LINGÜÍSTICA IBEROAMERICANA 21, 25 (2009).

²¹ Lynch, *supra* note 20, at 25.

²² See Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L. J. 869, 873 (1995).

²³ *Id.* at 892, 898–99; Melvyn C. Resnick, *Beyond the Ethnic Community: Spanish Language Roles and Maintenance in Miami*, 69 INT'L J. SOC. LANGUAGE 89, 96 (1988).

²⁴ OFF. OF CMTY. ADVOC., OFF. OF BLACK AFF., THOMAS D. BOSWELL, PROFILE OF THE BLACK POPULATION IN MIAMI-DADE COUNTY 111 (2007).

²⁵ Erika L. Wood, FLORIDA: AN OUTLIER IN DENYING VOTING RIGHTS 1, 22 n.46 (2016), <https://www.brennancenter.org/our-work/research-reports/florida-outlier-denying-voting-rights> (noting that Joe Lang Kershaw was the first Black member of the Florida Legislature since Reconstruction); *Meek v. Metro. Dade Cnty.*, 805 F. Supp.

It would take litigation, however, to ensure Hispanic and Black Miamians could fully participate in the political process. In 1986, several Black and Hispanic voters and politicians brought suit against the Dade County Commission, challenging the board's at-large election system under the amended Section 2.²⁶ The suit was successful, and transformed the commission from an eight-member body with one minority member (who was not the minority candidate of choice), into a thirteen-member body with six Hispanic, four Black, and three Anglo commissioners.²⁷ Notably, while the trial court in that case concluded the Hispanic plaintiffs had proven their dilution claim based on the totality of the circumstances, it found that "discrimination . . . does not significantly preclude Hispanics from participating in the electoral process," giving less weight to that factor as compared to others; such as the presence of racially polarized voting, unusually large election districts, economic and educational disparities, and campaign appeals to racial prejudice.²⁸

The bi-ethnic coalition that forced changes to local elections pushed for more electoral opportunities in the state's congressional districts too. In *De Grandy v. Wetherell*,²⁹ a three-judge district court adopted a new redistricting plan that incorporated districts from the Hispanic and Black plaintiffs' proposals. Specifically, the plan drew two new majority-Black districts and one Black influence seat, as well as two new Hispanic supermajority districts.³⁰ The plan resulted in the election of Florida's first Black members of Congress since Reconstruction, and its second Hispanic member of Congress ever.³¹ Notably, the *Wetherell I* court did not engage in a detailed analysis of the plaintiffs' Section 2 claims. It summarily noted a "longstanding general history of official discrimination against minorities," but it found only two facts relating to discrimination against Hispanics

967, 978 (S.D. Fla. 1992) (explaining that Earl Carroll was the first Black county commissioner).

²⁶ *Meek*, 805 F. Supp. at 969.

²⁷ Daryl Harris, *Generating Racial and Ethnic Conflict in Miami: Impact of American Foreign Policy and Domestic Racism, in BLACKS, LATINOS, AND ASIANS IN URBAN AMERICA* 79, 89 (James Jennings ed., 1994); *Meek*, 805 F. Supp. at 986.

²⁸ *Meek*, 805 F. Supp. at 990–93.

²⁹ (*Wetherell I*), 794 F. Supp 1076 (N.D. Fla. 1992).

³⁰ *Id.* at 1087.

³¹ See Adam Clymer, *Democrats Promise Quick Action on a Clinton Plan*, N.Y. TIMES (Nov. 5, 1992), <https://nyti.ms/3iSFrBT>.

specifically: that Florida had only one Hispanic congressperson, and until recently had no Hispanic state senators.³² The court did not require statistical evidence of racially polarized voting (RPV) but remarked that the parties agreed RPV existed throughout the state.³³

By the time of *Wetherell I* and *Meek*, the tripartite division between Hispanics, African Americans, and Anglos defined the political and social life of South Florida.³⁴ That tripartite structure drew the attention of the U.S. Supreme Court in *Johnson v. De Grandy*,³⁵ in which the Court upheld the Florida Legislature's 1992 legislative redistricting. Citing the district court's factual findings—which to date provide the most detailed legal analysis of South Florida voting patterns—the Court noted “political cohesion within each of the Hispanic and black populations but none between the two.”³⁶ The district court further noted the Hispanic population's atypical political makeup: “more conservative and much more Republican” than elsewhere in the U.S.³⁷

Even in the early 1990s, however, the Hispanic electorate was not monolithic. That fact too did not escape the court's notice.³⁸ While Dade County's Hispanic electorate was predominantly Republican Cuban American, Nicaraguans, Colombians, Peruvians, Hondurans, Guatemalans, Puerto Ricans, and others from elsewhere in Latin America constituted a solid minority—over two-fifths—of the Hispanic electorate in Dade County at the time.³⁹ Significantly, the court, and the expert witness on whose testimony it relied, did not assume political cohesion between Cuban and non-Cuban Hispanics. For certain groups, in fact, it noted political dissimilarities. Puerto

³² *Wetherell I*, 794 F. Supp. at 1079.

³³ *Id.*

³⁴ *De Grandy v. Wetherell (Wetherell II)*, 815 F. Supp. 1550, 1572 (N.D. Fla. 1992) (“[T]he division of the three major ethnic groups has led to the development of tripartite politics in Miami; that is, ethnic factors between the three communities predominate over all other factors in Dade politics.”), *aff'd in part, rev'd in part sub nom.* *Johnson v. De Grandy*, 512 U.S. 997 (1994).

³⁵ 512 U.S. 997 (1994).

³⁶ *Id.* at 1003 (citing *Wetherell II*, 815 F. Supp. at 1569).

³⁷ *Wetherell II*, 815 F. Supp. at 1570.

³⁸ *See id.*

³⁹ According to the 1990 Census, Cubans constituted over 59% of Dade County's Hispanic voters. *See id.*

Rican registrants were majority Democratic, for example, while Hispanic registrants overall were nearly 70% Republican.⁴⁰ And while the court ultimately concluded there was sufficient cohesiveness among all Hispanics to satisfy the second *Gingles* prong, it hedged that “there might be differences between the several Hispanic subgroups.”⁴¹

II. THE SOUTH FLORIDA HISPANIC COMMUNITY TODAY

Wetherell II and *Johnson v. De Grandy* were the last judicial rulings on Hispanic voting patterns in South Florida until the extended redistricting litigation following the 2010 Census.⁴² Since those cases were decided in the early 1990s, however, the political landscape in South Florida changed dramatically. In 2006, Luis Garcia Jr. became the first Democrat to represent a majority-Hispanic Dade legislative district under the 2002 Republican-drawn maps.⁴³ In 2012, one of South Florida’s three Hispanic congressional districts elected a Democrat for the first time, by an eleven-point margin.⁴⁴ In 2016, South Florida’s Hispanic Democratic state house delegation grew to

⁴⁰ *See id.* at 1570–71.

⁴¹ *Id.* at 1571.

⁴² That being said, in the course of rejecting a Section 2 suit claiming that the post-2000 redistricting diluted the Black vote, a three-judge district court noted that Florida’s two Hispanic-majority congressional districts elected Hispanic candidates of choice throughout the 1990s. *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1300 (S.D. Fla. 2002). The court further found that the three Hispanic-majority districts drawn in the 2002 plan would likely perform for Hispanic candidates of choice. *Id.* at 1301. That was the extent of the court’s discussion of Hispanic voting patterns. It is unclear if the court considered evidence of Hispanic voting cohesion or any RPV analysis focusing on Hispanic voters.

