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**TWIN PILLARS OF JUDICIAL PHILOSOPHY:
THE IMPACT OF THE GINSBURG
COLLEGIALITY AND GENDER DISCRIMINATION
PRINCIPLES ON HER SEPARATE OPINIONS
INVOLVING GENDER DISCRIMINATION**

Rebecca L. Barnhart & Deborah Zalesne***

The role of a judge is “to persuade . . . not pontificate.”¹ Ruth Bader Ginsburg made this statement in a Madison Lecture she gave at New York University in 1992, shortly before her appointment to the U.S. Supreme Court.² In it she addressed the necessity for collegiality among judges and the adverse impact that separate opinion writing can have on this imperative.

She contrasted the British tradition of individual judging with the continental institutional mode of judging, expressing a clear preference for the latter.³ Under the British tradition, separate and individual opinions are rendered by each judge, with each expressing her or his individual convictions and perspectives.⁴ The continental or civil law tradition calls for more moderation and restraint. Under this tradition, typified in France and Germany, judgments are collective and any disagreement is not published.⁵ The U.S. Supreme Court, originally directed toward institutional opinion-making under Chief Justice John Marshall,⁶ has metamorphosed into a system with a single institutional opinion of the Court, and with no limit on the prerogative of individual judges to express their differing views in separate opinions.⁷

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¹ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1186 (1992) [hereinafter *Judicial Voice*].

² *Id.* at 1185 n.1.

³ *Id.* at 1189.

⁴ *Id.*

⁵ *Id.* “Cases are decided with a single, per curiam opinion, generally following a uniform anonymous style.” *Id.*

⁶ *Id.*

⁷ *Id.* at 1189-90.

Justice Ginsburg's partiality for the institutional mode of judging stems from her belief that overindulgence in separate opinion writing threatens the collegiality of the Court, thereby damaging its reputation and diminishing the respect accorded to its decisions. She notes that "[r]ule of law virtues of consistency, predictability, clarity, and stability may be slighted when a court routinely fails to act as a collegial body."⁸ The resulting loss of respect engendered by the unfettered authorship of dissents, she posits, may ultimately result in the forfeiture of judicial power.⁹ Notably, Justice Ginsburg's collegial approach to decision-making may be gender-based. While qualities of aggressiveness, strength, competitiveness and independence have typically been construed as masculine in nature, stereotypically feminine traits include more collegial, passive and nurturing behavior.¹⁰

According to Justice Ginsburg, the collegiality of the Court is threatened by two distinct tendencies: "too frequent resort to separate opinions and the immoderate tone of statements diverging from the position of the Court's majority."¹¹ In substance, Justice Ginsburg defends dissent writing when it serves to enlighten.¹² The most effective dissent, she believes, is supported by its own legal analysis—"it spells out differences without jeopardizing collegiality or public respect for and confidence in the judiciary."¹³ She cautions that even "'the Great Dissenter,' Justice Oliver Wendell Holmes, in fact dissented less often than most of his colleagues,"¹⁴ and she subscribes to Justice Brandeis' view that "it is more impor-

⁸ *Id.* at 1191.

⁹ *Id.*

¹⁰ See Deborah L. Rhode, *Gender and Professional Roles*, 63 *FORDHAM L. REV.* 39, 44 (1994). While Professor Rhode recognizes that these values are "traditionally associated with women," she eschews "sweeping claims about woman's essential nature," noting that "women's voice speaks in more than one register; its expression depends heavily on the social circumstances and cross-cutting affiliations of the speaker, including not only gender but class, race, ethnicity, age, and sexual orientation." *Id.*

¹¹ *Judicial Voice*, *supra* note 1, at 1191.

¹² Justice Ginsburg has discussed the importance of dissents in our legal system in sharpening majority opinions. She often recounts how Justice Scalia came to her chambers to show her a draft of his dissent in the *United States v. Virginia* case. He told her, "Ruth, you're not going to like this . . . but I want you to have my dissent as early as I can give it to you so you'll have time to respond." Justice Ginsburg has said that her majority opinion was "ever so much better because of his stinging dissent." Jonathan Ringel, *Ginsburg Lifts High Court Curtain on Clerk Roles, Working with Scalia*, *FULTON COUNTY DAILY REP.*, Feb. 21, 2003; see also Kelly Kesner, *Justice Ginsburg Q & A with Students*, *THE DOCKET*, Vol. 12 No. 5 (March 2003).

¹³ *Judicial Voice*, *supra* note 1, at 1196.

¹⁴ *Id.* at 1191 (citing Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 *CORNELL L.Q.* 186, 202 (1959)).

tant that the applicable rule of law be settled than that it be settled right.”¹⁵

In style, she believes a dissent should be measured and moderate. The tendency of gratuitous and vociferous dissents displaces the proper focus on legal issues and becomes little more than an exercise in playground bullying and name calling. Quoting Roscoe Pound, Justice Ginsburg cautions that it is “‘not good for public respect for courts . . . for an appellate judge to burden an opinion with intemperate denunciation [of the writer’s] colleagues, violent invective, attributions of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of [judges who subscribe to the majority opinion].’”¹⁶ She agrees with Judge Collins J. Seitz, that such language “does nothing to further cordial relationships on the court.”¹⁷

Potentially at odds with her philosophy on collegiality and judicial restraint is Justice Ginsburg’s deep loyalty to advancing women’s legal rights. As director of the ACLU Women’s Rights Project from 1971 to 1980,¹⁸ Ruth Bader Ginsburg was the leading litigator in the area of gender discrimination. She authored or coauthored nine briefs,¹⁹ six of which she argued before the Supreme Court,²⁰ and she participated in the writing of fifteen amici curiae briefs.²¹ Her pioneering work has made a lasting imprint on gender jurisprudence.

This Article examines the inherent tension between the collegial court philosophy embraced by Justice Ginsburg, and her own position on gender discrimination. This tension is likely exaggerated in light of the divisiveness of the Court and the frequent five-to-four votes on the issue of gender discrimination. Within the framework of her Supreme Court dissents and concurring opinions on gender discrimination, this Article explores whether Jus-

¹⁵ *Id.* (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

¹⁶ *Id.* at 1194 (quoting Roscoe Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794, 795 (1953)).

¹⁷ *Id.* at 1195 (quoting Collins J. Seitz, *Collegiality and the Court of Appeals*, 75 JUDICATURE 26, 27 (1991)).

¹⁸ Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project*, 11 TEX. J. WOMEN & LAW 157, 158 (2002); see also Deborah L. Markowitz, *In Pursuit of Equality: One Woman’s Work to Change the Law*, 11 WOMEN’S RT. L. REP. 73 (1989).

¹⁹ Melanie K. Morris, *Ruth Bader Ginsburg and Gender Equality: A Reassessment of Her Contribution*, 9 CARDOZO WOMEN’S L. J. 1, 4 & n.20 (2002).

²⁰ Carey Olney, *Better Bitch Than Mouse: Ruth Bader Ginsburg, Feminism, and VMI*, 9 BUFF. WOMEN’S L.J. 97 n.1 (2000-2001).

²¹ Morris, *supra* note 19, at 4 & n.22 (citing cases).

tice Ginsburg has been able to maintain dual fidelity to the bulwark of collegiality, i.e., restraint in separate opinion writing, and to her gender postulate. Or, in the alternative, has Justice Ginsburg abandoned the possibly gender-based goal of collegiality in the highly politicized and contentious arena of gender discrimination, particularly as her colleagues have increasingly engaged in individual opinion writing? Consequently, the Article examines not only whether and when Justice Ginsburg has chosen to dissent or concur, but also the style and substance of her separate opinions.

Part I of the Article examines Justice Ginsburg's career as a litigator and her deep commitment to the eradication of gender discrimination. Part II considers her thirteen-year tenure as a circuit court judge for the District of Columbia and her reputation as a pragmatic, centrist judge concerned with consensus-building and collegiality. Part III completes the survey of her career with a study of her voting patterns as a Supreme Court justice in cases involving gender discrimination. Specifically, this Part explores whether her collegiality philosophy has led her to adopt a more moderate approach to gender issues, overlooking relatively minor differences with her more conservative colleagues.

The Article ultimately concludes that the dual objectives of gender equality and collegiality need not be mutually exclusive. Indeed, as evidenced by Justice Ginsburg's separate opinions, these two goals can coexist as a substantial force in advancing the law.

I. GINSBURG THE ADVOCATE: REPUTATION AS GENDER DISCRIMINATION PIONEER²²

Justice Ginsburg's gender and jurisprudential philosophies defined her strategy as an advocate. She worked for the achievement of gender equality, not for women's rights per se.²³ While this dis-

²² Because the focus of this Article is the impact of Justice Ginsburg's gender and judicial philosophies on her Supreme Court decision-making in the area of gender discrimination, this Part is intended merely to orient the reader as to her gender philosophy. For more in-depth treatment of her gender discrimination work as an advocate, see Deborah L. Markowitz, *Ruth Ginsburg: Women's Rights Advocate—Supreme Court Justice*, 20 VT. B. J. & L. DIG. 9 (1994); Markowitz, *In Pursuit*, *supra* note 18; Campbell, *supra* note 18, at 157; Toni J. Ellington et al., Comment, *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 U. HAW. L. REV. 699 (1998).

²³ Joyce Ann Baugh et al., *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 28 (1994); Morris, *supra* note 19, at 23; see also Ruth Bader Ginsburg, *Constitutional Adjudication in the United States As a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 266 (1997) [hereinafter *Constitutional Adjudication*] (noting that “[m]y major work . . . was to help advance the vibrant idea of the equal stature and dignity of men and women as a matter of constitutional principle”).

inction may be dismissed by some as a matter of semantics, it is fundamental to her strategy as a lawyer, and to this day, it informs her decisions as a jurist. This distinction identifies Justice Ginsburg more with egalitarian feminists who advocate the complete elimination of gender-based classifications in the law, and who regard special-treatment laws as divisive precisely because they exacerbate differences and inequality between the sexes.²⁴ Justice Ginsburg strove to demonstrate that laws differentiating on the basis of sex and whose rationale relied solely on the stereotypical roles that men and women play in society are discriminatory in violation of the Fourteenth Amendment.²⁵ Consequently, Justice Ginsburg's strategy was often to choose male litigants harmed by statutes created to protect women in order to educate the Supreme Court about the theory that even benign legislation based on gender roles is unfairly and unconstitutionally discriminatory.²⁶

Justice Ginsburg's jurisprudential philosophy had equal impact on her litigation strategy. Her respect for *stare decisis* and her belief that it is the most dependable means by which to ground courts' decisions was the primary reason that she chose to dismantle discriminatory laws incrementally, in a step-by-step approach.²⁷ She believed that the only prospect for success lay in slowly chipping away at the notion that laws based on gender classifications were constitutional because they either benefited women or did not harm either sex. Undoing centuries of gender discrimination required a reorientation of the Court's thinking; overnight success would lack the solid precedential value necessary to preserve these victories.²⁸ As discussed below, both Justice Ginsburg's equality doctrine and her conservative approach to litigating not only had impact on her work as an advocate, but also continue to inform her decision-making on the Supreme Court.²⁹

Justice Ginsburg's first victory as a litigator for gender equality occurred even before the ACLU established the Women's Rights Project. In its seminal decision in *Reed v. Reed*,³⁰ the Supreme Court extended the Equal Protection Clause of the Fourteenth Amendment to sex-based classifications for the first time.³¹ *Reed* chal-

²⁴ See Olney, *supra* note 20, at 118-19.

²⁵ *Constitutional Adjudication*, *supra* note 23, at 269-70.

²⁶ Baugh et al., *supra* note 23, at 26.

²⁷ *Id.* at 25.

²⁸ Morris, *supra* note 19, at 4.

²⁹ See *infra* Part III.

³⁰ 404 U.S. 71 (1971).

