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WINNING THE BATTLE, WINNING THE WAR

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ABSTRACT

This Article analyzes Derrick Bell's interest-convergence theory and its utility for lawyers when litigating for the rights of non-dominant groups. The first part of this Article studies four different cases in which plaintiffs or amicus curiae chose arguments that highlighted the ways their interests converged with potential allies. The Article uses these cases as examples of four different ways that a lawyer can engage in interest-convergence litigation. The strategies examined in this Article rest on two axes: dominant/nondominant narrative convergence and natural/unnatural ally convergence. An analysis of the effects of each of these techniques makes it clear that dominant narrative convergence is the most likely to harm non-dominant groups in the long run (winning the battle, losing the war). Unnatural ally convergence is less likely to harm non-dominant groups in the long run, but this technique is less likely to win the case

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at hand (losing the battle, winning the war). Unnatural ally convergence can be an effective strategy, so long as the litigant does not have to compromise on the reasoning in a case to appeal to allies. Compromising on reasoning can make similar cases more difficult to win in the future. Therefore, non-dominant narrative convergence emerges as the best tool for both short-term wins and long-term successes (winning the battle, winning the war).

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INTRODUCTION

You've got to decide, what am I trying to do here? Am I trying to win a political battle, as expeditiously and expediently as possible, or am I trying to make a larger moral argument about race and society?—Malcolm Gladwell on Brown v. Board of Education[1]

Derrick Bell introduces interest-convergence theory in his paper *Brown v. Board of Education and the Interest-Convergence Dilemma*.[2] The question he sets out to answer is simple: Why did the *Brown* Court overturn segregation in schools after declining to do so for nearly a century?[3] Bell's answer is that during this time, the interests of whites in policymaking positions converged with those opposed to segregation, resulting in the *Brown* decision.[4] These interests included (1) reasserting the American principle that "all men are created equal" in order to gain international credibility during the struggle against Communist countries; (2) providing reassurance to American Black men returning from the war; and (3) increasing economic development in the South.[5]

Bell explains that the reason *Brown* failed to actually improve education for Black children was because the interests that led to *Brown* faded in the 1970s.[6] The Court subsequently narrowed the holding of *Brown* by requiring the plaintiffs to prove intentional discrimination and only granting limited relief.[7]

This Article seeks to understand the ways that lawyers can utilize interest convergence when litigating for the rights of a non-dominant group. The first part of this Article looks at four different cases in which plaintiffs or amicus curiae chose arguments that high-

1. Dave Nussbaum, *A Conversation with Malcolm Gladwell: Revisiting* Brown v. Board, BEHAV. SCI. (July 12, 2017), https://behavioralscientist.org/conversation-malcolm-gladwell-revisiting-brown-v-board/ [https://perma.cc/B88F-V59R].

2. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

3. *Id.* at 524.

4. *Id.* at 525.

5. *Id.* at 524-25 (quoting Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 12 n.31 (1976)).

6. *Id.* at 526.

7. *Id.* at 527.

lighted the ways their interests converged with potential allies. To measure the persuasiveness of these techniques, I look at whether the Supreme Court adopted this language into its briefs. It is worth noting that the failure of courts to adopt interest-convergence language does not necessarily indicate that courts find this technique unpersuasive. However, the adoption of this language suggests the efficacy of interest-convergence litigation (winning the battle). I use these four cases as examples of four different ways that a lawyer can engage in interest-convergence litigation. The strategies examined in this Article rest on two axes: dominant/non-dominant narrative convergence and natural/unnatural ally convergence.

I then consider the effects of each of these techniques and find that dominant narrative convergence is the most likely to harm non-dominant groups in the long run (winning the battle, losing the war). Natural ally convergence is less likely to harm non-dominant groups in the long run, but this technique is also less likely to win the case at hand (losing the battle, winning the war). Unnatural ally convergence can be an effective strategy, so long as the litigant does not have to compromise on the reasoning in a case to appeal to allies. Compromising on reasoning can make similar cases more difficult to win in the future. Therefore, non-dominant narrative convergence emerges as the best tool for both short-term wins and long-term successes (winning the battle, winning the war).[8]

I. WINNING THE BATTLE

Winning the battle refers to interest-convergence litigation strategies that result in a court holding in favor of a non-dominant group. All four cases covered in this Section demonstrate how interest-convergence litigation can be used to "win the battle." The cases are (1) *Brown v. Board of Education*, in which the Court found American state laws establishing racial segregation unconstitutional;[9]

8. This Article analyzes the efficacy of arguments in a number of cases, including very problematic arguments advanced by attorneys in *Brown v. Board of Education*, 347 U.S. 483 (1954). The purpose of highlighting these arguments is to show the long-term damage they caused, not to lend them any credence.

