



Winter 2009

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Recommended Citation

Maureen A. Sanders, *A Woman for Her Time and Our Future*, 39 N.M. L. Rev. 29 (2009).
Available at: <https://digitalrepository.unm.edu/nmlr/vol39/iss1/5>

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P B M | A WOMAN FOR HER TIME AND OUR FUTURE

MAUREEN A. SANDERS*

Justice Pamela Burgy Minzner's legal career from 1965, when she first entered Harvard Law School, to her death in August 2007, spanned an interesting time in the legal landscape of the United States and New Mexico. During that time women began entering the legal profession in much greater numbers than had been the case historically.¹ Her entry into the legal profession in New Mexico in 1972² also came at about the same time that women's rights were recognized as worthy of constitutional protection.³ Additionally, her tenure as a well-respected and beloved professor at the University of New Mexico School of Law from 1973 to 1984 coincided with an increased recognition of the civil rights of women by the federal judiciary.⁴ From 1984 to 1994 she served on the New Mexico Court of Appeals.⁵ She was then appointed to become the second woman⁶ justice ever on the New

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1. Until the early 1960s no more than 3 percent of the lawyers in the United States were women. Deborah L. Rhode, *The Unfinished Agenda: Women and the Legal Profession*, ABA Commission on Women in the Profession, 2001, at 13. By the end of 1974 a total of only 120 women had been admitted to practice law in the entire history of New Mexico, including its territorial days. New Mexico Women's Bar Association in Cooperation with the State Bar of New Mexico, *A Celebration of New Mexico's First Women Lawyers*, at 32 [hereinafter *Celebration*] (on file with author). Yet thirty-three years later in 2007, 2,275 women were active members of the State Bar of New Mexico. They comprised 36.8 percent of the State Bar membership. State Bar of NM Demographics, updated Oct. 1, 2007. Nationally, nearly 400,000 of the approximately 1,000,000 practicing lawyers are women. Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 *FORDHAM L. REV.* 2207, 2207 (2002).

2. Justice Minzner was the seventy-eighth woman to be admitted to practice law in New Mexico. The first was Henrietta Pettijohn in 1892, ten years before New Mexico became a state. The committee which conducted the examination of Ms. Pettijohn reported that the "applicant passed a very creditable examination showing herself to be reasonably familiar with the various subjects embraced in the rules and as familiar with legal principles, as the average of persons admitted to practice upon first examination." Report of Committee In Re: Application of Henrietta Pettijohn to the New Mexico Bar, New Mexico Women's Bar Association in Cooperation with the State Bar of New Mexico, in *Celebration supra* note 1 (strike-through in original).

3. In *Reed v. Reed*, 404 U.S. 71 (1971), the U.S. Supreme Court ruled for the first time that a law that discriminates against women is unconstitutional under the Fourteenth Amendment. The Court, relying in part on the arguments presented by now Justice Ruth Bader Ginsburg, unanimously concluded that a state statute that provides that males must be preferred to females in estate administration denies women equal protection of the law. See also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543-44 (1971) (holding that employer violates Title VII when it refuses to hire women with young children while hiring men who are similarly situated).

4. See *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (striking down, under state public accommodations law, Jaycees' policy of excluding women by holding the practice is not protected by the First Amendment and that state has compelling interest in ending sex discrimination); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978) (requiring female workers to make larger pension fund contributions than male counterparts violated Title VII); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (holding that it is an unconstitutional violation of due process for public employers to require women to take unpaid maternity leave after first trimester because of a conclusive presumption that pregnant women are no longer able to work); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (holding that Equal Pay Act was violated when employer paid female day inspectors differently than male night inspectors); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down a federal statute that automatically granted housing and benefits for wives of male members of the military while requiring female members to demonstrate the "actual dependency" of their husbands to qualify for the same benefit).

5. *Celebration, supra* note 1, at 21.

6. *Id.* The first woman justice of the New Mexico Supreme Court was Justice Mary Coons Walters, who was appointed in 1984 and served in that position until 1988. Justice Walters was also the first woman district judge in New Mexico and the first woman Chief Judge of the New Mexico Court of Appeals. *Id.* at 13. Yet she was never selected by the other members of the New Mexico Supreme Court to serve as chief justice.

Mexico Supreme Court—just one year after Justice Ruth Bader Ginsburg became the second woman on the U.S. Supreme Court.⁷ The importance of having a second woman on the highest federal or state court was described by Justice Sandra Day O'Connor when discussing how she felt when Ruth Bader Ginsburg was appointed to the Supreme Court: “[T]he minute Justice Ginsburg came to the court, we were nine justices. It wasn’t seven and then ‘the women.’ We became nine. And it was a great relief to me....”⁸ Justice Minzner’s appointment to the state’s highest court illustrated how far women had progressed in the legal world in the few short decades of her career.

During Justice Minzner’s time as a member of the state judiciary, federal judicial decisions began to constrict the constitutional protections guaranteed by the Federal Constitution.⁹ As a result, the state courts experienced an increase in cases raising issues of state constitutional law. Additionally, the scope of the power of the separate branches of government was a frequent topic in the state courts during her tenure on the New Mexico Supreme Court.¹⁰ Thus, Justice Minzner had the opportunity through her opinions to discuss the parameters of the various branches of government and the obligations of government entities and officials to individuals in light of their State constitutional rights. Her opinions address difficult issues with real life ramifications for the parties appearing before her, be they individuals, public officials, state agencies, or business entities.