³¹ See Campbell, *supra* note 18, at 177.

lenged an Idaho statute that appointed men over women as administrators of estates even when both parties were equally qualified.³² The Reeds were separated and their son had committed suicide.³³ In her brief, Ginsburg asserted that the Idaho statute failed to pass even rational basis review because Ms. Reed was just as qualified as her husband to administer her son's estate.³⁴ However, she also challenged the Court to adopt strict scrutiny review for sex-based classifications, by demonstrating that such classifications relied on an immutable characteristic, often bearing no relationship to ability, as the basis for differential treatment. Such distinctions were thus a form of invidious discrimination contrary to the equal protection afforded by the Fourteenth Amendment.³⁵ Although the Court did not apply a higher level of scrutiny to sex-based classifications, Ginsburg had planted the seed, and the *Reed* brief would become known as the "Grandmother Brief" because it contained the legal arguments for all subsequent gender discrimination cases.³⁶

*Frontiero v. Richardson*³⁷ was Ginsburg's next victory. Sharron Frontiero was an Air Force lieutenant who was not automatically granted housing and medical benefits for her husband even though the Air Force automatically granted the same benefits to married male personnel.³⁸ Ginsburg pushed for the application of strict scrutiny to all sex-based classifications, but at the same time, introduced another level of scrutiny.³⁹ Four justices embraced the application of strict scrutiny to all sex-based classifications,⁴⁰ but without the majority necessary to make it law, Ginsburg moved away from strict scrutiny toward another level of heightened review, which the Court later named intermediate scrutiny.⁴¹

The Supreme Court finally accepted Ginsburg's invitation to

³² *Reed*, 404 U.S. at 73.

³³ See Campbell, *supra* note 18, at 169.

³⁴ See *id.* at 170.

³⁵ *Id.*

³⁶ James A. Kushner, *Introducing Ruth Bader Ginsburg and Predicting the Performance of a Ginsburg Court*, 32 SW. U. L. REV. 181, 183 (2003).

³⁷ 411 U.S. 677 (1973).

³⁸ *Id.* at 680.

³⁹ Campbell, *supra* note 18, at 188.

⁴⁰ Justices Douglas, Marshall, and White signed on to Justice Brennan's opinion for the Court. *Frontiero*, 411 U.S. at 678. Chief Justice Burger and Justices Stewart, Powell, and Blackmun concurred in the judgment. *Id.* at 691 (Powell, J., concurring).

⁴¹ Olney, *supra* note 20, at 114; Sheila M. Smith, *Justice Ruth Bader Ginsburg and Sexual Harassment Law: Will the Second Female Supreme Court Justice Become the Court's Women's Rights Champion?*, 63 U. CIN. L. REV. 1893, 1902 (1995).

craft a new intermediate scrutiny test with *Craig v. Boren*.⁴² Relying on earlier decisions invalidating sex-based classifications that were “an inaccurate proxy for other, more germane bases of classification,”⁴³ Justice Brennan struck down an Oklahoma statute prohibiting the sale of beer to men under twenty-one, but not to women of the same age. The Court specifically recognized that differential treatment resting on arcane and overbroad notions of men’s and women’s roles is hostile to the Equal Protection Clause.⁴⁴ Without going so far as to say that sex-based classifications were immediately suspect, the Court held that for a sex-based classification to survive review, there must be an important governmental interest, and the classification must be substantially related to that interest.⁴⁵

Since *Craig v. Boren*, intermediate scrutiny has been the rubric under which the Court has evaluated gender discriminatory laws.⁴⁶ However, after joining the Supreme Court, Justice Ginsburg hinted

⁴² 429 U.S. 190 (1976).

⁴³ *Id.* at 198.

⁴⁴ *Id.* In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), Justice Ginsburg also succeeded in convincing the Court that a social security statute that allowed women but not men to automatically claim survivor benefits was an impermissible sex classification that ignored women’s active role in the workforce and disqualified men solely on the basis of sex in violation of the Fifth Amendment. Michael James Confusione, *Justice Ruth Bader Ginsburg and Justice Thurgood Marshall: A Misleading Comparison*, 26 RUTGERS L. J. 887, 891 (1995).

⁴⁵ *Craig*, 429 U.S. at 197.

⁴⁶ As with many tests fashioned by the Supreme Court, controversy surrounds what actually is the test for intermediate scrutiny. Much of the debate focuses on the additional “exceedingly persuasive” language, which first appeared in *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) and which Justice O’Connor made an integral part of intermediate scrutiny in *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). However, the Justices themselves, the lower courts, and academics cannot agree as to whether “exceedingly persuasive” is simply a restatement of the traditional two-prong test or whether it is an additional requirement. See Olney, *supra* note 20, at 144; Morris, *supra* note 19 at 15-17; Ellington et al., *supra* note 22, at 754-55. Justice Ginsburg herself has contributed to the confusion in her landmark decision, *United States v. Virginia*, 518 U.S. 515 (1996) (*VMI*), which held that Virginia’s exclusion of women from the military school violated the equal protection guarantee of the Fourteenth Amendment. Justice Ginsburg’s coining of “skeptical scrutiny” in place of intermediate scrutiny and her reliance on the phrase “exceedingly persuasive” led Justice Scalia to assert that she was attempting to ratchet intermediate scrutiny closer toward strict scrutiny, long reserved for race-based discriminatory laws. See *VMI*, 518 U.S. at 570-75 (Scalia, J., dissenting) (arguing ambiguous language in place of the traditional language destabilizes current doctrine). Chief Justice Rehnquist, on the other hand, used his concurrence to insist that the *Hogan* standard had not changed, and thus, intermediate scrutiny remained intact. See *id.* at 558-59 (Rehnquist, C.J., concurring). Academics have argued whether the standard did indeed change. See, e.g., Morris, *supra* note 19, at 17-21; Olney, *supra* note 20, at 139; Ellington et al., *supra* note 22, at 700. Justice Ginsburg’s muddying of the gender discrimination jurisprudence is ironic when one considers that what often prompts her to write is the need for clarification. See Heather L. Stobaugh, Comment, *The Aftermath of United States v. Virginia: Why Five*

that she is interested in reopening a dialogue on this subject.⁴⁷ Regardless of the future path of gender jurisprudence, it owes its lifeblood, at least in part, to the pioneering work of Justice Ginsburg, who challenged the Court to recognize that the legal relegation of women to secondary class status violates the letter and the spirit of the Equal Protection Clause of the Fourteenth Amendment. In a moment of perfect symmetry, Justice Ginsburg, sitting on the very Court before which she had vigorously argued that differential treatment on the basis of sex is anathema to the Constitution, was able to put her imprimatur on the majority opinion for *United States v. Virginia* (“VMI”).⁴⁸

II. GINSBURG THE JUDGE: REPUTATION AS CONSENSUS-BUILDING MODERATE

When President Bill Clinton nominated Ruth Bader Ginsburg to fill Justice White’s seat on the Supreme Court, she, like most nominees, was unknown outside the legal community. Ginsburg had, however, been a circuit court judge for the District of Columbia for thirteen years.⁴⁹ Justice White’s retirement offered the first

Justices are Pulling in the Reins on the “Exceedingly Persuasive Justification,” 55 SMU L. REV. 1755 (2002); *Judicial Voice*, *supra* note 1, at 1185.

⁴⁷ See *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 26 n.* (1994) (Ginsburg, J., concurring) (illustrating that Justice Ginsburg has not entirely abandoned the goal of moving the Court toward a recognition of sex-based classifications as inherently suspect).

⁴⁸ 518 U.S. 515 (1996). *VMI* was a landmark case challenging single-sex military education. *Id.* at 519. Applying intermediate scrutiny, the Court refused to credit the State’s first justification—diversity of educational opportunities—for maintaining VMI as a single-sex institution. *Id.* at 539. Justice Ginsburg highlighted Virginia’s history of refusing to admit women to male academic institutions for much longer than many other states, to demonstrate that this stated goal’s origin was not long-standing, but rather in response to *Mississippi v. Hogan*, 458 U.S. 718 (1982). *Id.* at 537-39. The Court also rejected the State’s second justification for excluding women: their need for a cooperative learning atmosphere, rather than VMI’s adversarial method of training. *Id.* at 540-42. The State’s goal of preserving the kind and caliber of training was not furthered by the outright exclusion of women and thus the exclusion of women, which relied on generalizations concerning women’s interests and abilities, failed intermediate scrutiny. *Id.* at 540-46. The Court then turned to Virginia’s “separate but equal” solution of a parallel program for women. *Id.* at 526. It held that the Virginia Women’s Military Institute for Leadership did not meet the equal protection standards because the female facility was not substantially equal to VMI. *Id.* at 555. Justice Ginsburg proposed that “[i]nherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” *Id.* at 533. She explained further that “generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.” *Id.* at 517.

⁴⁹ President Clinton formally announced Justice Ginsburg’s nomination June 14,

opportunity for a Democrat president to nominate a Supreme Court justice since Lyndon Johnson had appointed Thurgood Marshall.⁵⁰ With the conservative White's retirement, legal experts predicted that a more liberal justice could provide a crucial swing vote on issues ranging from abortion to the death penalty to job discrimination.⁵¹

In announcing Ginsburg's nomination to the Supreme Court, President Clinton highlighted her roles as an attorney and a judge, describing her both as a women's rights pioneer, and as a consensus-building moderate,⁵² which he saw as an asset for the fractious Court.⁵³ Thus, the gendered dichotomy was immediately set in place between the zealous advocate of women's rights and the feminine conciliator with a dependable track record on the D.C. Circuit. The press ran with it, either confirming or attacking these labels. The flurry of newspaper articles on then-Circuit Judge Ginsburg immediately following her nomination uniformly labeled her moderate or centrist in stark contrast to her career as a women's rights advocate.⁵⁴ The media characterized her simultaneously as a "pioneer" and a "centrist,"⁵⁵ "trailblazing lawyer" and "non-ideological,"⁵⁶ "innovative" and "pragmatic,"⁵⁷ and a "pioneer" and a "dispassionate judge."⁵⁸

1993 in the Rose Garden of the White House, following a lengthy search lasting nearly three months. Ruth Marcus, *Judge Ruth Bader Ginsburg Named to High Court: Clinton's Unexpected Choice Is Women's Rights Pioneer*, WASH. POST, June 15, 1993, at A1. Justice Ginsburg was appointed appellate judge to the D.C. Circuit by President Jimmy Carter in 1980. Jill Abramson, *Ruth Bader Ginsburg Long Has Spent Her Career Overcoming the Odds*, WALL ST. J., June 15, 1993, at A8.

⁵⁰ Marcus, *supra* note 49.

⁵¹ Paul M. Barrett, *Ruth Ginsburg: The Swing Vote of the Future?*, WALL ST. J., June 30, 1993, at B1.

⁵² Joan Biskupic, *Judge Ruth Ginsburg Named to High Court; Nominee's Philosophy Seen Strengthening the Center*, WASH. POST, June 15, 1993, at A1.

⁵³ Marcus, *supra* note 49.

⁵⁴ See, e.g., Stefan Fatsis, *Ginsburg's Record Shows Will to Examine Both Sides*, THE JOURNAL RECORD, June 17, 1993, available at 1993 WL 9728306 (characterizing her as a trailblazing women's rights lawyer with a nonideological bent); Abramson, *supra* note 49 (labeling Justice Ginsburg as the "godmother of legal feminism" while also calling her "moderate"). She has been described alternatively as "cautious technician," Nathan Lewin, *Top Court Needs a Maverick*, CHI. DAILY L. BULL., July 27, 1993, at 5, and "careful, nondogmatic, pragmatic, consensus builder, methodical, and attentive to precedent." John Flynn Rooney, *Ginsburg Lauded For Her Demeanor, Intellect*, CHI. DAILY L. BULL., June 15, 1993, at 1.

⁵⁵ Marcus, *supra* note 49.

⁵⁶ Fatsis, *supra* note 54.

⁵⁷ Biskupic, *supra* note 52.

⁵⁸ Paul M. Barrett, *Justices' Shifting Views Mark 1992-93 High-Court Term*, WALL ST. J., June 30, 1993, at B1.