9. *Id.* at 495.

(2) *Weinberger v. Wiesenfeld*, in which the Court declared Section 402(g) of the Social Security Act unconstitutional due to gender-based distinctions;[10] (3) *United States v. Jones*, in which the Court found that installing a tracking device on a vehicle to monitor its movements constituted a search under the Fourth Amendment;[11] and (4) *Romer v. Evans*, in which the Court struck down an amendment to the Colorado Constitution that prevented protected status under the law for homosexuals and bisexuals.[12]

A. Dominant Narrative Convergence

The factors Bell identifies in *Brown* were barely discussed in the School Desegregation Cases' briefs[13] or by the Court.[14] At most, the petitioners' brief in *Bolling* mentioned some of these factors in general terms or in passing.[15] For example, the petitioners referred to the need for America to maintain democracy and an international moral high ground when they wrote "[e]ducation in America must be education for democracy," and "[s]egregation of the races by government fiat is incompatible with our national policy."[16] But these phrases fail to reflect the main thrust of the petitioners' argument in their brief.

The petitioners instead focused on a factor that Bell never discusses in his paper on interest-convergence theory: the ways in which segregation harms Black people.[17] In making this argument,

10. 420 U.S. 636, 653 (1975).

11. 565 U.S. 400, 404 (2012).

12. 517 U.S. 620, 635 (1996).

13. The phrase "School Desegregation Cases" refers to four cases that were aggregated at the Supreme Court under the name *Brown v. Board of Education*. *See* 347 U.S. at 483. The four cases included: *Gebhart v. Belton*; *Brown v. Board of Education*; *Briggs v. Elliott*; and *Davis v. County School Board*. *Id.* It also refers to a fifth case, *Bolling v. Sharpe*. *See* 347 U.S. 497, 498-500 (1954). While *Bolling* was technically decided separately, the petitioners' brief was part of the filings in *Brown*, *see* 347 U.S. at 484, it was decided on the same day as *Brown*, and the decision in *Bolling* is very short and says, "[f]or the reasons set out in *Brown v. Board of Education*, this case will be restored to the docket for reargument," 347 U.S. at 498, 500. In this Article, I examine the petitioners' brief in *Bolling* along with the Court's holding in *Brown*.

14. *See* 347 U.S. 483, 486-96 (1954).

15. *See* Brief for Petitioners at 16, Brown v. Board of Education, 347 U.S. 483 (1954) (No. 8), 1952 WL 47278.

16. *Id.*

17. *Id.* at 37-42.

the petitioners engaged in a specific form of interest-convergence litigation: they highlighted the convergence between those interested in desegregation and the existing fears of white elites.[18] The petitioners warned that segregation breeds "hatred or rage[,] which in turn may result[ ] in a distortion of normal social behavior."[19] They described Black people as living in a "mean and miserable state" of poverty, having "no incentive to improve their lot, and who feel themselves to be outcasts of society."[20]

These arguments made their way into the *Brown* decision. In footnote eleven, the Court listed a number of books and articles from psychologists who describe the detrimental effects of segregation on Black communities.[21] Many of these books and articles came from the petitioners' brief.[22] For example, both the brief and the decision cited a paper by Max Deutscher and Isidor Chein.[23] This paper surveyed various social scientists on the effects of segregation.[24] The petitioners' brief reflected language used throughout the paper.[25] For example, Deutscher and Chein quoted a psychologist who claimed that the "enforced status" of segregation led to "the blind and helpless and hard to handle more or less suppressed retaliatory rage, the displaced aggression and ambivalence toward their own kind."[26] One of the sociologists surveyed similarly claimed that "[t]he result of this denial is personality distortion, disillusionment, cynicism, and often overt behavior which is definitely antisocial itself."[27] Footnote eleven reflects the power and effectiveness of litigators who harness the narrative of the dominant group to make an argument for a non-dominant group.