Justice Minzner lived her life and wrote the law with the same underlying principles: respect for individuals, appreciation for the proper role of all branches of government and its officials, and a deep belief in the importance of being fair. Justice Minzner died in the prime of her career, but her gift to New Mexico’s future generations is twofold. First, with her opinions on critical topics at the very heart of our constitution and our form of government, she has left footprints to guide future courts in their struggles with difficult, important issues. Second, for the women law students, lawyers, and judges of this state she has led the way and left us challenges but she has also left us her shoulders to stand upon. This essay will accordingly proceed with a discussion of several examples of Justice Minzner’s significant legal contributions to the state and then discuss how those contributions inform and inspire women in the profession.

One of Justice Minzner’s last official acts prior to her death on August 31, 2007, was to sign a New Mexico Supreme Court Order filed on August 28, 2007, conferring the honorary title of Chief Justice of the New Mexico Supreme Court posthumously to Mary Coons Walters. The Order was filed in recognition of “the historical significance of Justice Walters as the first woman appointed and elected as a Supreme Court Justice of the State of New Mexico” and “her unwavering dedication to the administration of justice in New Mexico.” Order No. 07-8500 (2007) (copy on file with author).

7. ACLU Women’s Rights Project, *Timeline of Major Supreme Court Decisions on Women’s Rights*, May 2006.

8. Marie C. Wilson, *Closing the Leadership Gap: Why Women Can and Must Help Run the World*, at xiv (2004). New Mexico, however, would not see two women supreme court justices sitting at the same time until Justice Petra Maes was elected in 1998.

9. See, e.g., *United States v. Leon*, 468 U.S. 897, 905 (1984) (rejecting the notion that the exclusionary rule is a “necessary corollary of the Fourth Amendment”); *Illinois v. Gates*, 462 U.S. 213 (1983) (adopting the totality of the circumstances analysis for probable cause).

10. See, e.g., *State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm’n*, 2007-NMSC-023, 160 P. 3d 566; *State ex rel. N.M. Judicial Standards Comm’n v. Espinosa*, 2003-NMSC-17, 73 P.3d 197; *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995).

I. JUDICIAL FOOTPRINTS

Justice Minzner authored over 300 opinions during her twenty-three years on the bench.¹¹ The breadth of topics she addressed is staggering. Consistently she brought her scholar's training, her love of history, and her thoroughness to each opinion. Two of the cases in which she authored opinions while on the supreme court reflect those qualities and are prime examples of Justice Minzner's approach to her judicial decision-making. They also offer an opportunity to understand her deep reverence towards the words and the promises of the New Mexico Constitution and the roles of the respective branches of government.

A. Separation of Powers

Early in Justice Minzner's tenure as a supreme court justice, she authored a unanimous decision¹² which reflected her strong adherence to the separation of powers doctrine in *State ex rel. Clark v. Johnson*,¹³ which has become the starting point for many subsequent opinions addressing that doctrine in New Mexico and other jurisdictions.¹⁴ Justice Minzner's opinion is remarkable both as a work written by a new justice and because it addressed a critical governmental issue that New Mexico had never faced before. In *Clark* the petitioners alleged that the Governor of New Mexico lacked the authority to commit the State to certain compacts¹⁵ and revenue-sharing agreements with certain Tribes under the Indian Gaming Regulatory Act (IGRA).¹⁶ The petitioners asserted that the Governor's actions were an attempt to exercise legislative authority, contrary to the doctrine of separation of powers¹⁷ as expressed in the state constitution.¹⁸

Justice Minzner's analysis, as is often the case, begins with the language of the constitution and then proceeds to the historical framework surrounding the language. She first noted that the New Mexico Constitution vests the Legislature with the legislative power¹⁹ and the Governor and six other elected officials with the executive power.²⁰

11. Number derived from Westlaw research conducted Nov. 4, 2008.

12. Justice Minzner's opinion obtained the concurrence of Chief Justice Baca, Justice Ransom, Justice Franchini, and Judge Donnelly of the court of appeals, sitting by designation. *State ex rel. Clark v. Johnson*, 120 N.M. 562, 578, 904 P.2d 11, 27 (1995).

13. 120 N.M. 562, 904 P.2d 11 (1995).

14. *See, e.g., State ex rel. Taylor v. Johnson*, 1998-NMSC-015, 961 P.2d 768; *see also McCartney v. AG*, 587 N.W.2d 824 (Mich. Ct. App. 1998); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 740 N.Y.S.2d 733 (N.Y. App. Div. 2002); *Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004).

15. Towards the end of the separation of powers discussion, the court noted that since 1923, the State of New Mexico has entered into at least twenty-two different compacts with other sovereign entities, all of which were entered into with the enactment of a statute by the Legislature. *See Clark*, 120 N.M. at 575, 904 P.2d at 24. Thus, the court viewed the Governor's role in the compact-approval process as limited to approving or vetoing the legislation. *Id.*

16. 25 U.S.C. §§ 2701–2721 (2006).

17. *Clark*, 120 N.M. at 566, 904 P.2d at 15.

18. N.M. CONST. art. III, § 1.

19. *Clark*, 120 N.M. at 573, 904 P.2d at 22 (citing N.M. CONST. art IV, § 1).