Most journalists failed, however, to notice the similarities between Ginsburg the lawyer and Ginsburg the jurist, choosing instead to accept that pioneer lawyer and centrist judge were mutually exclusive.⁵⁹ The pioneer lawyer had always worked under the radar and chosen mundane cases to push forward gender equality law. According to one commentator, while Ginsburg's theory was radical, her approach was conservative and incremental with cases carefully chosen to show irrational disparate treatment of women solely on the basis of gender.⁶⁰ Thus, moderation and caution were her trademarks long before she joined the bench.⁶¹

Personal descriptions revealed, not surprisingly, an individual of contradictions.⁶² Although she was labeled a swing vote on the D.C. Circuit, Professor Alan Dershowitz, in one of the most interesting and germane assessments in light of Justice Ginsburg's own collegiality philosophy, believed she would prove to be anything

⁵⁹ One exception to the superficial coverage was Steven Roberts et al., *Two Lives of Ruth Bader Ginsburg: Crusader in the '70s; Centrist Judge After That*, U.S. NEWS & WORLD REP., June 28, 1993, at 26, 28, available at 1993 WL 6871318. This article took note of Justice Ginsburg's conservative legal strategy as a pioneer lawyer. Despite the authors' more nuanced analysis, the title of the article demonstrates that they, too, saw a sea change from crusader to conservative jurist. *Id.*

⁶⁰ *Id.*

⁶¹ Moderation has been a consistent trait of Justice Ginsburg and is one of her guiding principles concerning a judge's role and the importance of collegiality. Nevertheless, the mainstream media sought to categorize her moderation in judicial decision-making through political labels, such as conservative versus liberal, thus relying on political ideologies, rather than judicial philosophies, to explain her judicial decisions or perceived position on social issues. See, e.g., Biskupic, *supra* note 52; Marcus, *supra* note 49; Cal Thomas, *In Ginsburg, Her Nomination "Is About as Good as We'll Get,"* ORLANDO SENTINEL, June 17, 1993, at A15, available at 1993 WL 5794453; Pilita Clark, *Woman Is U.S. Court Pick*, THE AGE, June 16, 1993, at 9, available at 1993 WL 12365274. These labels make little sense, however, as applied to Justice Ginsburg, who refuses to prejudge a case based on her own belief system, even though she is a self-confessed feminist. See Ruth Bader Ginsburg, *New York Law School Law Review Dinner February 12, 1999, Remarks*, 44 N.Y.L. SCH. L. REV. 7, 8 (2000). For Justice Ginsburg's own description of her judging style during her Supreme Court confirmation hearings, see Lewin, *supra* note 54 (quoting Justice Ginsburg that "[j]ustice is not to be taken by storm. She is to be wooed by slow advances."); Olney, *supra* note 20, at 131-33 (relating Justice Ginsburg's plea to be "judged as a judge, not an advocate"); Baugh et al., *supra* note 23, at 7-10 (relating Justice Ginsburg's comment in her opening statement to the Committee at her confirmation hearing that her approach to judging is neither conservative nor liberal, rather she is committed to judicial restraint).

⁶² For articles discussing Ruth Bader Ginsburg the person, see generally Margaret Carlson, *The Law According to Ruth*, TIME, June 28, 1993, at 38, 40 (pointing out her "natural reserve" and "shyness"); Guy Gugliotta & Eleanor Randolph, *A Mentor, Role Model and Heroine of Feminist Lawyers*, WASHINGTON POST, June 15, 1993, at A14 (noting that "[s]he cares . . . about the real world and the effect her rulings will have," and describing her as "totally disarming," and a "stickler for details"); Biskupic, *supra* note 52 (describing her as "plain vanilla" and "remote"); Roberts et al., *supra* note 59 (describing her as "picky," "demanding," "sarcastic," "intimidating," and "a loner").

but a consensus-builder.⁶³ In fact, Professor Dershowitz took a veiled swipe at her for her friendship and admiration for Justice Scalia.⁶⁴ However, Justice Ginsburg's professional and personal association with Justice Scalia,⁶⁵ an unabashed conservative, arguably undermines Professor Dershowitz and other detractors' argument that she is immoderate and prickly. For his part, Justice Scalia reportedly said he would choose Justice Ginsburg as his companion on a desert island.⁶⁶ The spectrum of support and respect for Justice Ginsburg ran the gamut from Robert Bork, another former colleague and arch-conservative, describing her as "thoughtful" and "careful,"⁶⁷ to the then-president of the Center for Reproductive Law and Policy in New York, analogizing Justice Ginsburg's work in gender equality law to Thurgood Marshall's race equality work.⁶⁸ Justice Ginsburg's wide-ranging friendships seemed to confirm a collegial attitude and ability to separate ideology from the person. Moreover, garnering the respect of such a disparate group within the legal field is testimony to an eclectic and open mind in keeping with Justice Ginsburg's philosophy of collegiality.

III. GINSBURG THE SUPREME COURT JUSTICE: FIDELITY TO BOTH HER GENDER POSTULATE AND HER COLLEGIALLY PRINCIPLE

In considering Justice Ginsburg's voting patterns on the Supreme Court in cases involving gender discrimination and the extent to which they have been influenced by a desire to avoid writing separate opinions, Part III of this Article examines not only what prompts her to write separately, but also the form and substance of her writing. Given her commitment to collegiality, and thus carefully circumscribed use of separate opinion writing, this Part addresses the question of whether her collegiality philosophy has given way to her commitment to gender equality in the law.

⁶³ Alan Dershowitz, *Choice of Ginsburg Raises Many Questions*, BUFF. NEWS, June 17, 1993, at B3, available at 1993 WL 6097164 (citing Justice Ginsburg's colleagues who described her as difficult and alienating).

⁶⁴ *Id.* (stating "she has been compared to Justice Scalia, whom she admires and likes").

⁶⁵ Justices Ginsburg and Scalia served together on the D.C. Circuit. Gugliotta & Randolph, *supra* note 62, at A14.

⁶⁶ Carlson, *supra* note 62, at 40.

⁶⁷ Abramson, *supra* note 49, at A8.

⁶⁸ *Id.*

A. *Separate Dissent*

At the end of the 2001-02 term, Justice Ginsburg had authored forty-nine dissents, slightly above the Court's average in every term except one.⁶⁹ As illustrated by these dissents, her strong regard for precedent is perhaps the foremost reason for expressing disagreement with the Court.⁷⁰ Justice Ginsburg's adherence to precedent pushes her to illustrate the majority's disregard⁷¹ or even misapplication of precedent.⁷² Her incremental approach to the law prompts her to be critical of overbroad results that reach further than the facts of the case at hand⁷³ or that fudge the facts to match prior precedent.⁷⁴ Although conservative in her application of the law, Justice Ginsburg is hardly a blind follower of stare decisis; she demands only that when the Court breaks with past decisions, it does so in a forthright, definite manner⁷⁵ and with strong support.⁷⁶

The strictures that apply in deciding to write separately also pervade the form and substance of Ginsburg dissents. A conservative approach is equally applicable to her mantra of no "spicy" dissents.⁷⁷ Her dissents remain collegial by observing a respectful and restrained tone toward her colleagues,⁷⁸ never blatantly chastising or name calling, choosing to concentrate on the themes of precedent and its proper application, rather than a direct onslaught on the majority's reasoning.⁷⁹ Moreover, Justice Ginsburg tends to err on the side of brevity, favoring a narrow focus.⁸⁰

⁶⁹ Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOK. L. REV. 629, 654 (2003).

⁷⁰ *Id.* at 655-56.

⁷¹ *Id.* at 655.

⁷² Baugh et al., *supra* note 23, at 21.

⁷³ Ray, *supra* note 69, at 655.

⁷⁴ *Id.* at 657.

⁷⁵ *Id.* at 656.

⁷⁶ *Id.* at 658.

⁷⁷ *Id.* at 656 (citing Ruth Bader Ginsburg, *Styles of Collegial Judging: One Judge's Perspective*, 39 FED. B. NEWS & J. 199, 201 (1992)); see also *Judicial Voice*, *supra* note 1, at 1194 (explaining that she questions "resort to expressions on separate opinions that generate more heat than light").

⁷⁸ Ray, *supra* note 69, at 668.

⁷⁹ *Id.* at 671 (generally preferring more cryptically muted criticism, such as describing an opinion as "puzzling" or "enigmatic"). *Miller v. Albright*, 523 U.S. 420 (1998), discussed *infra* at Part III(A)(1), does not appear to fit within this rubric.

⁸⁰ Baugh et al., *supra* note 23, at 24.

1. *Miller v. Albright*⁸¹

The sole issue addressed by Justice Stevens, writing for the Court and joined by Chief Justice Rehnquist, in *Miller v. Albright*, was whether the requirement of additional proof of paternity imposed by 8 U.S.C.A. § 1409(a)(4) on citizen fathers of illegitimate children born abroad but not on citizen mothers, violated the Equal Protection Clause of the Fifth Amendment.⁸² A majority of the Court affirmed the District Court for the District of Columbia's dismissal of the petitioner daughter's case; however, a splintered Court prevented a decision as to the constitutionality of Section 1409.⁸³

The Court was sharply divided, as reflected in the plurality opinions upholding on various grounds the Court of Appeals decision. The opinions ranged from that of Justice Stevens, which held that Section 1409(a)(4) survived intermediate scrutiny review,⁸⁴ to Justices O'Connor's and Kennedy's concurring opinion finding that Miller lacked standing to assert a gender discrimination claim and thus the statute survived rational basis review,⁸⁵ to the opinion of Justices Scalia and Thomas, arguing that the Court did not have power to grant the requested relief.⁸⁶ Justice Stevens, applying the intermediate scrutiny test,⁸⁷ held that the paternity requirement was substantially related to the important governmental interests of ensuring a blood relationship between the citizen parent and child and of fostering a parent-child relationship, as well as ties between the child and the United States.⁸⁸ The disparity of treatment was not based on impermissible and outdated stereotypes, but rather on legitimate biological differences between mothers and fathers that did not make them similarly situated.⁸⁹ The paternity requirement for citizen fathers was therefore neither arbitrary nor irrational.⁹⁰

If ever there were a compelling reason for Justice Ginsburg to

⁸¹ 523 U.S. 420.

⁸² *Id.* at 428.

⁸³ *Id.* at 445. The constitutionality of § 1409 was later decided in *Nguyen v. INS*, 533 U.S. 53 (2001), discussed *infra* at Part III(B)(1).

⁸⁴ *Miller*, 523 U.S. at 441.

⁸⁵ *Id.* at 451-52 (O'Connor, J., concurring).

⁸⁶ *Id.* at 453 (Scalia, J., concurring).

⁸⁷ Interestingly, Justice Stevens never once identified the applicable test or acknowledged that statutes differentiating on the basis of sex are subject to "heightened scrutiny."

⁸⁸ *Miller*, 523 U.S. at 436, 438.

⁸⁹ *Id.* at 444-45.

⁹⁰ *Id.* at 424.

write separately, *Miller* is the paradigm, for it concerned gender discrimination, which occupied a large part of Justice Ginsburg's professional career, and the majority opinion flew in the face of precedent, shaped to a large extent by Justice Ginsburg. As she noted in her dissent, "Section 1409 is one of the few provisions remaining in the United States Code that uses sex as a criterion in delineating citizens' rights."⁹¹ Indeed the existence of a facially discriminatory statute seemed to make Section 1409 a dinosaur on a certain path to extinction.⁹² Justice Ginsburg's dissent bore her trademarks: a focused critique and fidelity to gender equality precedent. In style and tone, however, it is surprising in its biting criticism;⁹³ she seems to have chosen to engage in a less collegial dialogue with some of her colleagues, namely Justices Stevens and Rehnquist, while, on the other hand, working in tandem with Justices Breyer and Souter.⁹⁴

If Justice Ginsburg truly eschews separate opinion writing, one might ask why she wrote a separate dissent, rather than simply joining Justice Breyer's. Although she might have incorporated her arguments into Justice Breyer's dissenting opinion, the focus of their two dissents is entirely different, and they may have decided that one lengthy dissent would have carried less weight than two separate attacks on the plurality opinions. Moreover, the scope of Justice Breyer's opinion was far broader, addressing Justice O'Connor's standing argument, Justice Scalia's lack of relief stance, and finally the intermediate scrutiny analysis by Justice Stevens.⁹⁵ Paramount in Justice Ginsburg's decision to write separately must have been her conviction that the majority had broken with precedent and had erroneously applied the rules of gender jurisprudence.

Justice Ginsburg, however, chose an extremely narrow focus, concentrating on the history of citizenship laws, which traditionally discriminated against citizen mothers, and the Court's gender jurisprudence under which Section 1409 could not have survived had intermediate scrutiny been properly applied.⁹⁶ Justice Ginsburg addressed the historical discrimination toward citizen mothers in nationality and citizenship laws to broadside the government's

⁹¹ *Id.* at 461 (Ginsburg, J., dissenting).

⁹² Stobaugh, *supra* note 46, at 1756-57.

⁹³ See *infra* notes 107-11 and accompanying text.

⁹⁴ Justice Ginsburg, along with Justice Souter, signed on to Justice Breyer's dissent. *Miller*, 523 U.S. at 471 (Breyer, J., dissenting).