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18. *See id.*
19. *Id.* at 38.
20. *Id.* at 37-38.
21. Brown v. Board of Education, 347 U.S. 483, 494 n.11 (1954).
22. Brief for Petitioners, *supra* note 15, at 39.
23. *Id.*
24. *See* Max Deutscher & Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCH. 259, 259-62 (1948).
25. *See* Brief for Petitioners, *supra* note 15, at 39.
26. Deutscher & Chein, *supra* note 24, at 272.
27. *Id.* at 273.

B. Non-Dominant Narrative Convergence

Unlike the *Bolling v. Sharpe* brief, which used the dominant narrative to demonstrate how segregation harmed Black students, Ruth Bader Ginsburg's brief in *Weinberger v. Wiesenfeld* used a non-dominant narrative to show how gender discrimination harmed men, the dominant group.[28] This was a deliberate strategy. In a recent documentary, her client, Stephen Wiesenfeld explained, "[w]hen we got to the courtroom she sat me down at the table with her. She just wanted a male presence to be at that table so that the [J]ustices had something to identify with."[29] In 2014, at an anniversary dinner for the International Women's Health Organization, Justice Ginsburg brought up *Weinberger* as a model for future women's rights cases because "women will not achieve true equality until men are as concerned as women are with the raising of the next generation."[30]

In the *Weinberger* brief, then-attorney Ginsburg highlighted how gender discrimination hurt both men and women. First, she explained that a statute that only gave insurance payouts to widowed mothers and not fathers harmed both genders. She called the act "double-edged discrimination" because it devalued both a woman's status as a breadwinner and a man's status as a parent.[31] Second, she focused on the interests of the child who lost a parent, finding it unfair that social insurance benefits "include[ ] children with dead fathers, but exclude[ ] children with dead mothers."[32]

This narrative of harm to men broke free from the common discourse around these issues in the 1970s. Feminist discourse at this time focused on the ways that gender discrimination benefitted men.[33] Those who opposed feminists argued that gender-based laws

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28. *See* Brief for Appellee at 12, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (No. 73-1892), 1974 WL 186057.

29. Olivia B. Waxman, *3 Things We Learned from the New Ruth Bader Ginsburg Documentary,* TIME (May 4, 2018, 9:15 AM), https://time.com/5247283/ruth-bader-ginsburg-rbg/ [https://perma.cc/M5UR-BWR5].

30. *Id.*

31. Brief for Appellee, *supra* note 28, at 12.

32. *Id.* at 6.

33. *See, e.g.*, Alice S. Rossi, *Sex Equality: The Beginnings of Ideology*, *in* BEYOND SEX-ROLE STEREOTYPES: READINGS TOWARD A PSYCHOLOGY OF ANDROGYNY 79, 86 (Alexandra G. Kaplan & Joan P. Bean eds., 1976) (positing that men's traditional work patterns are only possible

protected women.[34] Non-dominant narrative convergence proved effective in this case. The Court echoed this reasoning in its holding when it stated, "[i]t is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female."[35] Ginsburg continued to win several gender discrimination cases by demonstrating how gender-based laws harmed both genders.[36]

C. Unnatural Ally Convergence

Litigants who engage in unnatural ally convergence focus on ways to build a coalition that crosses partisan lines. *United States v. Jones* provides an example of this technique in action.[37] The *Jones* case asked the Court to consider whether or not a GPS device installed on a car constituted a search under the Fourth Amendment.[38] This case touched on partisan issues of police surveillance and misconduct.[39] Although it is difficult to generalize, conservatives tend to support deferential treatment of law enforcement officials and believe that police misconduct is limited to "a few bad apples."[40] Liberals, on the other hand, tend to think that police need to be held accountable for misconduct and that systemic issues plague our law

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because wives free them from family responsibilities); Judy Syfers, *I Want a Wife*, *in* WOMEN'S LIBERATION!: FEMINIST WRITINGS THAT INSPIRED A REVOLUTION AND STILL CAN 233, 233-35 (Alix Kates Shulman & Honor Moore eds., 2021) (making the same point satirically).