⁴³ ROBERT E. CREW, JR. WITH THE ASSISTANCE OF SLATER BAYLISS, *THE 2010 ELECTIONS IN FLORIDA* 117 (2013). The Cuban-born Garcia was elected to three terms in total. *Id.*

⁴⁴ Cuban American Joe Garcia defeated Cuban American incumbent David Rivera. Patricia Mazzei & Amy Sherman, *In South Florida Congressional Races, David Rivera Loses to Joe Garcia, Allen West Appears to Fall to Patrick Murphy*, MIA. HERALD (Nov. 7, 2012), <https://www.miamiherald.com/article1944340.html>; Scott Hiaasen & Patricia Mazzei, *Changes in District Helped Lead to Rep. David Rivera’s Defeat*, MIA. HERALD (Nov. 7, 2012), <https://www.miamiherald.com/article1944366.html>; Patricia Mazzei, *Cuba Politics Maze Traps Joe Garcia, Carlos Curbelo*, MIA. HERALD (Oct. 30, 2014), <http://www.miamiherald.com/article3470631.html>.

three members,⁴⁵ while a Cuban American Democratic state representative defeated a three-term incumbent Cuban American Republican state senator, becoming the first Democrat elected from a Hispanic Dade Senate seat in over thirty years.⁴⁶ A year later, a Colombian-born candidate became the second.⁴⁷ And 2018 saw a pair of Anglo Democrats win high-profile races against Cuban Americans in Hispanic-majority districts: Donna Shalala in the 27th congressional district, and Eileen Higgins in the Little Havana-centered county commission district that Cuban Republicans sued to get thirty years earlier in *Meek*.⁴⁸ All these candidates were elected from districts

⁴⁵ See Jessica Bakeman, *GOP Incumbents Prevail to Keep Large Majority in Florida House, but Democrats Pick up Seats*, POLITICO (Nov. 8, 2016), <https://politi.co/3nALn6h>; Mary Ellen Klas, *David Rivera Loses Challenge; Robert Asencio Joins Legislature*, MIA. HERALD (Nov. 22, 2016), <https://www.miamiherald.com/article116537413.html>.

⁴⁶ Mary Ellen Klas et al., *Diaz de la Portilla and Bullard Defeated in State Senate Upsets*, MIA. HERALD (Nov. 8, 2016), <http://www.miamiherald.com/article113508138.html>; Patricia Mazzei, *Democratic State Senator Plans to Run for Ros-Lehtinen's Seat in Congress*, MIA. HERALD (May 9, 2017), <http://www.miamiherald.com/article149408974.html>. In 2020, Senator José Javier Rodríguez lost reelection to a Cuban American Republican by 32 votes. Samantha J. Gross, *No-Party Candidate in Miami Election Fraud Case Takes Plea Deal, Apologizes to Voters*, MIAMI HERALD (Aug. 24, 2021), <https://www.miamiherald.com/article253696658.html>.

⁴⁷ Annette Taddeo defeated Cuban American State Representative Jose Felix Diaz in a September 2017 special election. Suzanne Gamboa, *Annette Taddeo Wins Election, First Latina Democrat in Florida State Senate*, NBC NEWS (Sept. 27, 2017), <https://nbcnews.to/33NJaN6>; Fabiola Santiago, *Legislator Shed Beard and Deleted Inaugural Photo with Trump. Voters Weren't Fooled*, MIAMI HERALD (Sept. 28, 2017), <http://www.miamiherald.com/article176007441.html>.

⁴⁸ Lesley Clark & Rene Rodriguez, *Donna Shalala Defeats Maria Elvira Salazar, Flips Congressional Seat for Democrats*, MIA. HERALD (Nov. 6, 2018), <https://www.miamiherald.com/article220785310.html>; Douglas Hanks, *Eileen Higgins Wins Miami-Dade Commission Seat in Upset Over Zoraida Barreiro*, MIAMI HERALD (June 20, 2018), <https://www.miamiherald.com/article213376864.html>. Additionally, Ecuadorian-born Democrat Debbie Mucarsel-Powell defeated Cuban American incumbent Carlos Curbelo in the 26th congressional district; she lost reelection by less than four points. Alex Daugherty & Jimena Tavel, *Democrat Debbie Mucarsel-Powell Defeats Republican Carlos Curbelo*, MIA. HERALD (Nov. 7, 2018), <https://www.miamiherald.com/article220860675.html>; Alex Daugherty, *Carlos Gimenez Defeats Debbie Mucarsel-Powell in Florida's 26th District* (Nov. 4, 2020), <https://www.miamiherald.com/article246864797.html>.

with Hispanic voting-age population and voter registration supermajorities.⁴⁹ Underscoring the enduring competitiveness of these Hispanic-majority seats, in 2020 Shalala lost reelection by less than three points while Higgins won by five, both in races against Cuban American Republicans.⁵⁰

South Florida's changing political makeup has not escaped political and social scientists. Between 1970 and 1990, the Cuban share of Dade County's Hispanic population dropped from 91% to 59%, after an influx of new Central and South American immigrants.⁵¹ By 2019, that figure had fallen to 52%.⁵² Residents of South and Central American origin now form substantial minorities of Hispanics as a whole, at about 14–18% each.⁵³ In terms of their social background, the non-Cuban immigrants differ substantially from the Cubans who came before them; Central and South American arrivals tend to be of lower socio-economic backgrounds and more racially diverse, and they have fewer established ties to the United States than the early waves of Cuban

⁴⁹ Florida House of Representatives, *MyDistrictBuilder*, FLA. REDISTRICTING, <http://floridaredistrictingcloudapp.net/MyDistrictBuilder.aspx>; The Florida Senate, *Plan Summary for 2012-CA-2842*, FLA. SENATE, https://www.flsenate.gov/PublishedContent/Session/Redistricting/Plans/2012-CA-2842/2012-CA-2842_map_fl.pdf; The Florida Senate, *Plan Summary for H000H9049*, FLA. SENATE, https://www.flsenate.gov/PublishedContent/Session/Redistricting/Plans/h000h9049/h000h9049_map_fl.pdf; The Florida Senate, *Plan Summary for H000C9047*, FLA. SENATE, https://www.flsenate.gov/PublishedContent/Session/Redistricting/Plans/H000C9047/H000C9047_map_fl.pdf; The Florida Senate, *Plan Summary for FL2002_HOU*, FLA. SENATE, https://flsenate.gov/UserContent/Session/Redistricting/legal/Tab_D2_Benchmark_House_Districts.pdf.

⁵⁰ Alex Daugherty, *Maria Elvira Salazar Defeats Donna Shalala in Florida's 27th Congressional District*, MIA. HERALD (Nov. 4, 2020), <https://www.miamiherald.com/article246867257.html>; Jimena Tavel et al., *Regalado Ahead as Hardemon, Higgins and McGhee Win Miami-Dade Commission Seats*, MIA. HERALD (Nov. 4, 2020), <https://www.miamiherald.com/article246780027.html>; 2020 General Election, MIAMI-DADE COUNTY SUPERVISOR OF ELECTIONS, <https://enr.electionsfl.org/DAD/2779/Summary/>.

⁵¹ Grenier & Castro, *supra* note 17, at 275.

⁵² *QuickFacts: Miami-Dade Cnty., Fla.*, *supra* note 18.

⁵³ *Hisp. or Latino by Specific Origin 2019: Miami-Dade Cnty., Fla.*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=b03001&t=Populations%20and%20People&g=0500000US12086&tid=ACSDT1Y2019.B03001>.

immigrants.⁵⁴ In contrast, the “golden exiles” and “freedom flights” who came shortly after Castro’s revolution were predominantly white, urban, and upper- or middle-class.⁵⁵

Separate from the issue of cohesion between different Hispanic groups is the question of cohesion *within* the Cuban population—and that is not a foregone conclusion nowadays, either. Miami’s Cuban community shared robust ethnic solidarity following the first and second waves of arrivals, when the bulk of émigrés were highly educated and socioeconomically homogeneous.⁵⁶ These exiles and their families viewed themselves as a cohesive ethnic group and mobilized ethnic resources to build economic, social, and political capital in their new home throughout the 1960s and 1970s.⁵⁷

Recent social science and sociological studies, however, have found a decline in solidarity over the past three decades. As later waves of Cuban refugees (“Marielitos” in the 1980s, “Balseros” in 1994, and subsequent arrivals) changed the makeup of the Cuban American population in Dade County, the community fractured.⁵⁸ Intra-Cuban ethnic solidarity declined.⁵⁹ Having grown up or lived significant portions of their lives under Castro, many among these later waves were more influenced by Communist ideology. They lacked the preexisting family ties of earlier arrivals, had differing attitudes toward work, and shared different expectations of what life

⁵⁴ Grenier & Castro, *supra* note 17, at 275, 284.