20. *Id.* (citing N.M. CONST. art. V, § 1).

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.²¹

Justice Minzner viewed this constitutional declaration of the separation of powers doctrine as fundamental in the structure of New Mexico state government and as a safeguard against the “accumulation of too much power in one governmental entity [which] presents a threat to liberty.”²² She did, however, recognize that commonsense allowed for some overlap in the exercise of governmental function because the “absolute separation of governmental functions is neither desirable nor realistic.”²³ However, returning to the necessity of putting the text of the constitutional provision into effect, she acknowledged that the New Mexico Supreme Court had “not been reluctant to intervene when one branch of government unduly ‘interfered with or encroached on the authority or within the province of’ a coordinate branch of government.”²⁴ Thus, she acknowledged the modern court’s struggle with difficult separation of powers questions which require hard judgments to protect against the twin evils our constitutional order was designed to prevent—undue “aggrandizement” of power by one branch over another, and “encroachment” by one branch on the essential functions of another.²⁵

Turning to the analysis required in the case, Justice Minzner began with the notion that the Legislature creates the law and the Governor executes the law.²⁶ Thus, the powers of each of the branches of government are “functionally identifiable.”²⁷ The question becomes, “Was the Governor’s entering into the compacts an execution of the law, or did it infringe on the legislative task of making the law?” The court noted the lack of any statutory or case law authorizing the Governor to enter into the compacts, and this absence of authority essentially drove the court’s reasoning in determining whether the Governor’s action disrupts the proper balance between the executive and legislative branches.²⁸

The court identified the Governor’s foreclosure of legislative action in areas where legislative authority is undisputed as the leading mark of possible undue disruption of legislative authority by the executive branch.²⁹ In Justice Minzner’s words, the “Governor’s present authority could not preclude future legislative

21. *Id.* (quoting N.M. CONST. art. III, § 1).

22. *Id.* Relying on her extensive knowledge of history, she quoted James Madison, who wrote: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” *Id.* (quoting THE FEDERALIST NO. 47, at 329 (James Madison) (1901 ed.)).

23. *Id.*; see *Mowrer v. Rusk*, 95 N.M. 48, 53, 618 P.2d 886, 891 (1980); see also *Sabre v. Rutland R. Co.*, 85 A. 693, 699 (Vt. 1913) (The “separation of powers doctrine does not mean an absolute separation of functions; for, if it did, it would really mean that we are to have no government.” (internal quotation marks and citation omitted)).

24. *Id.* (quoting *Mowrer*, 95 N.M. at 54, 618 P.2d at 892) (internal brackets omitted).

25. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 382 (1989).

26. *Clark*, 120 N.M. at 573, 904 P.2d at 22.

27. *Id.*; see also *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

28. *Clark*, 120 N.M. at 574, 904 P.2d at 23.

29. *Id.*

action, and he could not execute an agreement that foreclosed inconsistent legislative action or precluded the application of such legislation to the agreement.”³⁰

The court determined that undue disruption of the legislative authority existed. The compacts gave the Tribe a “virtually irrevocable and seemingly perpetual right to conduct any form of Class III gaming permitted in New Mexico.”³¹ The compacts detailed a specific balance between the roles of the State and the Tribe regarding regulation and licensing of gaming operations and the respective civil and criminal jurisdictions of the State and Tribe. Yet these decisions were made without any action on the part of the Legislature. The court concluded that “the Governor cannot enter into such a compact solely on his own authority.”³²

The court was further troubled by the compacts in light of the clear authority of the Legislature to prohibit or regulate all aspects of gambling on non-Indian lands. The Legislature had expressed a general repugnance for for-profit gambling. The compacts entered into by the Governor permitted virtually any form of commercial gambling. The court opined that perhaps the Legislature would have chosen a more restrictive approach as to what gambling would be allowed under the compacts.³³

Justice Minzner’s perception of the Legislature’s authority is of particular interest. She declares that the residual governmental authority of the State “should rest with the legislative branch rather than the executive branch. The state Legislature, directly representative of the people, has broad plenary powers. If a state constitution is silent on a particular issue, the Legislature should be the body of government to address the issue.”³⁴ Not surprisingly, the court concluded that the Governor lacked the authority under the state constitution to unilaterally bind the State to the compacts and revenue-sharing agreements.³⁵

Thus, Justice Minzner’s opinion cabined the authority of the Governor to that which was specifically vested by the state constitution to the Governor. Just as important, her opinion explicitly provided that any governmental authority not specifically vested by the state constitution in a particular branch of government resided with the Legislature. Justice Minzner’s strong opinion on the limitations of

30. *Id.*

31. *Id.*

32. *Id.*

33. Justice Minzner relied on Justice Robert H. Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952):

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting on the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Clark, 120 N.M. at 575, 904 P.2d at 24 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 634–55 (1952)).

34. *Clark*, 120 N.M. at 574, 904 P.2d at 24.

35. The court proceeded to determine that no New Mexico statute granted the Governor the authority to enter into the compacts in question. *Id.* at 576, 904 P.2d at 25. It also found the Governor’s reliance on federal law as his source of authority as being contrary to the core principles of federalism and that Congress did not invest state governors with powers in excess of that which they possessed under state law. The court predicted that the U.S. Supreme Court “would reject any such attempt by Congress to enlarge state gubernatorial power.” *Id.* at 577, 904 P.2d at 26.

the Governor's authority amidst much media attention³⁶ and at such an early stage of her supreme court tenure is an example of her personal strength and integrity. That personal strength and integrity continued throughout her career on the bench as evidenced in another landmark New Mexico decision.