34. *See, e.g.*, Donald T. Critchlow, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE 220 (2d ed. 2008) ("There are many young, attractive mothers who feel threatened by ERA, for instance, because they believe it would deprive them of special protection they now have.").

35. Weinberger v. Wiesenfeld, 420 U.S. 636, 652 (1975).

36. *See* Frontiero v. Richardson, 411 U.S. 677, 677 (1973) (holding that military benefits to family of service members may not be distributed differently because of sex); Kahn v. Shevin, 416 U.S. 351, 352 (1974) (holding that a $500 property tax exemption cannot only apply to widows and not widowers); Califano v. Goldfarb, 430 U.S. 199, 199 (1977) (holding that survivor benefits may not include different requirements for widows and widowers).

37. *See* 565 U.S. 400, 402-14 (2012).

38. *Id.* at 402.

39. *Id.*

40. Conor Friedersdorf, *Few Conservatives Take Police Abuses Seriously,* THE ATLANTIC (May 1, 2015), https://www.theatlantic.com/politics/archive/2015/05/few-conservatives-take-police-abuses-seriously/391886/ [https://perma.cc/35N7-94H4]; *see also* Anna Brown, *Republicans More Likely Than Democrats to Have Confidence in Police*, PEW RSCH. CTR. (Jan. 13, 2017), https://www.pewresearch.org/fact-tank/2017/01/13/republicans-more-likely-than-democrats-to-haveconfidence-in-police/ [https://perma.cc/4LW2-435A].

enforcement system.[41] Feelings about surveillance track similar political divisions.[42] A poll on surveillance conducted by the Annenberg School for Communications at the University of Pennsylvania found that political affiliation was the main predictor of Americans' reactions to surveillance.[43] For example, when asked whether they were "pleased" or "angry" with the idea that a police department might use surveillance techniques to closely monitor people they think have "characteristics that are common among criminals," 53 percent of the Democratic respondents said they were "angry" compared to 23 percent of Republicans.[44]

In *Jones*, the appellants' brief focused on traditional Fourth Amendment tensions between privacy rights and effective law enforcement.[45] An unexpected ally, the Gun Owners of America (GOA), filed an amicus brief siding with the appellants, arguing that a GPS tracker attached to a car constituted a search under the Fourth Amendment.[46] GOA describes itself as "[t]he only no compromise gun lobby in Washington" and was founded by late Republican Senator H.L. Richardson.[47]

GOA's brief promoted an originalist approach to the Fourth Amendment. They argued for a Fourth Amendment test that focused on physical trespass and property rights.[48] The group criticized the privacy test as "wholly inadequate to the task of protecting the American people against invasions of their privacy through unreasonable search and seizures."[49] In other words, the Gun Owners Association's interest in protecting a person's right to property and to be free from trespass, converged with those opposed

41. *See* Brown, *supra* note 40.

42. *See* Natasha Singer, *Creepy or Not? Your Privacy Concerns Probably Reflect Your Politics*, N.Y. TIMES (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/technology/privacy-concerns-politics.html [https://perma.cc/6TAB-7YXU].

43. *Id.*

44. *Id.*

45. *See generally* Brief of Appellants, United States v. Jones, 565 U.S. 400 (2012) (No. 08-3030), 2009 WL 3155141 (using the word "privacy" thirty-three times and "property" only once).

46. Brief Amicus Curiae of Gun Owners of America, Inc. et al. in Support of Respondent at 29, United States v. Jones, 565 U.S. 400 (2012) (No. 10-1259).

47. *About Gun Owners of America*, GUN OWNERS OF AM., https://www.gunowners.org/about-goa/ [https://perma.cc/A7LN-N33X].

48. Brief Amicus Curiae, *supra* note 46, at 8.

49. *Id.* at 14.

to police monitoring. This argument was the one that resonated with Justice Scalia who, writing for the majority, stated that "[w]e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.... The text of the Fourth Amendment reflects its close connection to property."[50] Thus, the predominantly liberal advocates of privacy and criminal justice reform attracted nontraditional allies like GOA, whose reasoning contributed to winning the case.