⁹⁵ See generally *id.* at 471-90 (Breyer, J., dissenting).

⁹⁶ *Id.* at 460-71 (Ginsburg, J., dissenting).

explanation for the gender distinction—i.e., the close relationship between mother and child.⁹⁷ She methodically deconstructed the statute, starting with the premise that “distinctions based on gender trigger heightened scrutiny and ‘[i]t is unlikely . . . that any gender classifications based on stereotypes can survive heightened scrutiny.’”⁹⁸ Another nod to collegiality was her incorporation of Justice Breyer’s dissent, which addressed the statute’s unconstitutional classification on the basis of gender.⁹⁹

As the Court’s expert on gender jurisprudence, Justice Ginsburg might have been expected to author the lead dissent; however, she has consistently shown restraint when the Court has addressed gender discrimination cases.¹⁰⁰ Justice Ginsburg’s dissent is reminiscent of her litigation. She illustrated the impermissible reliance on stereotypes—mothers, not fathers, raise illegitimate children—which do not apply to all individuals and the use of gender as an impermissible proxy for better solutions.¹⁰¹ Justice Ginsburg directly challenged the reasons behind the gender classification and was openly skeptical of the government’s proffered explanations.¹⁰² She reasoned that promoting close ties between a foreign-born child and the United States could be achieved without reference to gender.¹⁰³

Justice Ginsburg’s dissent is most notable for the tone she adopted in addressing Justice Stevens’ opinion. It is one of her most direct attacks on a colleague’s opinion, setting this dissent apart from her norm, which ranges from characterizing her colleagues’ reasoning as puzzling¹⁰⁴ to burying criticism in footnotes.¹⁰⁵ In fact, Justice Ginsburg’s practice is to reserve mildly acerbic retorts¹⁰⁶ for her majority opinions. In *Miller*, however, she pointedly referenced the majority’s belief that Section 1409 was a benign classification to illustrate the irony of that observation in light of the discriminatory nature of nationality laws toward wo-

⁹⁷ *Id.* at 468 (Ginsburg, J., dissenting).

⁹⁸ *Id.* at 460 (Ginsburg, J., dissenting) (quoting Justice O’Connor’s concurring opinion). Justice Ginsburg’s use of Justice O’Connor’s language is a collegial gesture and cleverly points out that Justice O’Connor stands on the same side of the issue although she concurred on other grounds.

⁹⁹ *Id.*

¹⁰⁰ Ray, *supra* note 69, at 644.

¹⁰¹ *Miller*, 523 U.S. at 460 (Ginsburg, J., dissenting).

¹⁰² *Id.* at 468 (Ginsburg, J., dissenting).

¹⁰³ *Id.* at 470 (Ginsburg, J., dissenting).

¹⁰⁴ Ray, *supra* note 69, at 649.

¹⁰⁵ *Id.* at 672.

¹⁰⁶ *Id.* at 648.

men,¹⁰⁷ and to remind the Court that benign discrimination cannot save a statute whose objective could be served by gender neutral criteria.¹⁰⁸ Instead of masking criticism of her colleagues, she boldly chastised Justice Stevens' embrace of societal stereotypes¹⁰⁹ as constitutionally impermissible. She even sarcastically quoted his take on a mother's connection to her child,¹¹⁰ and then lambasted the government's use of the mother-child relationship to justify differential treatment when in fact the country historically did not respect this bond.¹¹¹

In concluding, Justice Ginsburg spoke directly to Congress as a coequal partner, challenging it to rectify Section 1409's gender bias.¹¹² Engagement of other branches is an important component of Justice Ginsburg's collegiality ideology.¹¹³ While her decision to write separately was an affirmative statement of her reasoning, faithful to her regard for precedent, it arguably did not conform to her guiding principle of moderation and restraint.

2. *Gebser v. Lago Vista Independent School District*¹¹⁴

In one of four sexual harassment cases decided by the Supreme Court in the 1997-98 term, the Court took up the issue of employer liability in the context of teacher-student sexual harassment. Victims of sexual harassment experienced the biggest setback in *Gebser v. Lago Vista Independent School District*, where Justice O'Connor, writing for the majority, held that a plaintiff is not entitled to damages for teacher-student sexual harassment unless a school district official with authority to institute corrective measures has actual notice of, and is deliberately indifferent to, the

¹⁰⁷ *Miller*, 523 U.S. at 460-61 (Ginsburg, J., dissenting).

¹⁰⁸ *Id.* at 460 (Ginsburg, J., dissenting).

¹⁰⁹ *Id.* at 469 (Ginsburg, J., dissenting). Justice Ginsburg noted that "[t]hese generalizations pervade the opinion of Justice Stevens, which constantly relates and relies on what 'typically,' or 'normally,' or 'probably' happens 'often.'" *Id.* (citation omitted).

¹¹⁰ *Id.* at 468 (Ginsburg, J., dissenting) (stating that "as Justice Stevens puts it, a mother's presence at birth, identification on the birth certificate, and likely 'initial custody' of the child give her an 'opportunity to develop a caring relationship with the child.'").

¹¹¹ *Id.*

¹¹² *Id.* at 471 (Ginsburg, J., dissenting) (stating that "Congress recognized this equality principle in 1934, and is positioned to restore that impartiality before the century is out.").

¹¹³ *Judicial Voice*, *supra* note 1, at 1186 (noting that judges engage "in a dialogue with, not a diatribe against, co-equal departments of government").

¹¹⁴ 524 U.S. 274 (1998).

teacher's misconduct.¹¹⁵

In that case, Alida Star Gebser, a high school student, was subjected to a campaign of sexual innuendo and provocation by her teacher.¹¹⁶ She ultimately had an affair with the teacher that lasted for a year; Gebser never reported the incidents to anyone, including her parents, because "she was uncertain how to react and she wanted to continue having him as a teacher."¹¹⁷ The affair was eventually discovered and the teacher was fired and arrested.¹¹⁸

Gebser sued under Title IX of the Education Amendments of 1972,¹¹⁹ which bars sex discrimination at educational institutions receiving federal funds. Although Titles VII and IX had been analogized in the past to determine liability for sexual harassment, the Court abandoned the analogy and departed from the clear law under Title VII in a 5-4 decision, holding that the school district was not liable for sexual harassment because no one with authority to take corrective action had actual notice of the harassment.¹²⁰

Justice Stevens, in his dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer, criticized the majority's "dramatic departure" from well-settled principles of agency law.¹²¹ He reasoned that under agency principles, the school district would be liable for the teacher's misconduct because it was the agency relationship that made the tort possible by giving the teacher such powerful influence over Gebser.¹²² Justice Stevens also highlighted the paradoxical result of the Court's ruling that school employees are now better protected from sexual harassment than are students at the same school. In fact, practically speaking, in some instances where even the principal of the school does not have authority to take corrective action, a harassed student may be required to report any instances of sexual harassment to the school board in order to take advantage of the protections of Title IX.¹²³ Finally, Justice Stevens pointed out that the majority's ruling actually en-

¹¹⁵ *Id.* at 290.

¹¹⁶ *Id.* at 277-78.

¹¹⁷ *Id.* at 278.

¹¹⁸ *Id.*

¹¹⁹ 20 U.S.C. § 1681 (2004).

¹²⁰ *Gebser*, 524 U.S. 274, 290-91 (1998).

¹²¹ *Id.* at 300-01 (Stevens, J., dissenting).

¹²² *Id.* at 298-99 (Stevens, J., dissenting) (citing RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957)).

¹²³ *Id.* at 301 (Stevens, J., dissenting) (stating that "[i]ndeed, the rule that the Court adopts would preclude a damages remedy even if every teacher at the school knew about the harassment but did not have 'authority to institute corrective measures on the district's behalf.'").

courages schools to turn their backs on sexual harassment altogether as a means of avoiding liability.¹²⁴ He noted that the ruling has taken away the incentive to have an anti-harassment policy, effectively putting the responsibility on a thirteen-year-old student for reporting an incident, rather than putting the responsibility on the school or the teacher.¹²⁵

Because of Justice Stevens' distinct concern for consistency with Title VII and with adherence to common law agency principles, it is within character that Justice Ginsburg signed on to the dissent. She did, however, also offer a brief independent dissent, in which Justices Souter and Breyer joined. Her dissent took Justice Stevens' dissenting opinion one step further to resolve the issue of whether a school district should be relieved of liability if it has a sexual harassment policy in place, recognizing an effective, adequately publicized policy for reporting and redressing sexual harassment as an affirmative defense to a Title IX sexual harassment claim.¹²⁶ This dissent is characteristically narrow in focus and moderate in style and tone. Three paragraphs long, her dissent reflects her desire to clarify an important issue left open by the lead dissent, without detracting from its force. Justice Ginsburg's concentration on this single unresolved issue is a typical manifestation of collegiality yielding to individuality. She believes that the Court's role is not only to follow and interpret precedent faithfully, but also to create new case law when presented with an issue on which the lower courts require guidance. For Justice Ginsburg, the institutional function of the Court is as vital as the underlying substantive law.

B. Collaborative Dissent

In Justice Ginsburg's view, the role of a justice is to nurture collaboration through restraint.¹²⁷ Thus, when egotism or the tug of individuality is the motivating force behind a dissent, it should

¹²⁴ He states:

The reason why the common law imposes liability on the principal in such circumstances is the same as the reason why Congress included the prohibition against discrimination on the basis of sex in Title IX: to induce school boards to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to such odious behavior. The rule that the Court has crafted creates the opposite incentive.

Id. at 300 (Stevens, J., dissenting).

¹²⁵ *Id.* (Stevens, J., dissenting).

¹²⁶ *Id.* at 307 (Ginsburg, J., dissenting).

¹²⁷ *Judicial Voice*, *supra* note 1, at 1186.

be avoided.¹²⁸ As such, a collaborative dissenting effort serves the dual goals of decrying the majority's lack of attention to precedent while preserving the noncompetitive atmosphere of the bench. Accordingly, Justice Ginsburg has not always chosen to author an independent dissent, even when gender principles are at stake.

1. *Nguyen v. INS*¹²⁹

Three years after *Miller*, the constitutionality of Section 1409(a) was squarely addressed in *Nguyen v. INS*.¹³⁰ Justice Kennedy's opinion for the majority upheld one of the last gender discriminatory statutes.¹³¹ In light of nearly thirty years of Supreme Court precedent striking down sex-based classifications rooted in overbroad generalizations, the ruling took academics and women's rights advocates by surprise.¹³²

Nguyen was the son of an American father and a Vietnamese mother. His father raised him in Vietnam and then the United States but never formally legitimated Nguyen, one of the means by which a child born out of wedlock and abroad to a citizen father and noncitizen mother may satisfy the paternity requirement of Section 1409(a)(4).¹³³ As a lawful permanent resident, Nguyen was eligible for deportation following conviction for a felony. The Board of Immigration Appeals rejected Nguyen's citizenship claim because he had not complied with Section 1409(a)'s statutory requirements. On appeal to the Court of Appeals for the Fifth Circuit, he argued that Section 1409(a) violated the Equal Protection Clause by treating similarly situated children differently depending on the sex of the citizen parent. The circuit court rejected his claim, and the Supreme Court granted writ of certiorari, this time putting the legitimacy of Section 1409(a) squarely before the

¹²⁸ See Ray, *supra* note 69, at 655; Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 141 (1990) (referring to "the competing tugs of collegiality and individuality").

¹²⁹ 533 U.S. 53 (2001).

¹³⁰ *Id.*

¹³¹ Justice Kennedy's authorship of the *Nguyen* opinion is especially puzzling given that he joined Justice O'Connor's concurrence in *Miller* regarding § 1409. See *Miller v. Albright*, 523 U.S. 420, 451-52 (1998) (O'Connor, J., concurring).

¹³² See, e.g., Mary-Christine Sungaila, *Nguyen v. INS and Sex Stereotyping in Citizenship Laws: Building on the Equal Protection Legacy of Ruth Bader Ginsburg*, 10 S. CAL. REV. L. & WOMEN'S STUD. 293, 301 (2001) (noting that *Nguyen* was not the "cakewalk" that everyone had anticipated it would be).