⁵⁵ *Id.* at 275, 279; Alberts, *supra* note 13, at 251; Jorge Duany, *Cuban Communities in the United States: Migration Waves, Settlement Patterns and Socioeconomic Diversity*, 11 POUVOIRS DANS LA CARAÏBE 69, 76, 78 (1999).

⁵⁶ Alejandro Portes, *The Rise of Ethnicity: Determinants of Ethnic Perceptions Among Cuban Exiles in Miami*, 49 AM. SOCIO. REV. 383, 395 (1984); Alejandro Portes, *The Social Origins of the Cuban Enclave Economy of Miami*, 30 SOCIO. PERSP. 340, 368 (1987); Alberts, *supra* note 12, at 251; Duany, *supra* note 55, at 76, 78.

⁵⁷ Heike C. Alberts, *Changes in Ethnic Solidarity in Cuban Miami*, 95 GEOGRAPHICAL REV. 231, 236–37 (2005).

⁵⁸ Duany, *supra* note 55, at 70, 72.

⁵⁹ Alberts, *supra* note 57, at 236; Alberts, *supra* note 13, at 251; Mireya Navarro, *One City, Two Cubas: Miami’s Exiles: Side by Side, Yet Worlds Apart*, N.Y. TIMES (Feb. 11, 1999), <https://nyti.ms/3ddQxQY>. See also MARIA CRISTINA GARCIA, *HAVANA USA: CUBAN EXILES AND CUBAN AMERICANS IN SOUTH FLORIDA, 1959–1994* (University of California Press ed., 1996).

in the United States would be like.⁶⁰ They were also more racially diverse—many were Black or darker-skinned, while earlier waves were mostly white.⁶¹ The majority were working-class and lacked a high school education, and came from more rural areas than the earlier urban emigrés.⁶² After the Marielitos, the Cuban American community could no longer be considered unqualifiedly homogenous. Duany describes how “the [Mariel] exodus deepened the rifts between ‘old’ and ‘new’ immigrants. Date of departure from Cuba—before or after 1980—became a symbol of one’s social status.”⁶³ Alberts goes so far as to say that “[s]ocial, racial, economic, and religious divisions . . . destroy[ed] practically all forms of ethnic solidarity.”⁶⁴

Those social divisions translated into political and electoral fragmentation, too. Cuban Americans had long registered and voted overwhelmingly Republican, and the policy preferences of Cuban voters were marked by substantial cohesiveness into the 1990s.⁶⁵ But between 2002 and 2013, the percentage of Cubans nationwide who were registered as Republicans dropped from nearly two-thirds to less than half, while Democratic registration increased from 22 to 44%.⁶⁶ General election results reflect that registration trend: in six of seven presidential elections between 1980 and 2004, the Republican candidate garnered over 70% of the Cuban vote in South Florida.⁶⁷ In 2008, though, that figure had declined to 65%, and by 2012 had dropped below 60% for the first time—maybe even below a majority.⁶⁸ Estimates for the most recent presidential elections indicate

⁶⁰ Alberts, *supra* note 57, at 239–40.

⁶¹ *Id.* at 240; Duany, *supra* note 55, at 80.

⁶² Duany, *supra* note 55, at 80, 85.

⁶³ *Id.*

⁶⁴ Alberts, *supra* note 57, at 241.

⁶⁵ Jens Manuel Krogstad, *After Decades of GOP Support, Cubans Shifting Toward the Democratic Party*, PEW RES. CTR., June 24, 2014, <https://pewrsr.ch/33Lcfsg>; Kevin A. Hill & Dario Moreno, *Second-Generation Cubans*, 18 HISP. J. BEHAV. SCI. 175, 175 (1996).

⁶⁶ Krogstad, *supra* note 66.

⁶⁷ Hill & Moreno, *supra* note 66, at 176; Juan O. Tamayo, *Did Obama or Romney Win the Cuban-American Vote?*, MIA. HERALD (Nov. 13, 2012), <http://www.miamiherald.com/article1944516.html>.

⁶⁸ Tamayo, *supra* note 68; Krogstad, *supra* note 66; Dario Moreno & James Wyatt, *Cuban-American Partisanship: A Secular Realignment?*, in MINORITY VOTING IN THE UNITED STATES 254, 256–57 (Kyle L. Kreider & Thomas J. Baldino eds. 2015).

improvement for the Republican ticket, with about 54 to 57% of South Florida Cuban voters supporting Trump in 2016, and about 55 to 69% in 2020.⁶⁹ The 2018 gubernatorial and U.S. Senate races saw similar splits of about 70–30 or less for the Republican candidates.⁷⁰ Recent top-of-ticket elections therefore suggest mixed results with respect to cohesion: some races with rough parity within the 60–40 range and others with robust Republican vote shares north of two-thirds, albeit less than the 75% or greater majorities the G.O.P. could count on a couple of decades ago.⁷¹

Finally, a recent report by Barreto and Gutierrez took a deeper look at Hispanic cohesion in Dade County in thirteen statewide, congressional, and state legislative races, using precinct-level analysis.⁷² The report describes “two distinct Latino electorates:” a “generally cohesive Cuban community [] that supports common candidates of choice,” and a “second electorate” of “non-Cuban Latinos” who “demonstrate patterns of majority support for their candidates of choice.”⁷³ Significantly, Barreto and Gutierrez conclude based on this analysis, “grouping all Latino voters as a single cohesive voting block is not supported by the data.”⁷⁴

⁶⁹ Jens Manuel Krogstad & Antonio Flores, *Unlike Other Latinos, About Half of Cuban Voters in Florida Backed Trump*, PEW RES. CTR. (Nov. 15, 2016), <https://pewrsr.ch/3iNCKlo>; Nora Gámez Torres, *‘Invisible Campaign’ and the Specter of Socialism: Why Cuban Americans Fell Hard for Trump*, MIA. HERALD (Nov. 19, 2020), <https://www.miamiherald.com/article247233684.html>; *State Results: Florida, THE AM. ELECTION EVE POLL* (Nov. 2020), <https://electioneve2020.com/poll/#/en/demographics/latino/fl>.

Another analysis estimated that the two-way Democratic share of the *total* vote in predominantly Cuban precincts *nationwide* dropped 13 percentage points from 2016 to 2020. Yair Ghitza & Jonathan Robinson, *What Happened in 2020*, CATALIST, <https://catalist.us/wh-national/#pp-toc-608eee40d2225-anchor-0>.

⁷⁰ STEVEN J. GREEN SCH. OF INT’L & PUB. AFFAIRS, 2018 FIU CUBA POLL: HOW CUBAN AMERICANS IN MIAMI VIEW U.S. POLICIES TOWARD CUBA 24–25 (Jan. 7, 2019), <https://cri.fiu.edu/research/cuba-poll/2018-fiu-cuba-poll.pdf>; Nora Gámez Torres, *Cuban-American Vote for DeSantis Might Prove Decisive as Race Moves Toward Recount*, MIAMI HERALD (Nov. 10, 2018), <https://www.miamiherald.com/article221439990.html>.

⁷¹ For example, George W. Bush garnered 75% of Florida’s Cuban vote in 2000. Tamayo, *supra* note 63.

⁷² Barreto & Gutierrez, *supra* note 13.

⁷³ *Id.* at 2.