D. Natural Ally Convergence

While *United States v. Jones* demonstrates cross-partisan convergence, *Romer v. Evans* exemplifies building a coalition on the same side.[51] In *Romer*, the respondents, through interest-convergence language, overturned an amendment to the Colorado Constitution that prohibited laws protecting LGBTQ individuals.[52] The respondents' brief framed the question as "whether state law may selectively impose such a sweeping deprivation of protection from discrimination on members of *any* group consistent with the Fourteenth Amendment's guarantee of equal protection of the laws."[53] The strategic decision to expand the issue to include *any* group highlighted how LGBTQ interests intersected with the interests of all groups who could face this kind of a law. For example, in disputing the State's claim that it could deny protection to gay people, the respondents quoted Judge Posner:

> [I]s there any reason to exclude homosexuals from a protected category that already includes not only racial, religious, and ethnic groups but also women, the physically and mentally handicapped, all workers aged 40 and older, and, in some cases even young healthy male WASPS? Is there less, or less harmful, or less irrational discrimination against homosexuals than

50. United States v. Jones, 565 U.S. 400, 404-05 (2012).

51. *See* 517 U.S. 620 (1996).

52. *See id.* at 620.

53. Brief for Respondents, Romer v. Evans, 517 U.S. 620 (No. 94-1039), 1995 WL 17008447, at *15.

> against the members of *any* of these other groups? The answer is no.[54]

The fact that several minority groups filed amicus briefs also demonstrated their aligned interests. Authors included the NAACP Legal Defense and Educational Fund, Inc., Asian American Legal Defense Fund, and the Mexican American Legal Defense and Educational Fund.[55]

The *Romer* opinion contained only minimal natural ally convergence language. Justice Kennedy, writing for the Court, criticized the amendment as a law that made it "more difficult for one group of citizens than for all others to seek aid from the government."[56] By resorting to the language of "groups" rather than homosexuals, the Court recognized the implications of this case for many other groups.[57] But it was Scalia in dissent who explicitly discussed the natural ally convergence technique. He criticized the majority for "plac[ing] the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias."[58] He reprimanded the majority for taking sides in the "culture wars" and noted that the United States Congress had been "unresponsive" to attempts to extend the federal civil rights laws to homosexuals and specifically excluded them from the Americans with Disabilities Act of 1990.[59] It is through Scalia's dissent that we can see how the majority implicitly accepted the natural ally convergence argument from the petitioners' brief.

II. WINNING THE WAR

In all four cases, the Court held in favor of non-dominant groups and accepted interest-convergence arguments from the litigants and/or amicus briefs. Therefore, there is some evidence that each of

54. *Id.* at 43 (quoting Richard A. Posner, SEX AND REASON 323 (1992)).

55. Brief for Amici Curiae Asian American Legal Defense and Education Fund et al. in Support of Respondents, Romer v. Evans, 517 U.S. 620 (No. 94-1039); Brief for the NAACP Legal Defense and Education Fund, Inc. et al. as Amici Curiae in Support of Respondents, Romer v. Evans, 517 U.S. 620 (No. 94-1039).

56. *Romer*, 517 U.S. at 633.

57. *See id.*

58. *Id.* at 636.

59. *Id.* at 652-53.

these techniques can be used to win cases and persuade judges. This section looks at the long-term effects of these techniques. Which ones are the most likely to further the goals of non-dominant groups, and which may ultimately harm them?

A. Dominant and Non-Dominant Narratives

Using the language and existing fears of dominant groups to win a case makes structural change challenging. For example, the plaintiffs in *Brown v. Board of Education* did not actually have a problem with the Black school's education or teachers.[60] Instead, the Brown family complained about a structural problem: the school was too far away for their daughter to walk, so they wanted the choice to send her to a closer school.[61] But the Supreme Court and the petitioners departed from this rationale. Instead, they argued that all-Black schools psychologically damaged Black children.[62]