¹³³ As with *Miller*, § 1409(a)(4) is the only subsection addressed by the Court; the constitutionality of § 1409(a)(3), which imposes a financial support requirement on citizen fathers but not citizen mothers, thus raising an equal protection claim, has not been reached by the Court. See *Miller*, 523 U.S. at 431; *Nguyen*, 533 U.S. at 60.

justices.¹³⁴

Writing for a five-justice majority, Justice Kennedy¹³⁵ held that the more strenuous citizenship requirements of Section 1409(a)(4)¹³⁶ for children born out of wedlock and abroad to a citizen father and noncitizen mother did not violate the equal protection guarantee embedded in the Fifth Amendment.¹³⁷ The majority found that (1) ensuring that a biological parent-child relationship exists, and (2) promoting the opportunity for a genuine parent-child relationship with ties between the child and parent and by extension the United States, were important governmental interests,¹³⁸ and that the statutory means chosen to achieve these interests were substantially related to the governmental purpose.¹³⁹ Thus, the statute satisfied intermediate scrutiny.

Justice O'Connor authored the dissent on behalf of four justices,¹⁴⁰ none of whom authored an additional dissenting opinion. Because *Nguyen* implicates an area on which Justice Ginsburg holds acknowledged and adamant legal views, it is worth inquiring as to why she did not write a dissent as well. *Nguyen* is not the first gender discrimination case where she has remained silent;¹⁴¹ however, it is remarkable for its rather blatant disregard, even misapplication, of precedent,¹⁴² which is traditionally one of the factors motivating a Ginsburg dissent.¹⁴³ Justice Ginsburg's silence is perhaps most appropriately explained by her equally strong fidelity to collegiality. Having already authored one of the dissents in *Miller*, she

¹³⁴ *Nguyen*, 533 U.S. at 56.

¹³⁵ Justice Kennedy's authorship of the majority opinion is seemingly in direct conflict with his position at the time of *Miller*, when he joined Justice O'Connor's opinion, which concurred in the judgment but found that petitioner lacked standing to bring a gender-based equal protection claim. Justice O'Connor hypothesized that it was unlikely that "any gender classifications based on stereotypes can survive heightened scrutiny." *Miller*, 523 U.S. at 452 (O'Connor, J., concurring).

¹³⁶ When the child's father is the American citizen, he must take one of three steps before the child's eighteenth birthday in order for the child to claim citizenship: legitimation, declaration of paternity under oath, or a court order of paternity. *Nguyen*, 533 U.S. at 62.

¹³⁷ *Id.* at 73.

¹³⁸ *Id.* at 63, 64-65.

¹³⁹ *Id.* at 70.

¹⁴⁰ Justices Souter, Ginsburg, and Breyer joined her dissent. *Id.* at 74 (O'Connor, J., dissenting).

¹⁴¹ See, e.g., discussion of *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), *infra* at Part III(D)(1).

¹⁴² Justice O'Connor lambasted the majority for giving lip service to intermediate scrutiny, but in reality applying rational basis review. *Nguyen*, 533 U.S. at 74-75 (O'Connor, J., dissenting).

¹⁴³ Ray, *supra* note 69, at 655-57.

deferred to Justice O'Connor's opinion addressing these same issues in *Nguyen*, which allowed Justice O'Connor to incorporate the major points of Justice Ginsburg's earlier dissent. Moreover, because Justice Ginsburg's collegiality philosophy restrains her from confronting justices head-on, she may have made a strategic decision that Justice O'Connor could deliver a more forceful attack on the majority opinion than she herself felt comfortable doing.¹⁴⁴ And finally, a single dissenting opinion would carry more weight, particularly if authored by the most conservative of the dissenters, and a member of the plurality majority in *Miller*.

The substance of Justice O'Connor's dissent incorporated Justice Ginsburg's gender jurisprudence, thus mitigating the necessity for a separate opinion. The dissent was a strong endorsement of the Ginsburg gender doctrine, reading like a Ginsburg brief in its recitation of precedent to illustrate the majority's misapplication, even disregard of the Court's own prior decisions.¹⁴⁵ The dissent eviscerated the moorings of the majority opinion. It attacked its failure to accurately apply intermediate scrutiny by essentially ignoring the "exceedingly persuasive" language component from *Mississippi University for Women v. Hogan*¹⁴⁶ and *United States v. Virginia (VMI)*.¹⁴⁷ It also maintained that sex-based classifications may not rely on overbroad generalizations based on outdated notions of the roles of men and women, and that the government's justifications for these classifications must be genuine, not a post-hoc product of litigation strategizing.¹⁴⁸ The dissent demonstrated that the statute impermissibly relied on the stereotype that women take primary responsibility for childrearing¹⁴⁹ and this stereotype, in fact, reinforced the lack of responsibility men assume when a child

¹⁴⁴ The style of the *Nguyen* dissent is forcefully direct, as demanded by such a bold divergence with Supreme Court gender jurisprudence, but this is not a style with which Justice Ginsburg is traditionally comfortable. In light of the majority's possible agenda to turn its back on invalidating gender discrimination, the members of the dissent may have decided the occasion called for a less diplomatic tone. In particular, the last paragraph of the dissent unabashedly criticized the legal analysis of the majority opinion: "[n]o one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications." *Nguyen*, 533 U.S. at 97 (O'Connor, J., dissenting).

¹⁴⁵ See Stobaugh, *supra* note 46, at 1757 (arguing that the majority in *Nguyen* reined in the use of the *VMI* "exceedingly persuasive justification" language).

¹⁴⁶ 458 U.S. 718 (1982).

¹⁴⁷ 518 U.S. 515 (1996); *Nguyen*, 533 U.S. at 74-77 (O'Connor, J., dissenting) (the dissenting Justices chastised the majority for applying rational basis review, instead of the required intermediate scrutiny).

¹⁴⁸ *Nguyen*, 533 U.S. at 74-76 (O'Connor, J. dissenting).

¹⁴⁹ *Id.* at 86 (O'Connor, J., dissenting).

is born out of wedlock.¹⁵⁰

Justice O'Connor further criticized the majority for "gloss[ing] over the crucial matter of the burden of justification."¹⁵¹ The first prong of the intermediate scrutiny test demands that the government provide an important governmental interest to justify its use of a sex-based classification. In other words, the government carries the burden. In altering the language to an impersonal construction,¹⁵² the majority lessened the government's burden, thereby setting the precedent of an alternative and lower standard for intermediate scrutiny.¹⁵³ Justice O'Connor also focused on gender-neutral alternatives to the sex-based classification, which the majority acknowledged existed but did not see as fatal to Section 1409's constitutionality.¹⁵⁴ Requiring that the parent be present at the birth or have knowledge of the birth were examples of such gender-neutral alternatives.¹⁵⁵ Furthermore, the means-end test was not met where the purported government objective of close ties between parent and child was not substantially furthered by requiring proof of such opportunity before the child's eighteenth birthday, and such relationships did exist even without obtaining such proof.¹⁵⁶ Moreover, the nexus was further weakened by the fact that some mothers never develop a relationship with their children due to abandonment or other tragedies.¹⁵⁷

Justice Ginsburg might have furthered her effort to have gender regarded as a suspect classification in a separate opinion—something she hinted at in *VMI* and *Harris v. Forklift Systems, Inc.*¹⁵⁸ Or, if this option was not in line with her views on judicial conservatism/moderation, she might have highlighted the majority's betrayal of precedent in misapplying intermediate scrutiny

¹⁵⁰ *Id.* at 92 (O'Connor, J., dissenting). Justice O'Connor buttressed her argument with the legislative history of § 1409 where the citizenship status of illegitimate children was tied to the mother because they stood in the shoes of the father. *Id.* at 91-92 (O'Connor, J., dissenting). This is, of course, in stark contrast to the traditional legal position that women could not transmit U.S. citizenship to children born abroad. See *Miller v. Albright*, 523 U.S. 420, 463 (1998) (Ginsburg, J., dissenting).

¹⁵¹ *Nguyen*, 533 U.S. at 78 (O'Connor, J., dissenting) (citation omitted).

¹⁵² *Id.* at 60 (stating that "[f]or a gender-based classification to withstand equal protection scrutiny, it must be established . . .") (emphasis added).

¹⁵³ *Id.* at 78 (O'Connor, J., dissenting) (explaining that "the Court's use of the impersonal construction might represent a mere elision of what we have stated expressly in our prior cases. Here, however, the elision presages some of the larger failings of the opinion.").

¹⁵⁴ Stobaugh, *supra* note 46, at 1771.

¹⁵⁵ *Nguyen*, 533 U.S. at 86 (O'Connor, J., dissenting).

¹⁵⁶ *Id.* at 84-86 (O'Connor, J., dissenting).

¹⁵⁷ *Id.* at 86 (O'Connor, J., dissenting).

¹⁵⁸ 510 U.S. 17, 26 n.* (1993) (Ginsburg, J., concurring).

and cursory acknowledgment of the “exceedingly persuasive” language, or she could have addressed the reasons behind the majority’s masked usage of rational basis.¹⁵⁹ However, these points apparently did not outweigh the need for collegiality as expressed by a single dissent.¹⁶⁰

C. *Separate Concurrence*

If it is true, as one commentator has stated, that a concurrence presents a less compelling justification for writing separately than a dissent,¹⁶¹ it is interesting to note that at the end of the 2001-02 term, Justice Ginsburg had authored more concurrences than dissents during her tenure.¹⁶² This figure is even more remarkable when broken down by term, which places Justice Ginsburg above the Court’s average in five out of her nine terms.¹⁶³

Justice Ginsburg’s concurrences seem to follow certain precepts. Notably, she does not engage in a lengthy regurgitation of the majority opinion.¹⁶⁴ Rather, she strikes out on her own legal footing to limit or expound on the Court’s holding in order to prevent its future misuse or misapplication and to raise open questions that she feels the majority opinion should have addressed.¹⁶⁵ Her vision is therefore turned toward the horizon of future cases.¹⁶⁶ While Justice Ginsburg thus appears to employ concurrences as a tool of clarification, her reasons for writing are not always evident.¹⁶⁷ In fact, the brevity of her concurrences, another Ginsburg trait,¹⁶⁸ sometimes contributes to the confusion concerning their meaning.

¹⁵⁹ Stobaugh, *supra* note 46, at 1772.

¹⁶⁰ Moreover, Justice O’Connor incorporated the major themes of Justice Ginsburg’s *Miller* dissent: the history of discrimination against women in laws governing the transmission of citizenship; the lack of fit between purpose and means; and the impermissible reliance on stereotypes that may hold true for most women but not for all women. *Nguyen*, 533 U.S. at 88-91 (O’Connor, J., dissenting).

¹⁶¹ Ray, *supra* note 69, at 673.

¹⁶² Between Supreme Court terms 1993-2001, Justice Ginsburg wrote fifty concurrences, one more than the number of her dissents. *Id.* at 673-74.

¹⁶³ *Id.* at 674.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 674-75.

¹⁶⁶ *Id.* at 674.

¹⁶⁷ See discussion of *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), *infra* at Part III(C)(2).

¹⁶⁸ Ray, *supra* note 69, at 674.

1. *Harris v. Forklift Systems, Inc.*¹⁶⁹

In 1993, the Supreme Court, by unanimous opinion, clarified the parameters of a hostile work environment sexual harassment claim in *Harris v. Forklift Systems, Inc.*,¹⁷⁰ holding that for actionable sexual harassment, the plaintiff need not show that the conduct caused a tangible psychological injury.¹⁷¹ Under *Harris*, courts must evaluate the totality of the circumstances, consider the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating, or whether it unreasonably interfered with an employee's work.¹⁷²

Without specifically rejecting the reasonable woman standard applied by the *Harris* trial court, and without directly addressing the debate, the Court applied the reasonable person test, holding that the conduct must be so "severe or pervasive" that a "reasonable person" would find it, and the plaintiff did find it, hostile or abusive.¹⁷³ The Court left the form of the objective test unresolved, "leaving lower courts wondering whether or not the Court had implicitly rejected the gender-based reasonableness standard."¹⁷⁴

In a short concurring opinion, Justice Ginsburg clarified what she acknowledged was implicit in the majority opinion: the "inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance."¹⁷⁵ She used the term "reasonable person" in her concurrence, reaffirming her approval of the majority's reliance on that test.¹⁷⁶ Additionally, she asserted in a footnote that "it remains an open question whether 'classifications based upon gender are inherently suspect.'"¹⁷⁷

Her concurrence is clear and to the point, acknowledging that her view seems to be "in harmony" with the majority's opinion,¹⁷⁸ but giving added guidance to lower courts for making the proper determination of whether a hostile work environment exists. But simply clarifying a point that is implicit in the majority opinion is

¹⁶⁹ 510 U.S. 17 (1993).