B. *The Equal Rights Amendment*

Three years after *Clark*, Justice Minzner had an opportunity to address the extent of the authority of the executive branch of government in a case involving claims of sex discrimination. The New Mexico Constitution had been silent on the issue of sex discrimination until the passage of the Equal Rights Amendment (ERA) in 1972.³⁷ New Mexico courts have had opportunities to analyze the ERA in a variety of contexts almost since ratification.³⁸ However, it was not until 1998 that the supreme court, in *New Mexico Right to Choose/NARAL v. Johnson*,³⁹ for the first time provided a comprehensive examination and analysis of the meaning of the ERA and its application to sex-based claims. Justice Minzner's decision provided a historical analysis of gender discrimination jurisprudence and of the ERA and garnered national attention when it was handed down.⁴⁰

In *NARAL*⁴¹ the supreme court affirmed the district court's order permanently enjoining the New Mexico Human Services Department from enforcing a rule that prohibited the use of state funds to pay for abortions for Medicaid-eligible women except when necessary to save the life of the mother, to end an ectopic pregnancy, or when the pregnancy resulted from rape or incest.⁴² The court's decision focused on the New Mexico Equal Rights Amendment, which had been ratified twenty-five years earlier.⁴³

36. In 1995, Governor Johnson, talking about the New Mexico Supreme Court's decisions on gubernatorial authority, said his losses were being caused by "a chicken bone thing. They put a bunch of chicken bones in the microwave and take them out and spread them out and, you know, there's a certain thing they do as a result of the way the bones lie." *That Old Black Magic*, COWCHIP AWARDS, ALBUQUERQUE J., Jan. 7, 1996, at B1; *see also* Barry Massey, *Case Broaches Constitutional Powers*, ALBUQUERQUE J., June 28, 1999, at B8.

37. N.M. CONST. art. II, § 18.

38. *See, e.g.*, *Swink v. Fingado*, 115 N.M. 275, 279–80, 850 P.2d 978, 982–83 (1993) (ensuring equal treatment of women and men in domestic relations law); *Schaab v. Schaab*, 87 N.M. 220, 223, 531 P.2d 954, 957 (1974) (state alimony statute must treat husband and wife with exact equality); *State v. Gonzales*, 111 N.M. 590, 598–99, 808 P.2d 40, 48–49 (Ct. App. 1991) (jury selection); *State v. Sandoval*, 98 N.M. 417, 419, 649 P.2d 485, 487 (Ct. App. 1982) (criminal prosecutions); *see also* 75 Op. Att'y Gen. 193 (1975) (implicitly rejecting stereotypes of women as unfit for military service).

39. 1999-NMSC-005, 975 P.2d 841.

40. Steven A. Holmes, *Right to Abortion Quietly Advances in State Courts*, N.Y. TIMES, Dec. 6, 1998, at A1.

41. 1999-NMSC-005, 975 P.2d 841. Justice Minzner wrote the opinion for a unanimous court which included Justice Gene Franchini, Justice Joseph Baca, Justice Dan McKinnon, III, and Judge M. Christina Armijo of the New Mexico Court of Appeals who sat by designation.

42. *Id.* ¶ 2, 975 P.2d at 845.

43. Adopted in 1973, New Mexico's Equal Rights Amendment provides: "Equality of rights under law shall not be denied on account of the sex of any person." N.M. CONST. art. II, § 18. This language was added to the constitutional provision which provided due process and equal protection guarantees: "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." *Id.*

In *NARAL* the plaintiffs challenged a proposed state regulatory change which would result in severe limitations on the circumstances which would allow New Mexico Medicaid recipients to be eligible to have abortions covered by state funds.⁴⁴ Pursuant to the Hyde Amendment to the Medicaid Act, federal funds were not available to pay for abortions except under certain specified circumstances.⁴⁵ Beginning in December 1994, during Governor Bruce King's administration, New Mexico had extended medical assistance to indigent women in need of medically necessary abortions.⁴⁶ The Department of Health and Human Services, however, after the election of Governor Gary Johnson, promulgated a regulation that would have taken effect on May 1, 1995, and would have limited medical assistance for abortions in a way that would mirror the limitations of the Federal Medicaid program.⁴⁷ The plaintiffs challenged the revision solely as a violation of the state constitutional guarantees of due process, inherent rights,⁴⁸ equal protection, and equal rights. The reliance on state constitutional arguments by the plaintiffs was dictated by the U.S. Supreme Court's decisions regarding sex discrimination under the Federal Constitution, including the Court's refusal to view pregnancy-based classifications as sex discrimination and the Court's application of an intermediate standard of review to sex-based claims under the Equal Protection Clause of the U.S. Constitution.⁴⁹

In *Geduldig v. Aiello*, for example, the Supreme Court held that a state disability plan that excluded pregnancy from coverage did not discriminate based on sex in violation of the Federal Equal Protection Clause.⁵⁰ The Court reasoned: "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second group includes members of both sexes."⁵¹ Therefore, according to the Court, because some

44. 1999-NMSC-005, ¶¶ 1, 3, 975 P.2d 841, 844.