In his book *Contempt and Pity*, Daryl Michael Scott situates *Brown* within a long history of Americans believing that Black people are psychologically damaged.[63] While liberals deviated from the conservative view that Black people were innately unequal, they still argued that social conditions rooted in slavery, then segregation, and then poverty damaged the Black psyche.[64] In his chapter on *Brown*, Scott explains that Chief Justice Earl Warren used social science research to reach a unanimous decision.[65] First, because it allowed the opinion to read more like an academic article instead of a declaration of human rights.[66] Second, because it gave the Justices a way to overturn *Plessy v. Ferguson* based on social science-driven arguments instead of asking them to pass moral judgment on

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60. Blackside, Inc., *Interview with Linda Brown Smith*, WASH. U. LIBRS., at 05:06 (Oct. 26, 1985), http://repository.wustl.edu/concern/videos/1n79h614g [https://perma.cc/UF6J-2LTV] ("[T]his was not the issue of that time, quality education, but it was the distance that I had to go to acquire that education.").

61. *Id.*

62. *See* Brief for Petitioners, *supra* note 15, at 39; Brown v. Board of Education, 347 U.S. 483, 494 n.11 (1954).

63. Daryl Michael Scott, CONTEMPT AND PITY xi-xii (1997).

64. *Id.* at xii.

65. *Id.* at 133-35.

66. *See id.*

the decision.[67] This technique allowed Justice Warren to "subtly but effectively convey[ ] the plight of the victim without censuring the guilty."[68] In other words, as Malcolm Gladwell explained in an interview on *Brown*, by locating the argument "entirely inside [B]lack people's psyches, then we can leave institutional structures in place that systematically disenfranchise African Americans."[69]

Perhaps a more human rights-based argument would not have resulted in a unanimous opinion; perhaps it would not have even attracted a majority. But compromising on the narrative allowed problematic institutional structures to continue and worsen. For example, before *Brown* was decided, approximately 82,000 Black teachers taught about two million Black students.[70] After the decision, around half of these Black teachers and administrators in seventeen southern and border states lost their jobs, leading to a lower number of Black students majoring in education.[71] This decline has continued since the Court decided *Brown* in 1954.[72] A report by the US Department of Education from 2016 found that fewer than one in five public school teachers are people of color, while nearly half of the students in public elementary and secondary schools are students of color.[73] Studies also show that students of color have a better chance of succeeding academically, finishing high school, and going to college when they have at least one teacher of color in elementary school.[74] But post-*Brown*, white teachers did not want to give up their jobs to Black teachers, and white parents

67. *Id.*

68. *Id.* at 136.

69. Nussbaum, *supra* note 1.

70. Mildred J. Hudson & Barbara J. Holmes, *Missing Teachers, Impaired Communities: The Unanticipated Consequences of* Brown v. Board of Education *on the African American Teaching Force at the Precollegiate Level*, 63 J. NEGRO EDUC. 388, 388 (1994).

71. *See id.* at 388-89.

72. C.K., *Why America Lost So Many of its Black Teachers*, THE ECONOMIST (July 8, 2019), https://www.economist.com/democracy-in-america/2019/07/08/why-america-lost-so-many-of-its-black-teachers [https://perma.cc/RR8U-6X5K].

73. U.S. DEP'T OF EDUC., THE STATE OF RACIAL DIVERSITY IN THE EDUCATOR WORKFORCE 3, 5-6 (2016), https://www2.ed.gov/rschstat/eval/highered/racialdiversity/state-racial-diversity-workforce.pdf [https://perma.cc/X6YX-HSB3].

74. Greg Stanley, *With Just One Black Teacher, Black Students More Likely to Graduate*, JOHNS HOPKINS UNIV. (Apr. 5, 2017), https://releases.jhu.edu/2017/04/05/with-just-one-black-teacher-black-studentsmore-likely-to-graduate/ [https://perma.cc/42ER-TSX9].

only wanted white teachers teaching their children.[75] Therefore, Black teachers paid the price. The focus in the *Bolling v. Sharpe* brief and *Brown* decision on the individual, internal harms of segregation allowed the dominant group to pay lip service to desegregation without compromising their jobs through structural changes.[76]

There is a fine but critical distinction between the petitioners' litigation technique in *Bolling* and Ginsburg's technique in *Weinberger v. Wiesenfeld*. Instead of drawing upon the existing gender narrative at the time to make her case, Ginsburg highlighted how gender discrimination harmed men too.[77] In this way, she harnessed the aligned interests of men and women without depending on the dominant narratives at the time.[78] In *Brown*, by contrast, the petitioners promoted desegregation by tapping into an existing narrative of Black people as poor, unmotivated, and full of "rage."[79] This narrative doomed public-school desegregation by expecting Black students to succeed in institutions without changing the structure of the schools themselves.[80] Ginsburg's technique in *Weinberger* allowed her to promote a different narrative instead of working within the dominant narrative to win the battle.