¹⁷⁰ *Id.* at 21-22.

¹⁷¹ *Id.* at 22.

¹⁷² *Id.* at 23.

¹⁷³ *Id.* at 22.

¹⁷⁴ Smith, *supra* note 41, at 1935.

¹⁷⁵ *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 26 (Ginsburg, J., concurring) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 & n.9 (1982)).

¹⁷⁸ *Id.*

not typically a sufficient basis for a Ginsburg concurrence.¹⁷⁹ She tends only to encroach on her collegiality principle and write separately to clarify points of confusion in the lead opinion, to delineate precisely the parameters of the Court's opinion, or to provide additional guidance to lower courts on issues left open by the majority. The substance of this concurrence in *Harris* reaches beyond these reasons. Thus, a closer look at her possible intentions is in order.

Through her comment in the footnote about whether sex-based classifications are immediately suspect, Justice Ginsburg "subtly laid the groundwork for future reconsideration of the question whether the Equal Protection [C]ause protects against gender discrimination as strongly as it protects against racial discrimination."¹⁸⁰ Because the case was decided under Title VII, rather than under the Fourteenth Amendment, Justice Ginsburg's decision to raise the application of strict scrutiny to sex-based classifications was already an aggressive legal stratagem. Also, by implying that sex should be declared a suspect classification entitled to the same scrutiny as race-based classifications, her comment challenged years of settled gender jurisprudence analyzed under the intermediate scrutiny test.¹⁸¹ Accordingly, she made a measured choice not to argue this point directly, but artfully raised the issue indirectly in a footnote.

The *Harris* footnote, in its attempt to reopen the debate on whether sex is a suspect classification, was an especially groundbreaking maneuver for Justice Ginsburg, who normally does not advocate the reevaluation of a settled issue.¹⁸² However, even in making this assertive step, Justice Ginsburg retained her quintessential characteristics of moderation and collegiality. She framed the issue indirectly in terms of gender as a suspect classification,¹⁸³ rather than directly attacking the analysis of classification under the less strenuous intermediate scrutiny test, which surely would have caused much rancor on the Court.

¹⁷⁹ See Ray, *supra* note 69, at 674-75.

¹⁸⁰ Christopher Smith et al., *The First-Term Performance of Justice Ruth Bader Ginsburg*, 78 JUDICATURE 74, 79 (1994).

¹⁸¹ Norman T. Deutsch, *Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185, 195 (2003) (stating that since 1982, intermediate scrutiny has been the consistent standard of review for a majority of the Supreme Court).

¹⁸² See *supra* text accompanying note 15.

¹⁸³ *Harris*, 510 U.S. at 26 (Ginsburg, J., concurring) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 & n.9 (1982)) (stating that "it remains an open question whether 'classifications based upon gender are inherently suspect'").

Since Justice Ginsburg was already compromising her collegiality views by writing separately on other issues, it is unclear why she did not also take the opportunity to express her view on the parameters of the objective test, an issue conspicuously ignored by the majority. The circuit courts were conflicted about the standard for determining the existence of a hostile or abusive work environment. Courts were split as to whether to make that determination from the perspective of a reasonable person or that of a reasonable woman, given that the vast majority of sexual harassment claims are brought by women.¹⁸⁴ At first blush, Justice Ginsburg might be expected to advocate for the reasonable woman standard. While the so-called neutral reasonable person test provides a universal standard, many commentators and some courts believe that it actually contains unstated assumptions that are male-based.¹⁸⁵ The reasonable woman standard, conversely, includes women's experiences "in a system with asymmetrical power relations that has historically excluded women's participation."¹⁸⁶

Arguably, however, the reasonable woman test is antithetical to Justice Ginsburg's egalitarian philosophy, favoring the complete elimination of gender-based classifications. "Undeniably, the reasonable woman standard is asymmetric; it is premised on an explicit gender distinction and calls for non-identical treatment of men and women."¹⁸⁷ The difference in treatment is implicitly based on the premise that men and women have different perspectives regarding what conduct constitutes sexual harassment and that women are more likely to be offended by certain workplace conduct than are men. This presumption perpetuates the stereotype that women are more emotional and more sensitive than men

¹⁸⁴ See, e.g., *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989) (applying reasonable person test); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 476 (5th Cir. 1989) (applying reasonable person test); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316-17 (11th Cir. 1989) (applying reasonable person test); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (applying reasonable person test); *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (applying reasonable woman test); *Andrews v. City of Phila.*, 895 F.2d 1469, 1482-83 (3d Cir. 1990) (applying "minority employee" test).

¹⁸⁵ See, e.g., *Ellison*, 924 F.2d at 879; *Andrews*, 895 F.2d at 1482-83; Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992); Sally A. Piefer, Comment, *Sexual Harassment from the Victim's Perspective: The Need for the Seventh Circuit to Adopt the Reasonable Woman Standard*, 77 MARQ. L. REV. 85, 86 (1993); Lynn Dennison, Note, *An Argument for the Reasonable Woman Standard in Hostile Environment Claims*, 54 OHIO ST. L. J. 473 (1993).

¹⁸⁶ Cahn, *supra* note 185, at 1401.

¹⁸⁷ Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & LAW 95, 108 (1992).

and therefore need greater protection.¹⁸⁸ The reasonable woman standard is also essentialist in nature, wrongly presuming that there is just one female perspective, typically that of the white, middle-class woman. Thus, the reasonable woman standard “may perpetuate existing inequalities based on race, class, sexual orientation and other factors when it fails to consider the point of view of subordinated groups other than women.”¹⁸⁹

Presumably, if Justice Ginsburg had disagreed with the majority’s use of the reasonable person standard, she would have so indicated in her concurrence. Instead, she subtly reaffirmed the majority’s use of the test by repeating the phrase “reasonable person” in her concurrence.¹⁹⁰ Because the reasonable woman standard differentiates women from men, in contravention of her belief that even benign differences in treatment of women ultimately harm women and their plight for equal treatment in the workplace, her failure to push for the reasonable woman standard is wholly consistent with her agenda.

2. *Burlington Industries, Inc. v. Ellerth*¹⁹¹

In two other sexual harassment cases decided during the 1997-98 term, the Supreme Court resolved a split in the circuit courts over the correct standard for holding employers liable for the sexual harassment of an employee by a supervisor. In *Faragher v. City of Boca Raton*, the Court addressed the issue in the context of a hostile work environment claim,¹⁹² whereas in *Burlington Industries v. Ellerth*, the Court addressed the issue based on a claim of quid pro quo sexual harassment.¹⁹³

¹⁸⁸ Smith, *supra* note 41, at 1935.

¹⁸⁹ Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who is the Reasonable Person?*, 38 B.C. L. REV. 861, 879-80 (1997).

¹⁹⁰ *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

¹⁹¹ 524 U.S. 742 (1998).

¹⁹² *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998). This case involved a lifeguard who was subjected to repeated and uninvited offensive touching, sexual comments and gestures and threatening sexual requests by her two male supervisors. *Id.* at 782. Her employer, the City of Boca Raton, asserted that it could not be held responsible for hostile work environment harassment that occurred at a remote location and which, although reported to an intermediate supervisor, was never reported to higher-ups in the city. *Id.* at 782-85.

¹⁹³ *Burlington*, 524 U.S. at 742. *Burlington* involved a claim that the plaintiff’s supervisor repeatedly implied that her job would be in jeopardy unless she succumbed to his advances. *Id.* at 748. Her employer, Burlington Industries, argued it should not be held liable because she suffered no job consequences (she actually was promoted before she quit), and because she failed to utilize the company’s sexual harassment complaint procedure. *Id.* at 749.

In considering these two cases, the Court determined first that the distinction between hostile work environment and *quid pro quo* harassment did not control the issue of employer liability.¹⁹⁴ The Court then held that under either type of claim, employers are potentially liable for their supervisors' misconduct, whether or not the company was aware of the misconduct.¹⁹⁵ Specifically, an employer will be held strictly liable to a victimized employee who has an actionable claim of sexual harassment against a supervisor who has authority over the employee, when the exercise of supervisory authority results in tangible employment action, such as discharge, demotion, or undesirable reassignment to the plaintiff.¹⁹⁶ When the plaintiff cannot prove tangible employment action, the employer can raise the affirmative defense that it exercised reasonable care to prevent and to promptly correct any sexually harassing behavior, and that the complaining employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.¹⁹⁷

Six justices, including Justice Ginsburg, signed on to Justice Souter's *Faragher* opinion, with only Justices Thomas and Scalia dissenting.¹⁹⁸ In *Burlington*, Justice Kennedy garnered a six-justice majority, with Justice Ginsburg concurring in the judgment only.¹⁹⁹ Again, Justices Thomas and Scalia were the lone dissenters.²⁰⁰

Justice Ginsburg's *Burlington* concurrence is characteristically short at a mere two sentences, but uncharacteristically vague. Her entire concurrence reads as follows:

I agree with the Court's ruling that "the labels *quid pro quo* and hostile work environment are not controlling for purposes of establishing employer liability." I also subscribe to the Court's statement of the rule governing employer liability, which is substantively identical to the rule the Court adopts in *Faragher v. Boca Raton*.²⁰¹

For Justice Ginsburg to weaken a seven-to-two decision by writing separately, one would expect deeply held principles to be at stake, yet she fails to articulate her objections to the majority's reasoning.

Why Justice Ginsburg wrote separately in this instance is in-

¹⁹⁴ *Id.* at 754.

¹⁹⁵ *See id.* at 765.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Faragher v. City of Boca Raton*, 524 U.S. 775, 810-11 (1998) (Thomas, J., dissenting).

¹⁹⁹ *Burlington Indus.*, 524 U.S. at 766 (Ginsburg, J., concurring).

²⁰⁰ *Id.* (Thomas, J., dissenting).

²⁰¹ *Id.* (Ginsburg, J., concurring).

deed puzzling, as her concurrence is unfaithful to her collegiality principle, with no countervailing conviction to explain the departure. As noted, Justice Ginsburg will typically write separately in order to clarify ambiguities or vague points, or to correct a misapplication of precedent.²⁰² Her *Burlington* concurrence does neither.²⁰³ She proceeds to muddy the water with respect to an otherwise solid majority opinion, by failing to articulate any precise objections.

The majority opinion rests primarily on the rule that, if supervisors create a hostile work environment, employers are strictly liable where there is tangible harm to the plaintiff, but only vicariously liable where the plaintiff suffers no tangible harm.²⁰⁴ Perhaps Justice Ginsburg opposed the application of agency principles, preferring instead a rule of strict liability for the employer in all cases. Strict employer liability is more in line with traditional Title VII doctrine, and accounts for the power supervisors typically have to adversely affect an employee's working terms or conditions.²⁰⁵ This interpretation of her concurrence fails, however, as Justice Ginsburg purported to agree with the rule applied by the majority. If she does, indeed, agree with the rule, one could assume she disagrees with the majority's reasoning. But this is conjecture, because she does not clearly so indicate. Furthermore, if she disagrees with the reasoning, she is not successful in pushing the law forward, as her objections are unclear.²⁰⁶

D. Collegial Alliance with Majority

Even where a case raises issues of gender discrimination, Justice Ginsburg does not compromise her fidelity to collegiality and moderation without good reason. Nowhere is this more evident than in several prominent gender discrimination cases, where Justice Ginsburg signs on to the Court's opinion without concurring. On certain notable occasions, Justice Ginsburg chose not to speak

²⁰² See *supra* notes 70-72 & 167-69 and accompanying text.

²⁰³ See *Burlington Indus.*, 524 U.S. at 766 (Ginsburg, J., concurring).

²⁰⁴ *Id.* at 765.

²⁰⁵ Before the *Burlington* and *Faragher* cases were decided, this reasoning led one commentator to predict that Justice Ginsburg would take this position. See Smith, *supra* note 41, at 1942. Smith predicted that "[u]nless courts are willing to find vicarious liability without requiring notice to the employer, Justice Ginsburg will reason, many valid sexual harassment claims will be denied a remedy, and the intent of Title VII to assure a workplace free from discrimination may be frustrated." *Id.*

²⁰⁶ Notably, Justice Ginsburg signed on to the majority opinion in *Faragher*, leaving the question of why she did not concur in that case as well. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

out, despite the presence of principles that guided her in breaking with her colleagues in past cases. While inductive analysis of Justice Ginsburg's inaction calls for a more hypothetical discussion than her action would have required, it is nonetheless instructive to consider what prompted her to remain a silent member of the majority in those cases.