⁷⁴ *Id.*

III. LESSONS FROM THE LAST CYCLE

In 2015, the changing social and political makeup of South Florida's Hispanic community became the focus of a voting rights dispute for the first time. In its *Apportionment VIII* ruling adopting congressional districts for the state, the Florida Supreme Court suggested "a lack of Hispanic voting cohesion" in South Florida.⁷⁵ This opinion was the final ruling in a suit brought by the Democratic Party and nonprofit groups challenging Florida's 2012 congressional redistricting plan as a violation of the Florida Constitution's prohibition on partisan gerrymandering, and the last in a series of opinions interpreting the new Fair Districts Amendments.⁷⁶ With respect to South Florida, the Supreme Court had earlier struck down three majority-Hispanic districts for splitting cities and counties to Republicans' partisan advantage.⁷⁷ The court then relinquished the case to the trial court to consider the State's proposed remedial plan and recommend adoption of a final map.⁷⁸ During the relinquishment, the trial court recommended that the Supreme Court reject the State's proposed remedial plan and adopt the plaintiffs' map.⁷⁹

The courts were prompted to confront the cohesion question because the State attacked one of the plaintiffs' districts for diminishing Hispanic voting strength, in violation of the Fair District Amendment's Section 5 analog.⁸⁰ Before addressing whether the proposed remedial plan was retrogressive, the Supreme Court addressed the threshold question of whether the Hispanic community satisfied the *Gingles* conditions—and concluded that the State had not proven the cohesion prong.⁸¹ Relying on the relatively evenly split registration figures in the district and region, the court concluded that "the

⁷⁵ *Apportionment VIII*, 179 So. 3d 258, 286–87 (Fla. 2015).

⁷⁶ *Id.* at 373; Jordan Lewis, Note, *Fair Districts Florida: A Meaningful Redistricting Reform?*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 189, 214 (2015); FLA. CONST. art. III, § 20.

⁷⁷ *League of Women Voters of Fla. v. Detzner (Apportionment VII)*, 172 So. 3d 363, 409–11 (Fla. 2015).

⁷⁸ *Id.* at 371–72; *Apportionment VIII*, 179 So. 3d at 260–62.

⁷⁹ *Apportionment VIII*, 179 So. 3d at 261.

⁸⁰ *Id.* at 279.

⁸¹ *Id.* at 286–87. Because of the case's procedural posture, the State had the burden of justifying its proposed plan. *Id.* at 261.

evidence . . . suggests a lack of Hispanic voting cohesion.”⁸²

The Florida Supreme Court stopped short, though, of determining that Hispanics were *not* politically cohesive under *Gingles*. The expert testimony on which the Supreme Court and trial court relied made more explicit conclusions, however. Three reports by two experts in the case shed light on the issue.⁸³ In his two reports, Stephen Ansolabehere found that “Hispanics vote cohesively in North and Central Florida,” but in South Florida, “Hispanics show little or no voting cohesion.”⁸⁴ When analyzing the three South Florida Hispanic districts, Ansolabehere always characterized them as having a majority Hispanic voting-age population (VAP) or citizen voting-age population (CVAP), but never as districts in which Hispanics have opportunities to elect their preferred candidate.⁸⁵ Such careful phrasing implies that because of non-cohesion, there was no Hispanic candidate of choice in these districts, because a minority group can have candidates of

⁸² *Id.* at 286–87. Of Hispanic registered voters in the benchmark district, 38% were Republicans, 30% were Democrats, and 33% were registered with neither party. Within the four counties that comprised the three majority-Hispanic districts (Miami-Dade, Monroe, Collier, Hendry), Hispanic registered voters were more closely divided among Republicans (37%), Democrats (31%), and neither party (33%). *Id.* at 287.

⁸³ Romo Plaintiffs’ Pretrial Disclosures Ex. A (Stephen Ansolabehere, *Expert Report on Congressional Districts in the State of Florida*, Feb. 14, 2013), *Romo v. Detzner*, No. 2012-CA-412, 2014 WL 3797315 (Fla. 2d Jud. Cir. Ct. July 10, 2014) [hereinafter *Ansolabehere Trial Rep.*]; Romo Plaintiffs’ Memorandum in Support of Romo Plaintiffs’ Proposed Remedial Plan and in Opposition to Alternative Proposed Remedial Plans Ex. C (Stephen Ansolabehere, *Report on Romo Plaintiffs’ Proposed Remedial Plan for the State of Florida*, Sept. 18, 2015), *Romo v. Detzner*, No. 2012-CA-412 (Fla. 2d Jud. Cir. Ct. Oct. 9, 2015) (relinquishment order) [hereinafter *Ansolabehere Relinq. Rep.*]; *Expert Report of Allan J. Lichtman*, Sept. 18, 2015, *Romo* (Fla. 2d Jud. Cir. Ct. Oct. 9, 2015) [hereinafter *Lichtman Relinq. Rep.*].

The trial court called Lichtman’s report “persuasive” but did not comment on either of Ansolabehere’s reports. Ansolabehere, but not Lichtman, testified at trial. *Romo*, slip op. at 13–15 (Fla. 2d Jud. Cir. Ct. Oct. 9, 2015).

⁸⁴ *Ansolabehere Trial Rep.*, *supra* note 84, at 24, 41. Ansolabehere based his conclusions on exit poll data and ecological regressions from the 2008 presidential and 2010 gubernatorial elections. *Id.* at 39.

⁸⁵ *Id.* at 28; *Ansolabehere Relinq. Rep.*, *supra* note 84, at 10. In contrast, Ansolabehere refers to one heavily Puerto Rican—and Democratic—Central Florida district as one “in which Hispanics have the ability to elect their preferred candidates.” *Id.* Unfortunately, this nuance in terms was lost on the trial court, which asserted that, based on the expert testimony, the South Florida districts “all function as performing Hispanic districts.” *Romo*, slip op. at 15 (Fla. 2d Jud. Cir. Ct. Oct. 9, 2015).

choice only if it is internally politically cohesive.⁸⁶

Unlike Ansolabehere, the plaintiffs' second expert, Allan Lichtman, did not directly make a conclusion about Hispanic voting cohesion. While he analyzed many congressional and legislative races rather than just Ansolabehere's two statewide elections, Lichtman merely summarized the (quite substantial) success of Hispanic *candidates* in those races, rather than determining through regression whether those successful candidates were the Hispanic voters' *candidates of choice*.⁸⁷ It was the success of *candidates of a certain race* that inappropriately led him to call all the studied districts "effective performing Hispanic districts."⁸⁸

Notably, the one legislative race for which Lichtman *did* perform a regression analysis actually undermines the argument for cohesion.⁸⁹ Lichtman analyzed the one district of all the heavily Hispanic districts he studied which elected an *Anglo* candidate: Republican State Representative Michael Bileca.⁹⁰ Lichtman determined that Bileca was in fact the Hispanic candidate of choice in that race, but the numbers do not obviously lead to that conclusion. While Bileca won 77% of the Hispanic vote in the general

⁸⁶ Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the VRA After Shelby County*, 115 COLUM. L. REV. 2143, 2149 (2015); J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 438–39 (2000).

⁸⁷ *Lichtman Relinq. Rep.*, *supra* note 84, at 8–10. Lichtman testified to essentially the same analysis in the contemporaneous lawsuit over Florida's state senate districts. The trial court in that case accepted his opinions, and the case was not appealed. *League of Women Voters of Fla. v. Detzner*, No. 2012-CA-2842, slip op. at 32–37, 67 (Fla. 2d Jud. Cir. Ct. Dec. 30, 2015); John Kennedy, *Florida Senate Won't Appeal New District Boundaries to Supreme Court*, PALM BEACH POST, <https://www.palmbeachpost.com/story/news/state/2016/01/20/florida-senate-won-t-appeal/6798413007/> (Jan. 19, 2016).