45. Several different versions of the Hyde Amendment provided various exceptions to the prohibition of using federal funds for abortions including from time to time the following: (1) where the life of the mother would be endangered if the fetus were carried to term; (2) where the medical procedure was necessary for the victims of reported rape or incest; (3) where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term as determined by two physicians. See Act of Nov. 20, 1979, Pub. L. No. 96-123 § 109, 93 Stat. 923, 926; Act of Oct. 12, 1979, Pub. L. No. 96-86, § 118, 93 Stat. 656, 662; Act of Oct. 18, 1978, Pub. L. No. 95-480, § 210, 92 Stat. 1567, 1586; Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460, 1460; Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434.

46. MEDICAL ASSISTANCE DIVISION PROVIDER MANUAL, reg. 766.3 (1994).

47. N.M. DEP'T OF HEALTH & HUMAN SERVS., FINAL REG. GOVERNING PREGNANCY TERMINATION PROCEDURES, (1995) (restricting funding of abortions to those "certified by a physician as necessary to save the life of the mother or to end an ectopic pregnancy, or when the pregnancy resulted from rape or incest").

48. The New Mexico Constitution provides: "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness." N.M. CONST. art. II, § 4.

49. See *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974), superseded by statute, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076, as recognized in *Newport News Shipping & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 667, 676-79 (1983); *Craig v. Boren*, 429 U.S. 190, 204 (1976).

50. 417 U.S. at 494.

51. *Id.* at 496 n.20. The Court has also upheld abortion-specific restrictions without seeming to find it necessary to subject such measures to established gender equal-protection scrutiny. See, e.g., *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (sustaining prohibition on abortions by nonphysicians without subjecting measure to gender equal-protection scrutiny); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (sustaining twenty-four hour waiting period, informed consent, and recordkeeping requirements specific to abortions without subjecting measures to gender equal-protection scrutiny).

women received disability benefits, the plan did not discriminate.⁵² As Professor Linda J. Wharton explains:

Legal commentators have widely criticized this decision and the Court's general insistence on formal equality as "injurious to women by ignoring important sex-based differences, or ultimately holding women to standards that have been established principally by men in a sexually unequal past." Specifically, commentators have emphasized that by analyzing "pregnancy-based classifications as if pregnancy were merely a physical condition appearing in only one sex," the Court ignored the long and troublesome history of women's disadvantageous treatment in the workplace and elsewhere precisely *because of* their reproductive capacity, thereby perpetuating the subordination of women.⁵³

In 1974, the U.S. Supreme Court announced for the first time that sex-based classifications were subject to an intermediate standard of review under the Equal Protection Clause of the Fourteenth Amendment.⁵⁴ Further, because the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike,"⁵⁵ the Court found that only laws that discriminate against women in situations in which they are similarly situated to men are subject to review under the intermediate standard of review. On that basis, the Supreme Court has routinely held that discrimination based on pregnancy, and abortion specifically, is not sex discrimination.⁵⁶

In *Harris v. McRae*,⁵⁷ the Supreme Court addressed the constitutionality of the Hyde Amendment which prohibited federal public funding for medically necessary abortions. It determined that states were not required by the Federal Constitution to fund medically necessary abortions which were not reimbursable by the Federal Medicaid agency.⁵⁸ The Supreme Court determined that the Hyde Amendment did not violate the guarantee of equal protection of the laws under the Due Process Clause of the Fourteenth Amendment and did not violate the Establishment Clause of the First Amendment.⁵⁹ The Court analyzed the Fifth Amendment equal protection claim as one based on a claim of discrimination against those who live in poverty, which is not a suspect class.⁶⁰ Ultimately, the Court applied a rational

52. 417 U.S. at 497.

53. Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1217 (2004) (footnotes omitted).

54. *Craig v. Boren*, 429 U.S. 190 (1976). In *Boren*, a group of young men joined a liquor store owner in challenging an Oklahoma law that allowed women but not men between the ages of eighteen and twenty-one to buy 3.2 beer. *Id.* at 192. The Court adopted a standard of intermediate scrutiny, under which classifications based on sex must serve and be substantially related to important governmental objectives. *Id.* at 204. It should be noted that while "strict scrutiny creates a clear rule that classification on the basis of a suspect class is almost always impermissible, intermediate scrutiny is much more ambiguous. It has no clear application; rather it occupies the vast gray area between rational basis and strict scrutiny." Sabrina Ariel Miesowitz, Note, *ERA Is Still the Way*, 3 N.Y.U. J.L. & LIBERTY 124, 131 (2008).

55. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

56. See *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

57. 448 U.S. 297 (1980).

58. *Id.* at 308-11.

59. *Id.* at 318-20.