While her decisions in some cases may seem to evidence acquiescence to institutional pressures and forfeiture of her gender equality principles, a more nuanced analysis often reveals a deep allegiance to her collegiality postulate, and concern for the precedential weight afforded to a majority opinion. These decisions are also consistent with her incremental approach to decision-making, as she may have questioned the timing of raising more radical issues.

1. *J.E.B. v. Alabama ex rel. T.B.*

During Justice Ginsburg's first term, a gender discrimination case, *J.E.B. v. Alabama ex rel. T.B.*, was on the docket.²⁰⁷ The case challenged the use of peremptory strikes based on gender on the ground that it violated the Equal Protection Clause.²⁰⁸ The Court ruled six-to-three that a juror's gender was a constitutionally impermissible reason for dismissal.²⁰⁹ This decision was entirely consistent with the Court's rulings over the past two decades, recognizing that gender could not be a proxy for a more competent and individualized analysis of a person.²¹⁰ As the first equal protection gender discrimination case before Justice Ginsburg in her first term on the Court, *J.E.B.* received heightened scrutiny from women's rights groups and legal commentators.²¹¹ Based on her public stand regarding absolute equality of the sexes, some questioned whether she would continue to advocate on the bench. Justice Ginsburg chose to remain silent, joining the majority opinion authored by Justice Blackmun.²¹²

J.E.B. was the putative father of a child born out of wedlock.²¹³ The State of Alabama, on behalf of the mother, *T.B.*, brought a paternity suit in the District Court of Jackson County, Alabama.²¹⁴

²⁰⁷ 511 U.S. 127 (1994).

²⁰⁸ *Id.* at 129.

²⁰⁹ *Id.* at 128.

²¹⁰ *See id.* at 139 n.11.

²¹¹ Baugh et al., *supra* note 23, at 26-27.

²¹² *J.E.B.*, 511 U.S. at 128.

²¹³ *See id.* at 129.

²¹⁴ *Id.*

During *voir dire*, the State used nine of its ten peremptory challenges to dismiss potential male jurors.²¹⁵ Subsequent to the jury finding J.E.B. to be the father and the court entering an order directing him to pay child support, he appealed on the ground that the State's use of peremptory challenges to dismiss male jurors solely because of their sex violated the Equal Protection Clause and prevented him from receiving a fair trial.²¹⁶

The trial court rejected this claim, holding that *Batson v. Kentucky*²¹⁷ did not extend to gender-based peremptory challenges, and the Alabama Court of Civil Appeals affirmed.²¹⁸ The Supreme Court of Alabama subsequently denied *certiorari*.²¹⁹ The Supreme Court, however, overturned the ruling of the Alabama Court of Civil Appeals, and Justice Blackmun reaffirmed the last twenty-three years of gender precedent.²²⁰ It must not have escaped Justice Blackmun's notice that his opinion relied on the very gender precedents that his new colleague, Justice Ginsburg, helped formulate.²²¹ Nevertheless, he refused to revisit the issue of whether gender classifications are *per se* suspect; in fact, he pointedly abstained from declaring gender a suspect classification.²²²

Justice Blackmun was directly responding to Justice Ginsburg's *Harris* footnote, which was intended to reopen the debate regarding the appropriate level of scrutiny for gender classifications.²²³ Whether the footnote was a collegial invitation to the Court to revisit the level of scrutiny for gender classifications or a more aggressive declaration of one justice's agenda, or a combination of the two, Justice Ginsburg mysteriously did not follow through on either her footnote or Justice Blackmun's blunt refusal to settle the issue. Instead she silently joined the majority. It makes little sense that she should challenge intermediate scrutiny in a footnote and then not revisit the issue at the next opportunity, especially considering that gender discrimination cases do not frequently come before the Court. Perhaps Justice Ginsburg felt that the time was not ripe

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ 476 U.S. 79 (1986) (holding that race-based peremptory challenges violated the Fourteenth Amendment's Equal Protection Clause).

²¹⁸ *J.E.B.*, 511 U.S. at 129.

²¹⁹ *Id.* at 130.

²²⁰ *See id.* at 139 n.11.

²²¹ *See id.* at 135-36 (citing the *Reed*, *Boren* and *Frontiero* cases, among others).

²²² *Id.* at 137 n.6 (noting that "we once again need not decide whether classifications based on gender are inherently suspect").

²²³ *See supra* notes 180, 183 & 185 and accompanying text.

to revisit the issue of scrutiny level and that more time was needed to lay a friendlier foundation.

To some commentators, Justice Ginsburg's decision to remain silent constituted an abdication of her duty to use her position to engage the Court in a discussion of important issues within gender discrimination law.²²⁴ Certainly, a concurrence would not have compromised her collegiality views, which prescribe the use of separate opinion writing to clarify affirmative statements of the law.²²⁵ Given that the Supreme Court has struggled in the past with the level of scrutiny to attach to gender discrimination,²²⁶ Justice Blackmun threw down the gauntlet by citing Justice Ginsburg's *Harris* footnote in which she supports the inclusion of gender as a suspect classification. Readdressing the issue and maintaining a consistent voice would have informed her colleagues that this was an issue that needed to be addressed at some point and was not going away. Another advantage to concurring could have been to lay the foundation for incremental consensus-building. If Justice Ginsburg's silence may be explained by her reluctance to use her expertise in the field of gender discrimination to lord over her colleagues, it is unfortunate, for a strong voice was needed to remind the Court of its gender precedents in light of the Court's subsequent direction in *Miller* and *Nguyen*.

2. *Oncale v. Sundowner Offshore Services, Inc.*²²⁷

In *Oncale v. Sundowner*, the Supreme Court revisited the issue of what conduct constitutes sexual harassment, but this time in the context of a man suing another man.²²⁸ In 1991, Joseph Oncale, a self-identified heterosexual oilrig worker, was sexually harassed by his heterosexual co-workers and supervisor on an oilrig off the coast of Louisiana. He claimed that he was sexually assaulted, battered, touched and threatened with rape by his direct supervisor and others, including one instance where three male co-workers held him down in a shower and shoved a bar of soap between his

²²⁴ See Baugh et al., *supra* note 23, at 27.

²²⁵ See *Judicial Voice*, *supra* note 1, at 1196. Moreover, it is less clear whether Justice Ginsburg is as skeptical of the concurring justice as she is of the dissenter. Her remarks focus more on the evils of prolific and vociferous dissenting, not of concurring.

²²⁶ Justice Brennan did not have a majority join his strict scrutiny reasoning in *Frontiero v. Richardson*, 411 U.S. 677 (1973). See *supra* note 40 and accompanying text. Justice Ginsburg pushed for intermediate scrutiny following this decision. See *supra* note 41 and accompanying text.

²²⁷ 523 U.S. 75 (1998).

²²⁸ *Id.*

buttocks.²²⁹ He sued under Title VII, claiming he was subjected to a hostile work environment, but the lower courts denied his claim since both he and his harassers were male.²³⁰ By unanimous vote, the Supreme Court reinstated Oncale's claim, stating that "nothing in Title VII necessarily bars a claim of discrimination 'because of sex' merely because the plaintiff and the defendant . . . are of the same sex."²³¹

While the *Oncale* opinion was widely touted as expanding the scope of protection of Title VII,²³² the holding is limited in a way that leaves open many questions of application. In response to the concern that Title VII would expand into "a general civility code for the American workplace,"²³³ the Court assured that even a same-sex plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination . . . because of sex.'"²³⁴ The Court then proposed two possible evidentiary routes to support an inference that a same-sex harassment plaintiff had been singled out for harassment on the basis of sex: (1) evidence that "a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace;"²³⁵ and (2) "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."²³⁶ These examples, strikingly irrelevant to the conduct before the Court involving harassment of a male in a male-dominated workplace, focus exclusively on biological sex, limiting sexual harassment to situations where the harasser treats men as a group differently from women as a group. Excluded from protection under this narrow reading is the effeminate or sexually prudish man who is singled

²²⁹ *Oncale v. Sundowner Offshore Serv. Inc.*, 83 F.3d 118, 119 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

²³⁰ *Id.*

²³¹ *Oncale*, 523 U.S. at 79.

²³² See, e.g., John Gallagher, *Friends of the Court: Landmark Decisions on Same-Sex Sexual Harassment and Marriage Side in Gays' Favor*, *ADVOC.: NAT'L GAY & LESBIAN NEWS-MAGAZINE* 13 (Mar. 31, 1998); John Cloud, *Harassed or Hazed?: Why the Supreme Court Ruled that Men Can Sue Men for Sex Harassment*, *TIME*, Mar. 16, 1998, at 55 (reporting that "most lesbians and gays praised Scalia's ruling" and that "feminists have rejoiced"); *Same-Gender Harassment is also Banned*, 219 *N.Y.L.J.* 1 (March 5, 1998) (referring to the *Oncale* decision as "a case of enormous importance for American workplaces").

²³³ *Oncale*, 523 U.S. at 80.

²³⁴ *Id.* at 81.

²³⁵ *Id.* at 80.

²³⁶ *Id.* at 80-81.

out by his male coworkers or employers and teased, taunted, and ridiculed because he does not conform to traditional and expected gender roles.

Indeed, the Court's ruling did not address whether Oncale was in fact sexually harassed, leaving it to the lower courts to work out what proof was required to establish that same-sex harassment was "because of sex." Oncale's case was remanded and Oncale was left to convince a jury that his co-workers and supervisor discriminated against him because of his sex. The parties ultimately settled the case,²³⁷ so it remains unclear whether the Supreme Court's ruling would have helped Oncale. In fact, while the *Oncale* decision allows the possibility of a same-sex sexual harassment claim, there is no indication that the Court would recognize the right of such a plaintiff based on the gender stereotyping that is typical of same-sex sexual harassment. Accordingly, even if Oncale's co-workers did everything he said they did, he still might have lost his case on remand.

Despite this lack of clarity and subtle limitation of the rights of same-sex harassment plaintiffs, Justice Ginsburg signed on to the majority opinion, foregoing an opportunity to provide additional guidance in a case with particular gender equality implications. Justice Ginsburg surely had an interest in maintaining the force of a unanimous court in an opinion widely believed to be an important victory for same-sex harassment plaintiffs, particularly in light of the fact that it was authored by Justice Scalia, one of the Court's arch-conservatives. A concurrence, however, would not have betrayed her strict principles regarding writing separately.

The examples enumerated by the Court, while not necessarily exhaustive of the ways in which a same-sex harassment plaintiff can prove that the harassment was "because of sex," reflect rigid, constrained conceptions of "sex" and sex-based conduct. As many courts below had done, the Court effectively bifurcated personhood into "male" and "female" components, attributing distinct characteristics to men and women as if they applied universally and without variation. By using "male" and "female" as opposing binaries in its narrow interpretation of "sex," the Court implicitly accepted the validity of biological sexual differences, perpetuating the stereotyped distinctions between the sexes that Justice Ginsburg famously abhors. Even if the "because of sex" requirement were not meant to be interpreted in such a limited way, Justice

²³⁷ See Mary Judice, *LA. Offshore Worker Settles Sex Suit: Harassment Case Made History in Supreme Court*, NEW ORLEANS TIMES-PICAYUNE, Oct. 24, 1998, at C1.

Ginsburg might, at a minimum have spoken out on the remarkable lack of guidance for applying this requirement in an all-male work environment.

She might also have argued for a more liberal interpretation of Title VII's "because of sex" language, so as to remain in line with opposite-sex sexual harassment jurisprudence. In that context, courts have long recognized that Title VII's reference to conduct based on an individual's "sex" is, in essence, a reference to conduct based on the individual's gender identity, because gender identity encompasses the socially-constructed and socially-relevant aspects of an individual's sex.²³⁸ Accordingly, the Supreme Court has recognized in opposite-sex sexual harassment cases that conduct based on gender-stereotyped notions of how an individual should appear and behave, is, in effect, conduct based on the plaintiff's sex within the meaning of Title VII.²³⁹

The *Oncale* case presented an opportunity for Justice Ginsburg to use a male litigant to advance her concern with gender equality over women's rights.²⁴⁰ Title VII was intended to lift all arbitrary and capricious hurdles to employment and to afford employees "the right to work in an environment free from discriminatory intimidation, ridicule, and insult."²⁴¹ Congresswoman May, arguing in favor of the addition of "sex" in Title VII, described Title VII as an "endeavor to have all persons, men and women, possess the same rights and same opportunities."²⁴² By potentially limiting the reach of Title VII protection to people who fail to conform to gender stereotypes where the harasser is of the opposite sex, the Court contravenes the explicit goals of the statute.