⁸⁸ *Lichtman Relinq. Rep.*, *supra* note 84, at 16–17. *Contra Thornburg v. Gingles*, 478 U.S. 30, 68 (1986) (plurality opinion) (“[I]t is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important.”) (emphasis in original).

⁸⁹ Lichtman also performed a regression analysis for one statewide race, the 2010 U.S. Senate election. In that race, Hispanic Republican Marco Rubio garnered between 71 and 79% of the Hispanic vote in the three Hispanic-majority congressional districts, with the remaining Hispanic vote split between a Black Democrat and an Anglo independent. *Lichtman Relinq. Rep.*, *supra* note 84, at 13–15. That election's peculiar circumstances (one Hispanic Republican versus two left-wing non-Hispanics) caution against using it to draw broad conclusions about Hispanic voting patterns.

⁹⁰ *Id.* at 11–12.

election against an Anglo Democrat, he received only 34% of the Hispanic Republican primary vote—hardly the “commanding majority” needed to call him the community’s candidate of choice.⁹¹ This is especially so considering that his 34% figure does not take into account the Hispanic voters registered as Democrats or with no party affiliation who could not vote in the closed Republican primary. Moreover, five losing Hispanic candidates in Bileca’s Republican primary collectively garnered 65% of the Hispanic vote.⁹²

IV. APPLYING THE COHESION STANDARD

The Florida courts’ opinions of the last redistricting cycle, the expert reports from those cases, and the Census, voter registration, exit poll, and elections data on which those reports rely cannot substitute for a complete analysis of Hispanic voting patterns. The VRA does not allow statistical shortcuts or permit the use of just a few numbers to demonstrate racially polarized voting.⁹³ Investigating Hispanic voting cohesion with the rigor that *Gingles* demands would require not just a “quick and dirty” inquiry into party registration breakdowns, but also ecological regression or inference analyses of multiple elections (rather than just a couple legislative and statewide races) to determine how Hispanics are actually voting.⁹⁴ It requires going behind the ethnicity of winning candidates, to look at a range of elections in which Hispanics run against Anglos as well as co-ethnics.⁹⁵ It requires looking at

⁹¹ *Id.* at 13; Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 226 (2007) (describing the DOJ’s policy dictating that “[u]nless a candidate wins a commanding majority of the minority vote in both the primary and general elections, she cannot be considered the community’s candidate of choice”); Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1395 n.44 (2010).

⁹² *Lichtman Relinq. Rep.*, *supra* note 84, at 13.

⁹³ *Gingles*, 478 U.S. at 58 (“there is no simple doctrinal test for the existence of legally significant racial bloc voting”); *Johnson v. De Grandy*, 512 U.S. 997, 1020–21 (1994) (“[n]o single statistic provides courts with a shortcut to determine” vote dilution); *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003) (“any assessment . . . depends on an examination of all the relevant circumstances”).

⁹⁴ Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 587–88 (2016).

⁹⁵ Persily, *supra* note 92, at 221–22; Comment, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2226 (2003).

the two-step election process, determining how Hispanics vote in primaries as well as general elections.⁹⁶ Following the DOJ's former practice in evaluating preclearance submissions, it even requires looking at "soft" factors like the opinions of Hispanic politicians and Hispanic civic groups to see if the community "genuinely" prefers a candidate or just reluctantly supports them.⁹⁷

It is clear that no such searching analysis has been made to date, either in the course of litigation or in the academic literature.⁹⁸ It is equally clear that much more research needs to be done. However, we can attempt some preliminary conclusions about Hispanic voting cohesion based on the data and research that *are* available, by applying the correct cohesion standard overlooked by the Florida courts.

First, exit polls, regression data, and precinct analyses from recent presidential elections show mainly low or moderate cohesion. In the three presidential elections between 2008 and 2016, South Florida Hispanics were about evenly split between the Democratic and Republican presidential candidates, with no candidate gaining more than 60% of the vote.⁹⁹ Even in the 2016 U.S. Senate election, Marco Rubio—a Cuban American Republican and the incumbent—received less than 55% of the Hispanic vote statewide

⁹⁶ Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7, 21–22 (2002); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself: Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1535–36 (2002); Comment, *supra* note 96, at 2219; Persily, *supra* note 92, at 226–27; Section 5 Recommendation Memorandum from Tim Mellett et al., Attorneys and Staff, Voting Section, U.S. Dep't of Justice to Robert S. Berman, Deputy Chief, Voting Section, Dep't of Justice (Dec. 12, 2006) [hereinafter DOJ Memo], available at <https://wapo.st/3ILyqVJ>.

⁹⁷ Persily, *supra* note 92, at 227; DOJ Memo, *supra* note 97, at 29, 33–35, 40, 53.

⁹⁸ It is possible the Florida Legislature itself commissioned such analyses for the 2020-cycle redistricting process, but that analysis has not been made publicly available. Andrew Pantazi, *Florida House Approves State District Maps Without Sharing Racial Analyses*, THE TRIBUTARY (Feb. 2, 2022), <https://jaxtrib.org/2022/02/02/florida-house-approves-state-district-maps-without-sharing-racial-analyses/>.

⁹⁹ GIANCARLO SOPO & GUILLERMO GRENIER, ANALYSIS OF THE 2016 CUBAN-AMERICAN VOTE, SCRIBD, 2 (Dec. 18, 2016), <https://www.scribd.com/document/334539413/Analysis-of-the-2016-Cuban-American-Vote-by-Giancarlo-Sopo-Guillermo-Grenier-Ph-D>; Krogstad & Flores, *supra* note 70; *Exit Polls: Florida President*, CNN (Nov. 9, 2016), <https://cnn.it/3lBzVWq>; *State Results: Florida*, *supra* note 70.

against an Anglo Democratic opponent.¹⁰⁰ That compares to 2010, when Rubio won about three-quarters of the South Florida Hispanic vote.¹⁰¹ The 2014 governor's race saw a similarly divided Hispanic electorate statewide, with Democrat Charlie Crist garnering less than 60% of the vote.¹⁰² The 2018 top-of-ticket races showed similar breakdowns within the 60/40 range.¹⁰³ In 2020, exit polls painted a picture roughly akin to 2018 and 2016, while other analyses based on results in the most heavily-Hispanic precincts (but not ecological regression or inference analyses) estimated a breakdown closer to two-thirds/one-third for the Republican presidential ticket.¹⁰⁴ By all accounts, the swing toward the G.O.P. was fueled not only by a Cuban reversion, but also by non-Cuban Hispanic voters.¹⁰⁵ It remains to be seen whether that rightward movement will endure in future cycles; if so, to what extent; and whether it would disrupt a conclusion of noncohesion generally—or if it means simply that neither party can count on garnering a solid majority of the South Florida Hispanic voting bloc in any one election.

Considering the known data, few or none of the presidential, gubernatorial, or U.S. Senate races of the last several cycles, then, have seen the level of Hispanic cohesion courts have usually found sufficient to satisfy the second *Gingles* prong. While there is no bright-line cutoff, minority electorates that split 60/40 are generally non-cohesive.¹⁰⁶ At the opposite end, experts have concluded that divides upwards of around 85/15 demonstrate cohesion.¹⁰⁷

¹⁰⁰ *Exit Polls: Florida Senate*, CNN (Nov. 9, 2016), <https://cnn.it/3nEZxcU>.

¹⁰¹ *Lichtman Relinq. Rep.*, *supra* note 84, at 13–15.

¹⁰² *Governor: Florida*, CNN (Nov. 6, 2014), <https://cnn.it/3ltG1Yw>.

¹⁰³ *Exit Polls: Florida*, CNN (2018), <https://cnn.it/2FoJqZy>; Green, *supra* note 71, at 24–25.

¹⁰⁴ Carmen Sesin, *Trump Cultivated the Latino Vote in Florida, and It Paid Off*, NBC NEWS (Nov. 4, 2020), <https://nbcnews.to/34qOaar>; Rodrigo Domínguez-Villegas et al., *Vote Choice of Latino Voters in the 2020 Presidential Election*, UCLA LATINO POLICY & POLITICS INITIATIVE (Jan. 19, 2020), <https://latino.ucla.edu/research/latino-voters-in-2020-election/>, at 6, 15–16.