60. *Id.* at 323.

basis standard and decided in favor of the government's denial of medical assistance.⁶¹

The inadequacy of the scope of federal constitutional protection afforded against sex discrimination would surely have extended to the plaintiffs in *NARAL* had the New Mexico courts relied on the federal model for their analysis. Although New Mexico courts have long held that the Federal Constitution does not limit the New Mexico Constitution,⁶² which often provides its citizens broader protections than its federal counterpart,⁶³ the New Mexico Supreme Court in *NARAL* turned to the independent language in the ERA, rather than a state-constitution-equal-protection analysis, to find the revised regulation unconstitutional.⁶⁴

Writing for the court, Justice Minzner made clear that the state ERA provides more comprehensive protection against sex discrimination than that available under the Federal Constitution. Reviewing both the history and text of the New Mexico Constitution, she concluded that "New Mexico's Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious consequences of the gender-based discrimination that prevailed under the common law and civil law traditions that preceded it."⁶⁵ Thus, the court reasoned, distinctions based on pregnancy, although a physical characteristic unique to women, must be subject to closer scrutiny.⁶⁶ In other words, challenges to sex-based classifications under the ERA are subject to strict scrutiny because any other interpretation would nullify the amendment.⁶⁷

The *NARAL* court rejected the reasoning of the U.S. Supreme Court in *Geduldig*, and noted that it "would be error...to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical condition unique to one sex."⁶⁸ Instead, the court reasoned that the New Mexico ERA demanded that lower courts look "beyond the classification to the purpose of the law," and to whether women would suffer any disadvantage as a result of the law. Thus, "[t]he question at hand is whether the government has the

61. *Id.* at 326.

62. *See* State v. Gutierrez, 116 N.M. 431, 435-36, 863 P.2d 1052, 1056-57 (1993) (noting that New Mexico courts "independently analyze the New Mexico constitutional proscription against unreasonable searches and seizures"); *see also* Blea v. City of Española, 117 N.M. 217, 221, 870 P.2d 755, 759 (Ct. App. 1994) (finding that the state supreme court has "continued its expansion of rights in favor of the citizen"); City of Farmington v. Fawcett, 114 N.M. 537, 544-45, 843 P.2d 839, 846-47 (Ct. App. 1992) ("[F]ederal decisions do not control the nature and scope of the rights guaranteed by the New Mexico Constitution.").

63. *See* State v. Attaway, 117 N.M. 141, 147-51, 870 P.2d 103, 109-13 (1994); State v. Gutierrez, 116 N.M. 431, 435-36, 863 P.2d 1052, 1056-57 (1993); State v. Cordova, 109 N.M. 211, 212 n.1, 784 P.2d 30, 31 n.1 (1989). As the New Mexico Supreme Court stated over twenty years ago:

[As] the ultimate arbiters of the law of New Mexico[, we] are not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, "unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter."

State *ex rel.* Serna v. Hodges, 89 N.M. 351, 356, 552 P.2d 787, 792 (1976) (quoting *People v. Brisendine*, 531 P.2d 1099, 1112 (Cal. 1975)), *overruled on other grounds*, State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

64. N.M. Right to Choose/*NARAL v. Johnson*, 1999-NMSC-005, ¶ 27, 975 P.2d 841, 850.

65. *Id.* ¶ 36, 975 P.2d at 853.

66. *Id.* ¶¶ 38-43, 975 P.2d at 853-55.

67. *Id.* ¶ 30, 975 P.2d at 851-52.

68. *Id.* ¶ 39, 975 P.2d at 854.

power to turn th[e] capacity [to bear children], limited as it is to one gender, into a source of social disadvantage.”⁶⁹ In that regard, the court noted that it could not overlook “the fact that ‘[s]ince time immemorial, women’s biology and ability to bear children have been used as a basis for discrimination against them.’”⁷⁰ Justice Minzner went on to cite several cases in which gender stereotyping based on women’s physiology and “maternal functions” were used as justification to deny them opportunities.⁷¹ Given the history of discrimination against women, the court held that a “searching judicial inquiry” was required for all classifications based on women’s ability to become pregnant and bear children.⁷²

In analyzing the relative positions of men and women in relation to the rule, the court found that both sexes were similarly situated with regard to Medicaid coverage and that the criteria for Medicaid eligibility were the same.⁷³ Further, the new rule discriminated against women by singling them out for different treatment than men with respect to medically necessary services:

[T]here is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision...that disfavors any comparable, medically necessary procedure unique to the male anatomy....

Thus, [the rule] undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women.⁷⁴

Because it operated to the disadvantage of women, the court found the rule was presumptively unconstitutional.⁷⁵ Thus, the State would be required to provide a compelling justification for using the sex-based classification.

The court soundly rejected the State’s proffered reason that the new rule was a cost-saving measure, particularly in light of the cost of the alternative: bringing the pregnancy to term.⁷⁶ In addition, the court found that the State’s interest in protecting the potential life of the unborn did not justify the rule because it was not the least restrictive means of accomplishing that goal.⁷⁷ Because the State had not produced any compelling justification for its discriminatory treatment of women seeking abortion, the court concluded that the rule violated the Equal Rights Amendment to Article II, section 18 of the New Mexico Constitution.⁷⁸

Throughout her tenure on the bench, the opinions authored by Justice Minzner have been noted for their thorough and careful analysis of the legal issues presented. The *NARAL* decision is no exception. In considering whether divergence from federal precedent was appropriate in the case, Justice Minzner thoroughly examined

69. *Id.* ¶ 40, 975 p.2d at 854 (quoting Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 33 (1992)).

70. *Id.* ¶ 41, 975 P.2d at 854 (quoting *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986)).

71. *Id.* ¶ 41, 975 P.2d 855 (quoting *Muller v. Oregon*, 208 U.S. 412, 422 (1908)).

72. *Id.* ¶ 43, 975 P.2d at 855.