Non-dominant narrative convergence does involve some risks. Importantly, litigants risk tying progress to the interests of the dominant group. In other words, by claiming that gender discrimination is wrong because it harms both men and women, women may find it difficult to win on issues that do not harm men. For example, when it comes to abortion, arguments about how abortion bans harm men have not gained traction.[81] Therefore, this technique may prove impractical for some litigants on issues such as abortion.

Still, when possible, this technique is more likely than dominant narrative convergence to succeed in both the short and long term. In

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75. *See* C.K., *supra* note 72.

76. *See supra* notes 13-19 and accompanying text.

77. *See* Brief for Appellee, *supra* note 28, at 12.

78. *See supra* note 21 and accompanying text.

79. *See* Brief for Petitioners, *supra* note 15, at 38.

80. *See* C.K., *supra* note 72.

81. *See, e.g.*, Ashley Fetters, *Men Aren't Quite Sure How to Be Abortion Activists*, THE ATLANTIC (June 10, 2019), https://www.theatlantic.com/family/archive/2019/06/men-abortion-debate/591259/ [https://perma.cc/3KJS-74X4].

the short term, it allows the dominant group to rule in favor of non-dominant groups without worrying about how the ruling will negatively impact them. In the long term, it allows the non-dominant group to control the narrative. Unlike the dominant narrative convergence in *Brown*, which situated the problem within black psyches,[82] the non-dominant narrative in *Weinberger* targeted structural inequities by uniting the dominant and non-dominant groups in dismantling them.[83]

B. Natural and Unnatural Ally Convergence

While reaching across partisan lines to build a coalition of allies who are not usually on the same side of issues can be effective, this technique is also fraught with danger. The problem with focusing on attracting "strange bedfellows" is that litigants may compromise their reasoning in the process. For example, in *United States v. Jones*, the property-rights argument relied on by GOA's amicus brief resonated with Justice Scalia, who authored the Court's opinion.[84] While this resulted in a win for the appellants, the private-property-based logic created a stir in the Court. Justices Sotomayor, Alito, Ginsburg, Breyer, and Kagan all concurred in the judgment, and all discussed this private-property-based approach.[85] Justice Sotomayor, writing for herself, felt the need to clarify that "the Fourth Amendment is not concerned only with trespassory intrusions."[86]

Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, went even further. They found the majority's reasoning "unwise" and reminded the Court that property-based reasoning echoed the trespass-based rules that the Court had repudiated years ago in *Katz v. United States*.[87] They explained that private-property-based reasoning disregards the way modern surveillance techniques occur through purely "electronic, as opposed to physical, contact with the item to be tracked."[88] They asked: what if the police tapped into

82. *See supra* Part I.A.
83. *See supra* Part I.B.
84. *See* 565 U.S. 400, 405-08 (2012).
85. *Id.* at 418-23 (Alito, J., concurring).
86. *Id.* at 414 (Sotomayor, J., concurring).
87. *Id.* at 419, 422-24 (Alito, J., concurring).
88. *Id.* at 426.

GPS tracking devices that were installed on the car before the purchase?[89] Since no physical trespass occurred, a judge engaged in purely private-property-based reasoning would find no violation of the Fourth Amendment in that case.[90] Thus, these Justices worried that a private-property-based approach fails to provide a check on modern technologies.[91] While the Court has since interpreted *Jones* as adopting *both* the property and privacy rationales,[92] this case still provides a cautionary tale: nonnatural allies often come at a price. This case opened the door to reasoning that could weaken restrictions on police surveillance.