¹⁰⁵ Alex Daugherty, David Smiley, Bianca Padró Ocasio & Ben Wieder, *How Non-Cuban Hispanics in Miami Helped Deliver Florida for Donald Trump*, MIA. HERALD (Nov. 6, 2020), <https://www.miamiherald.com/article246978452.html>.

¹⁰⁶ See Elmendorf et al., *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 627, 681 (2016); Persily, *supra* note 92, at 225; Ansolabehere et al., *supra* note 92, at 1407.

¹⁰⁷ See Hirsch, *supra* note 97, at 16–17.

Second, Barreto and Gutierrez’s recent research provides the clearest indication yet that, even if South Florida’s Cuban voters are cohesive in the elections studied, the Hispanic community overall lacks cohesion.¹⁰⁸ Conducting an ecological analysis of thirteen different elections, they reach the conclusion that there are “two Latino electorates” in the region: a cohesive, mostly Republican, Cuban electorate that makes up about 45% of the region’s Hispanic voters, and a non-Cuban electorate representing 55% of Hispanics overall, and that is more likely to support Democrats.¹⁰⁹ Specifically, Barreto and Gutierrez list the two-party vote breakdown in majority-Hispanic precincts across the thirteen elections studied from 2016 to 2020. All fall within the 65/35 range, with eleven races splitting 59/41 or closer.¹¹⁰ Focusing on the Cuban subset, the study estimates that over 80% of Cuban voters voted cohesively for certain Republican candidates in some of the races studied—exhibiting divergent preferences from the remainder of the Hispanic electorate.¹¹¹

While this recent research is indeed illuminating, the otherwise lack of RPV analysis of legislative and congressional elections, or even South Florida-specific exit poll data for top-of-ticket races, makes it tricky to draw firm conclusions about Hispanic voting behavior further down the ticket. Nonetheless, the data available points to a lack of overall Hispanic cohesion in at least some Hispanic-majority districts, even while Cuban and non-Cuban voters may exhibit divergent political preferences as cohesive subgroups.¹¹²

V. ALTERNATIVES AND CONSEQUENCES

The possibility of Hispanic non-cohesion raises the question: how should voting rights legislation and jurisprudence respond? This Part discusses three distinct approaches: First, continuing the course: treating “Hispanics” as one irreducible classification, and accepting the attendant consequences should proper analysis reveal electoral disunity. Second, diving deeper than the “Hispanic” category: looking at the voting behavior of its constituent

¹⁰⁸ Barreto & Gutierrez, *supra* note 13, at 1–2.

¹⁰⁹ *Id.* at 15.

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* at 10, 14.

¹¹² *See supra* Part II; *Apportionment VIII*, 179 So. 3d 258, 286–87 (Fla. 2015).

national-origin subgroups. However, whether this approach is appropriate under either the existing Voting Rights Act or Florida’s Fair Districts Amendments is no certain proposition, and Congress could—perhaps should—update the statute to adopt this framework. The third approach builds on the second, but adds a wrinkle: where appropriate, combining the subcommunities back together under a coalition theory—also no certain proposition under existing caselaw. I discuss each approach in turn.¹¹³

A. *Hispanics as One Group*

If further research confirms a lack of voting cohesion among Hispanics in South Florida, and if the law continues to treat Hispanics together, that would not necessarily mean the end of the road for the Voting Rights Act vis-à-vis South Florida Hispanics. It is true that a non-cohesive Hispanic community would mean vote dilution claims would fail and no changes in

¹¹³ The Florida House of Representatives suggested a fourth, and radical, potential approach in its recent brief defending its own map in the Florida Supreme Court: dispensing with the cohesion requirement altogether. Brief of Fla. House of Representatives at 27 n.10, *In re 2022 Apportionment*, No. SC22-131, 2022 WL 619841 (Fla. Mar. 3, 2022) (asking the Court to “clarify” *Apportionment VIII*’s footnote 11 and declare that the *Gingles* prerequisites do not govern the non-diminishment standard under Section 5).

The existence of racially polarized voting (the second and third *Gingles* preconditions) is and has been a prerequisite not only for Section 2 liability, but also under Section 5. *See, e.g., Apportionment VIII*, 179 So. 3d at 287 n.11 (citing *Texas v. United States*, 831 F. Supp. 2d 244, 262–63 (D.D.C. 2011) (“At the outset, a court addressing a proposed voting plan under Section 5 must determine whether there is cohesive voting among minorities and whether minority/White polarization is present.”)); Letter from Asst. Atty. Gen. Ralph F. Boyd Jr. to President of the Fla. Senate John M. McKay and Speaker of the Fla. House Tom Feeney (July 1, 2002), at 1, 3 (denying preclearance to 2002 Florida House plan and discussing cohesion among disparate Hispanic populations as grounds for objection).

Indeed, a prohibition on diminishing a minority group’s “ability to elect representatives of their choice” presupposes the existence of candidates preferred by a cohesive majority of that group. For the reasons hinted at below, *infra* Part VI, it is the corrosive and invidious nature of racially polarized voting that necessitates the VRA’s and Fair Districts Amendments’ protections from vote dilution and retrogression in the first place. Without RPV—without minority cohesion—the VRA’s theoretical underpinnings unravel.

The Florida Supreme Court declined the House’s invitation to revisit *Apportionment VIII*’s discussion of cohesion. *See generally In re 2022 Apportionment*.

district lines could be retrogressive.¹¹⁴ Even considering racial and ethnic demographics in districting would be constitutionally dubious under prevailing equal protection jurisprudence.¹¹⁵ Without the justification of VRA compliance, lawmakers engaged in race-conscious redistricting might find their Dade districts vulnerable to challenge, even though Dade’s concentrated Hispanic populations would not necessitate contorted district shapes.¹¹⁶ Florida mapmakers’ discretion to draw the lines as they wished would be quite constrained, especially since the state constitution forbids an “it was politics, not race” defense to a racial gerrymandering claim for legislative districts.¹¹⁷ Politically motivated legislators would find it harder to hide behind VRA justifications to draw districts favoring their party.¹¹⁸

But as mentioned above, it may be the case that Hispanic voters are cohesive in certain types of races—local elections, for instance—if not all races. Likewise, it may be the case that Hispanic voters are cohesive in certain neighborhoods—the Republican-heavy Cuban areas around Hialeah and the Tamiami Trail, for instance—if not all areas of South Florida. If so, the VRA’s and Florida Constitution’s protections against dilution and retrogression remain operative with respect to certain legislative and local districts, but perhaps not for congressional districts or in areas where non-Cuban voters are more prevalent. Assuming that electoral unity in some races implies cohesion in all is the kind of stereotyping the VRA rejects and which

¹¹⁴ Persily, *supra* note 92, at 243.

¹¹⁵ Wis. Legislature v. Wis. Elections Comm’n, No. 21A471, 2022 WL 851720, at *2 (U.S. Mar. 23, 2022) (“[D]istricting maps that sort voters on the basis of race ‘are by their very nature odious.’ ” (quoting *Shaw v. Reno*, 509 U.S. 630, 643 (1993))); *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (“The Equal Protection Clause forbids ‘racial gerrymandering,’ that is, intentionally assigning citizens to a district on the basis of race without sufficient justification.”). *See also* Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 262–63 (2015); *Miller v. Johnson*, 515 U.S. 900, 913, 916 (1995); *Shaw*, 509 U.S. at 649.

¹¹⁶ *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017); *Apportionment I*, 83 So. 3d 597, 645 (Fla. 2012).

¹¹⁷ *Compare* FLA. CONST. art. III, §§ 20(a), 21(a), *with* *Easley v. Cromartie*, 532 U.S. 234, 258 (2001).