73. *Id.* ¶ 44, 975 P.2d at 855.

74. *Id.* ¶¶ 46–47, 975 P.2d at 856.

75. *Id.* ¶ 47, 975 P.2d at 856.

76. *Id.* ¶¶ 49–52, 975 P.2d at 856–57.

77. *Id.* ¶ 54, 975 P.2d at 857. The court reasoned that the rule was too broad because it failed to sufficiently balance the State’s interest in potential life with its interest in the health of the mother.

78. *Id.*

both the text of the New Mexico ERA and its history and meaning in the context of sex discrimination under New Mexico law from territorial times to the present.⁷⁹ With regard to the ERA in particular, she noted that the guarantee became part of the state constitution after it passed “by an overwhelming margin.”⁸⁰ She further wrote that the ERA represented “the culmination of a series of state constitutional amendments that reflect an evolving concept of gender equality in this State.”⁸¹ Justice Minzner ultimately concluded that, based on the legislative history and distinctive text of the New Mexico ERA, the amendment was added to the constitution with the specific intention of providing greater protection against sex discrimination than “that already afforded by the general language of the Equal Protection Clause.”⁸²

Since the *NARAL* decision in 1998, New Mexico appellate courts have not had the opportunity to apply the more broadly-based framework of gender discrimination jurisprudence that resulted from Justice Minzner’s opinion. At least one scholar continues to argue that state ERAs have made little difference in advancing women’s equality.⁸³ Nevertheless, Justice Minzner’s jurisprudence on the unique provisions of the New Mexico ERA remains an important legal tool for combating sex discrimination in New Mexico. Her opinion gave real meaning to the passage of the ERA by the New Mexico Legislature and the people of New Mexico. Essentially, she gave effect to the process that led to the passage of the ERA.⁸⁴ She honored the role of the legislative process and the voters’ participation in the constitutional change⁸⁵ affording freedom from discrimination on account of the sex of any person.⁸⁶ In so doing she thwarted the efforts of the executive branch to limit,

79. *Id.* ¶¶ 27–37, 975 P.2d at 851–53.

80. *Id.* ¶ 29, 975 P.2d at 851.

81. *Id.* ¶ 31, 975 P.2d at 852; *see also* Holmes, *supra* note 40, at A1 (documenting state cases broadly interpreting state constitutions to allow greater abortion rights).

82. *Id.* ¶ 30, 974 P.2d at 851.

83. *See* Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 940–41 (1997). It is interesting to note that the article was written by the attorney who filed an amicus brief in *NARAL* on behalf of Americans United for Life, which argued in support of the State. Others, however, have recognized the importance of state constitutional law, particularly the ERAs, to enforcing women’s equality rights. Risa E. Kaufman, *State ERAs in the New Era: Securing Poor Women’s Equality by Eliminating Reproductive-Based Discrimination*, 24 HARV. WOMEN’S L.J. 191, 193 (2001).

84. It is interesting to note that Justice Minzner, while a professor at the University of New Mexico School of Law, testified at the legislative hearings in support of the passage of the ERA as a state constitutional amendment. Anne Bingaman, Esq., Remarks at the Memorial Service for Justice Minzner (Aug. 2007) (on file with author).

85. Justice Minzner subsequently noted in her dissent in *Espinosa* that “[W]e must never forget that it is a constitution we are expounding.” *State ex rel. N.M. Judicial Standards Comm’n v. Espinosa*, 2003-NMSC-017, ¶ 74, 73 P.3d 197, 214 (Minzner, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.)) (alterations in original). She went on to state: “If we are uncertain about the proper construction of a constitutional provision, it makes sense to me to adopt the construction that is more likely to have been the intention of those responsible for including it, rather than requiring that the Constitution be amended in order for that intention to be effectuated.” *Id.* She again reflected that belief in her dissent in *State ex rel. Richardson v. Fifth Judicial District Nominating Commission*, 2007-NMSC-023, ¶ 28, 160 P.3d 566, 574, where she included the constitutional provision at issue as an appendix, “because the text of the constitution is important.” She went on to note, “Other than those who have served on nominating commissions or applied for consideration by a nominating commission, few New Mexico citizens will have read the entire text of the relevant constitutional amendment, and the text as a whole is important.” *Id.*

86. In a subsequent opinion in the *NARAL* case, Justice Minzner exercised judicial restraint out of respect for the separation of powers constitutional provision. She refused to use the court’s equitable powers to award

through regulation, medical assistance to indigent women in a manner contrary to the will of the Legislature and the people.

II. CHALLENGES LEFT TO US⁸⁷

Justice Minzner's opinions give us some insight into her use of history to move the law forward and into her view of how state government works. Those opinions exist because she made a decision to become a law professor and later to seek judicial office. Those decisions were made at times when in New Mexico the law school faculty was primarily male and the judicial glass ceiling had only a few cracks. In both of those positions she became a mentor and a role model for other women, especially lawyers and law students. In that additional role she was constantly assuring the women in the legal community that they too could be successful in the legal profession in whatever way they chose. The importance of that gift to those of us who have followed her cannot be overstated. Her efforts in living her life and in seeking equality for women under the law and in the legal community itself challenge those remaining to continue that work.