A litigant who engages with unnatural ally convergence can avoid these pitfalls through thoughtful deliberation. The question to ask is this: what, if anything, must I give up to attract these allies? Sometimes the answer is nothing. For example, former military officials wrote amicus briefs in support of same-sex marriage to the Court.[93] These briefs explained how forcing service members to move to places where their marriage was not recognized hurt recruitment, retention, morale, and readiness in the military.[94] The brief argued that "[t]hose willing to risk their lives for the security of their country should never be forced to risk losing the protections of marriage and the attendant rights of parenthood."[95] It can be very powerful when unexpected groups unite, and arguments from the military referencing national security can be very persuasive. Therefore, engaging with unnatural ally convergence *thoughtfully* can work well if the litigant understands the risks involved with this technique.

One way to avoid the pitfalls of engaging with unnatural allies is to focus instead on a group's "natural" allies. However, this technique comes with problems of its own. Where unnatural ally convergence may sacrifice reasoning for results, natural ally convergence may not produce any results. For example, in *Jones* the Court came

89. *Id.*
90. *See id.*
91. *Id.* at 426-27.
92. Florida v. Jardines, 569 U.S. 1, 10-11 (2013).
93. Brief of Hon. Lawrence J. Korb et. al. as Amici Curiae in Support of Petitioners at 1-2, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 & 14-574).
94. *Id.* at 3-4.
95. *Id.* at 3.

to a unanimous decision through unnatural ally convergence.[96] By contrast, *Romer* resulted in a vehement dissent by three Justices.[97] Therefore, while natural ally convergence may "win the battle," there is always a risk in crafting an argument that unites the interests of disfavored groups without attempting to appeal to the dominant group in any way. This technique may alienate those in power and ultimately hurt the cause. The other three techniques all focus on bringing "others" over to the litigant's side, either by engaging with a dominant narrative, aligning dominant interests with a non-dominant narrative, or engaging with unnatural allies. These techniques all serve to widen the base of supporters and weaken potential backlash. Therefore, while it might seem easier to just engage with those who already fit neatly into one side of the issue, this technique makes it difficult for the group to achieve long-term success.

CONCLUSION

This Article seeks to understand (1) the ways in which litigants can win cases using different versions of interest-convergence theory and (2) the long-term impacts of each of these techniques on a group's goals. While it is impossible to create a "one-size-fits-all" solution, my research suggests that the non-dominant narrative convergence gives litigants the strongest chance of both short-term and long-term success. This technique highlights how the interests of non-dominant groups converge with the dominant group while still retaining control over the narrative and reasoning. Unnatural ally convergence follows close behind. This technique has the strongest chance of success when unnatural allies do not require litigants to change their reasoning to attract them. Compromising on reasoning to attract unnatural allies creates long-term problems for future cases litigated in this area.

Natural ally convergence and dominant narrative convergence are the least helpful tools for litigants. Both of these techniques fail to challenge the way the world is, and they suffer as a result. Natural ally convergence tries to build a coalition among those who

96. *See supra* Part I.C.

97. *See supra* notes 44-45 and accompanying text.

already see eye to eye on a number of issues. By refusing to engage with unnatural groups, litigants using this technique may find themselves at an impasse due to existing power dynamics. Those who do win are more likely to face backlash in the future. Dominant narrative convergence is also unlikely to succeed because it seeks to fit the interests of non-dominant groups into existing narratives. These narratives are built around dominant groups retaining dominance and resisting large scale structural changes. Therefore, crafting an argument within this narrative is unlikely to change underlying structural inequalities at play.

This Article introduces four different techniques of interest-convergence litigation and analyzes the pros and cons of each. Due to the constraints of this Article, there are a number of areas that could benefit from further research. First, researchers could conduct a comprehensive study of more cases and analyze whether they fit into the framework identified in this Article. Second, this Article only looks at cases that won in the Supreme Court. Future researchers may want to focus on cases that lost, the impact of interest-convergence litigation on those decisions, and what happens when both sides in the litigation utilize interest convergence. Finally, interviews could be conducted with attorneys who litigate for non-dominant groups to understand whether they explicitly consider interest-convergence litigation when arguing cases and, if so, what factors they weigh in choosing a technique.