¹¹⁸ *See Apportionment I*, 83 So. 3d at 640 (noting that using “minority protection . . . as a pretext for drawing districts with the intent to favor a political party or an incumbent . . . would frustrate rather than further the overall purpose of the Fair Districts Amendment”).

the Equal Protection Clause forbids.¹¹⁹ Mapmakers would have to consider ethnicity for those elections in which it is salient, but disregard it when drawing districts with low Hispanic cohesion. If cohesion varies within the South Florida region, then certain districts may be protected from retrogression, while others may not be.

What would this mean in practice? Judging by recent endogenous election results, this approach could cut the number of Hispanic-majority legislative seats protected from retrogression or dilution from fifteen to six or fewer.¹²⁰ Applying the same cursory review to local government—where Republican strength has eroded more slowly—paints a different picture: of the eight predominantly Hispanic Miami-Dade County Commission districts, only two or three might exhibit the noncohesion necessary to lose VRA protection.¹²¹

B. *Subgroups Under the Voting Rights Act*

All of this raises a larger issue. Regardless of whether there is cohesion amongst Hispanics as a group in all, some, or no elections, mapmakers and courts ought to reexamine their use of the category “Hispanic” when drawing districts and analyzing VRA claims in South Florida. There are robust cultural, economic, and political differences between the various Hispanic groups in the area.¹²² Recognizing those differences accords with anti-discrimination law’s goals of combatting stereotypes and rejecting

¹¹⁹ Levitt, *supra* note 95, at 577; *Ala. Legis. Black Caucus*, 135 S. Ct. at 1284.

¹²⁰ Under the 2010-cycle maps, there are fifteen majority-Hispanic legislative districts in South Florida: SDs 36, 37, 39, and 40; and HDs 103, 105, 110–116, 118, and 119. Of those, only six remain uncompetitive in general elections (with winning margins of ten percentage points or greater): SD 36, and HDs 110, 111, 113, 116, and 119. Given the large Hispanic electorates in all these districts, it is likely that regression analyses will reveal divided Hispanic electorates in the competitive districts. *Election Results*, FLA. DEP’T OF STATE, <https://results.elections.myflorida.com/>; Fla. House of Representatives, *supra* note 49.

¹²¹ Districts 5–8 and 10–13 are majority-Hispanic. Districts 5, 7, and 8 have had recent competitive elections; the others consistently vote overwhelmingly for Hispanic Republicans. MIAMI-DADE CNTY., *Election Results Archive*, <https://www8.miamidade.gov/global/elections/election-results-archive.page>.

¹²² Grenier & Castro, *supra* note 17, at 275, 279; Alberts, *supra* note 13, at 251; *Wetherell II*, 815 F. Supp. 1550, 1570 (N.D. Fla. 1992); *QuickFacts: Miami-Dade Cnty., Fla.*, *supra* note 18.

assumptions about minority groups. Just as we cannot assume difference between groups, we should not assume sameness within groups. Even if Hispanics as a whole do not vote cohesively, subgroups of certain national origin backgrounds may. This approach is practically feasible, as national origin data is collected by both the decennial U.S. Census and the ongoing American Community Survey.

Analyzing subgroup behavior raises some legal questions, however. As an initial matter, by its terms, the text of the Voting Rights Act precludes going beyond the broad umbrella of the “Hispanic” category. The VRA does protect “language minority group[s],” and one could argue that the variations in the Spanish that Cubans, Venezuelans, and other “Hispanic” subgroups speak make each a distinct language minority group.¹²³ But the VRA specifically defines “language minority group” to mean persons “of Spanish heritage”—rejecting diving deeper than the “Hispanic” umbrella.¹²⁴

Legal efforts to break up the umbrella for other “language minority groups” listed in the statute have failed and are instructive for the Hispanic question. In 1994, a federal district court rejected a Section 2 suit brought by Yupik Alaskans challenging that state’s legislative redistricting.¹²⁵ The plaintiffs argued the State diluted the Yupik vote in favor of two other Alaskan Native groups, even though the overall number of Native seats was unaffected.¹²⁶ The court rejected the Yupik plaintiffs’ contention that they deserved independent consideration separate from Alaskan Natives as a whole, notwithstanding the Yupiks’ distinct dialect or language:

¹²³ 52 U.S.C. § 10303(f)(2); Ana Celia Zentella, *Latin@ Languages and Identities*, in *LATINOS: REMAKING AMERICA* 321, 321 (Marcelo M. Suárez-Orozco & Mariela M. Páez eds., 2008) (“The varieties of Spanish spoken by national-origin groups serve as nationalist flags that symbolize each group’s unique identity. . . .”).

See also MELVYN C. RESNICK, *PHONOLOGICAL VARIANTS AND DIALECT IDENTIFICATION IN LATIN AMERICAN SPANISH* (2012); R.W. Thompson, *Spanish as a Pluricentric Language*, in *PLURICENTRIC LANGUAGES* 45 (Michael Clyne, ed., 1992); JOHN M. LIPSKI, *LATIN AMERICAN SPANISH* (1994); Paola Bentivoglio and Mercedes Sedano, *Morphosyntactic Variation in Spanish-Speaking Latin America*, in *THE HANDBOOK OF HISPANIC SOCIOLINGUISTICS* 168 (Manual Díaz-Campos ed., 2011).

¹²⁴ 52 U.S.C. § 10310(c)(3).

¹²⁵ *Guy v. Hickel*, No. A92-494 CIV (JWS), slip op. at 1–2 (D. Alaska Nov. 2, 1994).

¹²⁶ *Id.* at 2, 4; Complaint at 5, 8, *Hickel*. See also *Hickel*, slip op. at 1–2 (noting that the other two groups were the Iñupiat and Alaskan Athabaskans).

If Congress had intended to create numerous subgroups and classes of minorities to correspond to the indeterminate number of languages and dialects spoken in the United States, it could have done so. Instead, the language of the statute is specific: protected classes include “American Indians, Asian Americans, Alaskan Natives or [persons] of Spanish Heritage.”¹²⁷

Notably, the U.S. Department of Justice ignored the Yupik argument during Section 5 preclearance proceedings in the same redistricting cycle.¹²⁸

While the Yupik case points against breaking up the statutory “language minority groups,” other courts have seen reason to do just that—albeit not squarely within the Section 2 context. After the 1992 Arizona Legislature deadlocked, a federal district court was tasked with redrawing the state’s congressional districts.¹²⁹ While there was no American Indian VRA claim in the case, the court took care to keep two Indian groups—Hopi and Navajo—in separate districts, “out of respect for . . . the historical tension and present competition between these two tribes.”¹³⁰ A decade later, the Arizona Independent Redistricting Commission similarly separated the tribes, and state courts looked on that approach favorably in subsequent litigation.¹³¹

Whether the constituent parts of a protected group can raise VRA claims

¹²⁷ *Id.* at 5 (quoting 52 U.S.C. §§ 10310(c)(3), 10503(e)).

¹²⁸ *Id.* at 4 (noting that the DOJ suggested the State add Yupik areas to a plurality-Athabaskan district to bolster its overall Alaskan Native numbers).

¹²⁹ *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 686–87 (D. Ariz. 1992), *aff’d sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993).

¹³⁰ *Id.* at 690. The court did so even though it necessitated highly noncompact (and even noncontiguous) districts. *Id.* at 720–21.