While strict adherence to the gender precedent set by the opposite-sex harassment cases might be expected from Justice Ginsburg, given the great strides the *Oncale* Court had already taken in

²³⁸ Many courts have, in fact, used the word "gender" interchangeably with the word "sex" in their analyses under Title VII. See, e.g., *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749 n.1 (4th Cir. 1996) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-41 (1989)); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *Schoiber v. Emro Mktg. Co.*, 941 F. Supp. 730, 734 (N.D. Ill. 1996).

²³⁹ See, e.g., *Price Waterhouse*, 490 U.S. 228 (affirming the U.S. District Court for the District of Columbia's finding of sex discrimination). *Price Waterhouse* had impermissibly discriminated on the basis of "sex" when it "acted on the basis of gender" by penalizing the plaintiff for failing to walk, talk, dress and groom herself "more femininely." *Id.* at 235, 240.

²⁴⁰ See *supra* notes 23-26 and accompanying text.

²⁴¹ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

²⁴² *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F. Supp. 393, 400 n.5 (D. Minn. 1996) (citing 110 CONG. REC. 2577, 2583 (1964)).

reconciling the body of law governing same-sex harassment claims, she may have felt it would be too far-reaching to enumerate the scope of the “because of sex” requirement more precisely. The Court recognized that sex-based harassment, like other forms of sex-based discrimination, is actionable irrespective of the sex of the plaintiff or the sex of the perpetrator, and acknowledged that conduct need not be based on sexual desire to be based on sex. In doing so, the Court, in several important respects, reconciled the same-sex sexual harassment doctrine with established standards for adjudicating sexual harassment claims. In light of Justice Ginsburg’s incremental approach to decision-making, it is possible she chose to leave more radical developments for another day.

3. *Davis v. Monroe County Board of Education*

In 1999, the Supreme Court decided another school sexual harassment case, but this time involving two students. *Davis v. Monroe County Board of Education*²⁴³ was a sex discrimination lawsuit brought by the mother of LaShonda Davis who was sexually harassed by G.F., a fifth grade classmate.²⁴⁴ Sitting behind her in the classroom, in physical education class, and in the hallways, G.F. would try to touch her breasts and vaginal area saying, “I want to get in bed with you” and “I want to feel your boobs.”²⁴⁵ He rubbed his body against hers in the hallways, put a doorstop in his pants, and pretended to have sex with her during physical education class.²⁴⁶ LaShonda complained about each incident, but neither her teachers nor the elementary school’s principal responded.²⁴⁷ Davis tried to get away from G.F. by asking for her seat assignment to be changed, but it was three months before the teacher let her move.²⁴⁸ Even then, G.F., who was never disciplined by the school, continued to sexually harass her in the hallways.²⁴⁹ She told her mother that she “didn’t know how long she could keep him off her,” and worried that the only way she could get him to stop would be to kill herself.²⁵⁰ It was the criminal justice system, not the school, that finally put an end to the harassment: G.F. was arrested for sexual battery and he pled guilty to the charge in juvenile

²⁴³ 526 U.S. 629 (1999).

²⁴⁴ *Id.* at 633.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 634.

²⁴⁷ *Id.* at 635.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 634.

²⁵⁰ *Id.*

court.²⁵¹

A divided Supreme Court affirmed the legal obligation of schools to protect students from severe and pervasive sexual harassment by other students.²⁵² The decision, authored by Justice O'Connor, with Justices Stevens, Souter, Ginsburg and Breyer joining, recognizes that student-on-student sexual harassment disrupts a student's ability to learn. The Court, however, applied the same stringent standard it adopted in *Gebser*, holding that a school board may be held liable only where it exhibits "deliberate indifference" to sexual harassment of which it has actual knowledge.²⁵³ The Court again rejected the use of agency principles, which it freely applied in the employment context, to impute liability to the school board—the school board will only be liable for "its own decision to remain idle in the face of known student-on-student harassment in its schools."²⁵⁴ Like the *Gebser* case, while recognizing the problems associated with harassment of a student, the Court actually imposed higher standards on students suing for sexual harassment than on similarly situated adult employees.²⁵⁵

Justice Kennedy, in a dissent that Chief Justice Rehnquist and Justices Scalia and Thomas joined, disagreed with the majority's assertion that a school "subjects" its students to discrimination when it knows of peer harassment and fails to respond appropriately.²⁵⁶ He pointed out that a violation of Title IX does not occur any time a student is subjected to discrimination, but rather, the student must be "subjected to discrimination under [an] education program or activity."²⁵⁷ To impose liability under Title IX, the discrimination must actually be controlled by the school.²⁵⁸ Whereas a teacher's conduct, in some cases, may be authorized by the school or be in accordance with its policies, a student's conduct "cannot be said to be 'under' the school's program or activity as required by Title IX."²⁵⁹ Justice Kennedy pointed out that "[m]ost public schools do not screen or select students, and their power to discipline students is far from unfettered."²⁶⁰ Accordingly, the dissenters, who espoused the rule in *Gebser* that could potentially impute

²⁵¹ *Id.*

²⁵² *Id.* at 633.

²⁵³ *Id.*

²⁵⁴ *Id.* at 641.

²⁵⁵ *See supra* note 123 and accompanying text.

²⁵⁶ *Davis*, 526 U.S. at 658 (Kennedy, J., dissenting).

²⁵⁷ *Id.* at 659 (Kennedy, J., dissenting) (citing 20 U.S.C. § 1681(a)).

²⁵⁸ *Id.* at 660 (Kennedy, J., dissenting).

²⁵⁹ *Id.* at 661 (Kennedy, J., dissenting).

²⁶⁰ *Id.* at 664 (Kennedy, J., dissenting).

liability on the school district for a teacher's misconduct, would apply a more stringent rule in the case of student misconduct.

Justices Ginsburg, Stevens, Souter, and Breyer, the four justices who signed on to Justice O'Connor's majority opinion, found themselves in an anomalous position. Presumably, they signed on to the majority because they agreed with the result—a valid damages claim was stated against the school board. However, the standard adopted by the majority opinion is the same standard these four justices opposed in the *Gebser* case, which was also authored by Justice O'Connor. These justices dissented in *Gebser* because of the majority's failure to interpret Title IX consistently with well established agency principles, but they subsequently signed on to a majority opinion espousing the same interpretation of Title IX.

Had these justices not signed on to Justice O'Connor's opinion or had they concurred in judgment only, the majority opinion would have turned into a plurality opinion with no precedential weight. While their views on the *Gebser* and *Davis* cases can not easily be reconciled and their position in the *Davis* case may seem unprincipled, it may have been their only means to secure Justice O'Connor's swing vote.

IV. CONCLUSION

In eight gender discrimination cases heard by the Supreme Court over the last ten years, Justice Ginsburg has deftly managed to navigate the fine line between advocating for the rejection of gender-role stereotypes that repress women and maintaining collegiality among judges, proving that her twin objectives of gender equality and collegiality are not mutually exclusive.

Despite her desire to foster cooperation among judges and her distaste for separate opinions written to satisfy personal ego, Justice Ginsburg has been surprisingly assertive in writing concurring and dissenting opinions. During her first nine terms she exceeded the Court's average for dissents and was above average for concurrences in five terms, often to advance her agenda of gender equality.²⁶¹ She authored the majority opinion of a landmark gender discrimination case with an expansive view of the Equal Protection Clause,²⁶² and has spoken out on issues ranging from the

²⁶¹ Ray, *supra* note 69, at 673-74, 654; *see also* Smith et al., *supra* note 180, at 78 (stating that during Justice Ginsburg's first term, "[w]ith respect to concurring opinions, she was tied for third among all justices in the frequency of explaining her views when she agreed with the outcome of a case but did not write the majority opinion.").

²⁶² *See U.S. v. Virginia*, 518 U.S. 515 (1996).

improper use of gender classifications based on stereotypes,²⁶³ to whether sex-based classifications are inherently suspect.²⁶⁴ She continues in her tradition of advocating for legal rules that can be applied neutrally to either sex,²⁶⁵ and has hinted that, despite the importance of precedent, judicial standards are not set in stone.²⁶⁶

Primarily, she has written separately to point out an unwarranted deviation from precedent, as in the *Miller* case,²⁶⁷ or to resolve an issue unresolved by the lead opinion, as in *Gebser*.²⁶⁸ She has advocated overruling precedent only in unique circumstances. In one unusual case, she wrote separately to lay the groundwork for future consideration of the intermediate scrutiny standard currently adopted for gender classifications,²⁶⁹ an issue she had fought for in incremental steps over the course of her career. Because this would overrule years of established precedent and was beyond the scope of her typical separate opinion, she advocated this change in a footnote. Subsequently, she has been hesitant to follow up on the issue in later cases.

At the same time, her judicial style has generated “balanced, intelligent opinions reflecting a profound sense and respect for precedent.”²⁷⁰ In style, she has been consistent in maintaining a narrow focus in her separate opinions, pointing out differences and failures of the lead opinion without undermining public confidence in the judiciary. Indeed, her *Burlington* concurrence was so brief it teetered on defeating the purpose for writing separately.²⁷¹ She has exercised restraint when developing new doctrine, going only so far as necessary for the case at hand, and building upon previous precedent whenever possible. She speaks in a temperate voice and emphasizes points of agreement whenever applicable.²⁷² With one exception, Justice Ginsburg has abstained from forcefully critiquing her colleagues’ legal reasoning.²⁷³

In deference to her collegiality philosophy, however, she has,

²⁶³ See *Miller v. Albright*, 523 U.S. 420, 460 (Ginsburg, J., dissenting).

²⁶⁴ See *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 26 (Ginsburg, J., concurring).

²⁶⁵ See *Miller*, 523 U.S. at 460 (Ginsburg, J., dissenting).

²⁶⁶ See *Harris*, 510 U.S. at 26 (Ginsburg, J., concurring).

²⁶⁷ See *Miller*, 523 U.S. at 469-70 (Ginsburg, J., dissenting).

²⁶⁸ See *Gebser*, 524 U.S. 274, 307 (1998) (Ginsburg, J., dissenting).

²⁶⁹ See *Harris*, 510 U.S. at 26 (Ginsburg, J., concurring).

²⁷⁰ Kushner, *supra* note 36, at 184.

²⁷¹ See *Burlington*, 524 U.S. at 766 (Ginsburg, J., concurring).

²⁷² See, e.g., *Harris*, 510 U.S. at 26 (Ginsburg, J., concurring); *Burlington*, 524 U.S. at 766 (Ginsburg, J., concurring).

²⁷³ See *Miller*, 523 U.S. at 460-71 (Ginsburg, J., dissenting) (uncharacteristically citing and deconstructing Justice Stevens’ opinion for the Court).

on occasion, slighted her other long-standing passion—gender equality. In those cases where she did not write separately, she forfeited the opportunity to advance the dialogue on gender equality that she had put on the table,²⁷⁴ or to put the Court and the public on notice that precedent had been dangerously subverted.²⁷⁵ Justice Ginsburg's lack of consistency as a vocal gender advocate has the potential to undermine her future separate opinions because she has unwittingly sent the message that she will not always follow through on her admonitions to her colleagues. She also failed to take several opportunities to clarify rules set forth in a majority opinion,²⁷⁶ and in one case, she even signed on to a majority opinion that applied a rule to which she had previously objected.²⁷⁷

On balance, Justice Ginsburg has maintained fidelity to her twin philosophies of collegiality and gender equality jurisprudence. Although only one voice amongst nine, her moderate tendency on the Court, both in substance and tone, has softened the intemperateness of some of her colleagues. Her decorum is rare in an era that prizes bold declarations over reflection and serves as a standard many in the law and media would do well to emulate and which could further an enlightened dialogue on such lightning rod topics as abortion and same-sex marriage.

²⁷⁴ See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.6 (1994), where Justice Ginsburg failed to write a separate concurring opinion although Justice Blackmun publicly refused to address and thus resolve the *Harris* footnote.

²⁷⁵ See *Nguyen v. INS*, 533 U.S. 53 (2001); *Oncale*, 523 U.S. 75 (1998).

²⁷⁶ See, e.g., *id.*

²⁷⁷ See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).