¹³¹ *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 121 P.3d 843, 849 (Ariz. Ct. App. 2005). The Arizona courts primarily relied on the state constitution’s mandate to “respect communities of interest,” not the VRA. *Id.* at 871; ARIZ. CONST. art. IV, pt. 2, § 1(14)(D).

on behalf of their subgroup is clearly not a new issue.¹³² But the sparse caselaw indicates that this question—how to treat homogenous components of heterogeneous minority groups—remains an “emerging” one, just as Pamela Karlan described over twenty years ago.¹³³ Nevertheless, given the apparent rigidity of the VRA’s “Spanish heritage” definition, it seems unlikely that a subgroup approach is workable. As Congress debates new voting rights legislation, lawmakers should consider how to update the “language minority group” definition to recognize the true diversity of (and distinctive identities within) that term. A reworking of the statute to refine the catchalls “persons who are American Indians, Asian Americans, Alaskan Natives or of Spanish Heritage” to permit claims by members of individual tribes and national origin groups would go a long way toward achieving that goal. Even just adding “ethnicity” as a standalone protected category could be a workable, flexible solution, giving courts leeway to tailor VRA remedies to the social and political realities on the ground.

C. *Subgroups Under the Fair Districts Amendments and a Coalitional Approach*

In contrast to the Voting Rights Act, Florida’s Fair Districts Amendments protect “racial [and] language minorities,” without defining those terms.¹³⁴ Regardless of whatever amendments Congress makes to the VRA, the Fair Districts text opens a window for a creative Florida court to define either of those terms to include national origin-specific categories. Hampering a flexible interpretation, however, is the Florida Supreme Court’s declaration that the VRA guides their interpretation of Fair Districts, as well

¹³² See *Hickel*, slip op. at 1–2. See also Wendy K. Tam, *Asians—A Monolithic Voting Bloc?*, 17 POL. BEHAV. 223, 246–47 (1995) (urging a subgroup approach when evaluating voting rights claims of the heterogeneous Asian community in California); Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participating in Local Government or Race-Based Gerrymandering?*, 14 CARDOZO L. REV. 1175, 1211 (1992) (discussing the creation of a heavily Dominican as opposed to more general Hispanic district, and a heavily Caribbean as opposed to Black district, during the 1990 New York City redistricting process).

¹³³ Karlan, *supra* note 13, at 86–87.

¹³⁴ FLA. CONST. art III, §§ 20(a), 21(a).

as Fair Districts’ plain text.¹³⁵ But facing the realities of collectively diverse, individually unified Hispanic subcommunities, the Florida courts could disregard the VRA, cast aside a constrained definition of “racial and language minorities,” and invoke their “independent constitutional obligation to interpret [their] own state constitutional provisions.”¹³⁶

Such an approach could better reflect the realities of the people in the world, particularly if combined with a coalitional approach to voting rights claims, as discussed above. Whether through an amended VRA or reinterpreted Fair Districts Amendments, a subgroup framework would provide particularly robust protections if combined with a coalitional approach to voting rights claims. If different subgroups exhibited similar voting behavior, those communities could be assembled together. Component communities that might be too small to constitute a majority in their own single-member district would not necessarily be locked out of a dilution claim. While the U.S. Supreme Court has never endorsed cross-racial or cross-ethnic vote dilution claims, other courts have—including the Eleventh Circuit.¹³⁷ And notably, the most recent version of H.R. 4, the John

¹³⁵ *In re 2022 Apportionment*, No. SC22-131, 2022 WL 619841, at *4 (“While they exist independently as Florida law, these provisions were modeled on . . . key provisions of the federal Voting Rights Act of 1965 . . .”); *Apportionment I*, 83 So. 3d 597, 620 (Fla. 2012) (“[O]ur interpretation of Florida’s corresponding provision is guided by prevailing United States Supreme Court precedent.”); Advisory Op. to the Gov. re Implementation of Amend. 4, the Voting Rights Restoration Amend., 288 So. 3d 1070, 1078 (Fla. 2020) (“[O]ur opinion is based . . . on the objective meaning of the constitutional text We therefore adhere to the ‘supremacy-of-text principle.’”), *receding from Williams v. Smith*, 360 So. 2d 417, 419 (Fla. 1978) (“In construing the Constitution, we first seek to ascertain the intent of the framers and voters, and to interpret the provision before us in the way that will best fulfill that intent.”).

¹³⁶ *Apportionment I*, 83 So. 3d at 621.

¹³⁷ *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009); *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm’rs*, 906 F.2d 524, 526 (11th Cir. 1990) (“Two minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner.”); *LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) (“If blacks and Hispanics vote cohesively, they are legally a single minority group.”); *Badillo v. City of Stockton*, 956 F.2d 884, 891 (9th Cir. 1992) (“Plaintiffs must be able to show that minorities have in the past voted cohesively.”); *Arbor Hill Concerned Citizens Neighborhood Ass’n v. Cnty. of Albany*, No. 03-CV-502, 2003 WL 21524820, at *5 (N.D.N.Y. July 7, 2003) (“[B]lacks and Hispanics may be considered as a single minority group under the Voting Rights Act if the coalition meets the three *Gingles* preconditions.”).

R. Lewis Voting Rights Advancement Act of 2021, explicitly recognizes claims by “cohesive coalition[s] of members of different racial or language minority groups.”¹³⁸

But setting aside, for a moment, the prospect of coalitional claims, South Florida’s demographics throw a wrench into the subgroup strategy. All but one national-origin group are too dispersed to form a majority in a legislative or county commission district.¹³⁹ Cubans are the only community that could satisfy the first *Gingles* precondition (“sufficiently large and geographically compact to constitute a majority in a single-member district”).¹⁴⁰ Even if national-origin subcommunities were grouped into coalitions, the non-Cuban population is so scattered that no combination could form a majority in any type of district. A subgroup approach may be more appropriate than treating all Hispanics as an undifferentiated whole, then, but the practical difference is likely minimal (except, perhaps, for the Cuban American community).

CONCLUSION

The perfunctory nature in which many courts and litigants gloss over minority cohesion in vote dilution cases can obscure its importance to the VRA framework. But racially polarized voting matters because it is itself corrosive to the democratic process. Without RPV, the discriminatory mechanisms by which racial minorities’ political opportunities are frustrated could not operate.¹⁴¹ Indeed, when minority voters can no longer be automatically identified from the candidates and parties they support, the VRA’s purpose of remedying the lingering effects of discrimination is no longer salient. If candidate preferences no longer align with race, then at least in the electoral arena, color-blindness wins the day.

Such an outcome doesn’t punish minority voters for “unremarkable” voting patterns, nor does it embody a “use it or lose it” attitude about VRA protections. Because at the point when minority-group voting looks roughly

The 6th Circuit is the only U.S. Court of Appeals to have rejected the coalition theory. *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc).

¹³⁸ H.R. 4, 117th Cong. § 2(b)(3) (2021) (creating 52 U.S.C. § 10301(b)(4)) (as passed by the House, Aug. 24, 2021).

¹³⁹ Fla. House of Representatives, *supra* note 49.

¹⁴⁰ *Id.*; *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

¹⁴¹ *See Issacharoff, supra* note 10, at 1836–37.

like majority-group voting, there's nothing to "lose:" the "operation of those political processes ordinarily to be relied upon to protect minorities" can indeed be relied upon.¹⁴² Especially in light of the Fourteenth Amendment's prohibition on sorting by race, the government shouldn't be making racial classifications without good reason.¹⁴³ Compliance with the VRA's results test is a good reason,¹⁴⁴ but only so long as race or ethnicity is clearly salient in shaping the electoral opportunities of historically disadvantaged groups and remedying the effects of past discrimination.

So, answering the question of whether South Florida's Hispanic community votes cohesively has significant implications for how we measure our society's progress on the road toward racial equality. While more research needs to be done, this investigation suggests that for this particular minority group in this particular context, we are one step closer to leaving behind the "politics of second best."¹⁴⁵

¹⁴² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

¹⁴³ *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) ("The Equal Protection Clause prohibits a State, without sufficient justification, from 'separat[ing] its citizens into different voting districts on the basis of race.' " (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995))).

¹⁴⁴ *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) ("[W]e have assumed that complying with the VRA is a compelling state interest, and that a State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has 'good reasons' for believing that its decision is necessary in order to comply with the VRA." (citations omitted)).

¹⁴⁵ *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (quoting BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 136 (1992)).