Recently, Judge Linda Vanzi spoke at a Women's Law Caucus Award ceremony where Professor Ruth Kovnat was being honored. Judge Vanzi, after reflecting on the accomplishments of her grandmother, as well as Willa Cather, Gloria Steinem, Aung San Suu Kyi, Billie Jean King, and Benazir Bhutto, and their place in her life, stated:

These are a few of the women that have influenced me; they are part of my heritage. The fact of these women and their contributions inspire me, empower me, and give me courage. They help me clarify my sense of self and inform my decisions and my dreams in a big-picture kind of way.

Then there are those who have inspired and influenced me—who have inspired and influenced all of us in the practice of law—those trailblazers who came before us and changed the legal landscape. Their legacy enables us to be here today—to be law students, lawyers, deans, professors, and judges. They have opened so many doors for us, and we stand ready to take our place in this profession.

My reflections on women in the law branch into two areas. The first branch is how far we have come and how far there is to go. It is about how remarkable it is that we sit here as women lawyers and women law students. It is a timeline—of the past up to now.

The second branch is a compelling sense that we are in a new chapter. It is full of questions and curiosity. Now that we are in the law schools, firms, and courtrooms, what are we bringing to the practice of law? In what ways is our presence influencing and transforming the legal profession?

plaintiffs their attorneys' fees by adopting the private attorney general exception to the American rule regarding attorneys' fees because of the absence of a specific authorization by the Legislature. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, 986 P.2d 450.

87. Many of the thoughts expressed in this section are the result of countless discussions with the Garcia's Friday Morning Breakfast Club (Barbara Stephenson, Kathy Wissel, Sig Olson, Pat Stelzner, Karen Meyers) over the last thirty years and others, particularly Ruth Kovnat, David Stout, Jane Wishner, and Judge Linda Vanzi. The opinions expressed are, however, solely those of the author.

Let's talk about how far we have come. It took eighty-two years for the first 100 women to be admitted to the state bar. The 100th woman was admitted only in 1974. These first 100 women were the ones who scouted the territory and inch by inch carved out a small corner to claim as their own. They did this by bringing their best game, by being so certain of who they were and what their rights were that the system had to bend and flex for them. We could not be here without them.

So, tonight we stand on the shoulders of Henrietta Pettijohn, Nellie Brewer Pierce, Katherine Burns Mabry, and Gladys Brice Watts who were the first women admitted to practice law in New Mexico. They were admitted before women even had the right to vote.

We stand on the shoulders of Mary Coons Walters, a home economics major, WWII Air Force Pilot, and chain smoker who was admitted to the bar in 1962 and became the first woman district judge, first woman chief judge on the court of appeals, and in 1984—just twenty-four years ago—the first woman justice on the New Mexico Supreme Court.

We stand on the shoulders of Anne Bingaman, who was admitted to the bar in 1969 and became the first woman professor at this law school. She went on to head the Antitrust Division of the Department of Justice and has so many firsts since then it makes my head spin.

We stand on the shoulders of Justice Petra Maes and former Attorney General Patricia Madrid. Admitted to the bar in 1973, they were the first two Hispanic women to graduate from this law school. Justice Maes was the first Hispanic woman on the supreme court and first Hispanic woman to be chief justice. She still is the only Hispanic woman to ever have been a New Mexico Supreme Court justice. Patricia Madrid was the first woman and only Hispanic woman to be elected the State's Attorney General.

We stand on the shoulders of Justice Pamela Minzner who was admitted to the bar in 1972 and became a monumental figure in our community. She was a law professor, a judge on the court of appeals, and the first female chief justice on the New Mexico Supreme Court. I think we can all agree that Justice Minzner brought a feminine character to this profession. Ask those who knew her and they proudly discuss her intellectual rigor and profound grasp of the law, but they also warmly and affectionately remember her civility, her generosity, and her unique brand of simple kindness. Justice Minzner gave us so many reasons to be proud of being women in this profession. Justice Minzner was honored with many awards in her career, including the Justice Mary Walters award that you are presenting to another extraordinary woman tonight, and on whose shoulders we also stand, Professor Ruth Kovnat.

....

100 women in eighty-two years—what did these women answer to, and how far have we come? This is how far we have come—the past: 100 women in eighty-two years. The present: 100 women in two years. Your graduating classes today are at or over 50 percent women! So in just the next two years, the UNM Law School is going to graduate 100 women who will then study and sit for the bar. I don't know if that is a revolution or if it's simply evolution, but what a hopeful and inspiring thing it is.

Justice Sandra Day O'Connor said: "For both men and women the first step in getting power is to become visible to others, and then to put on an impressive show...as women achieve power, the barriers will fall. As society sees what

women can do, as women see what women can do, there will be more women out there doing things, and we'll all be better off for it."

And there *are* more women out there doing things, and they *have* put on a fantastic show, and we *are* better off. But we are not there yet; we are still mid-stride in our step to equality.

Think about it. It is remarkable that in 1967, less than 4 percent of women occupied seats in law schools and that today women comprise almost 50 percent of all law students. But it is also remarkable that women in law school still lag behind men on most measures of success, like volunteering in class, rating themselves, and gaining academic honors.

It is remarkable that in the 1960s, women accounted for about 3 percent of the nation's lawyers and that today their ranks have increased tenfold—we now make up about 30 percent of the U.S. bar. But it is equally remarkable that women are not assuming leadership roles in proportion to their numbers. While over 50 percent of associates at large firms are women, they only account for 17 percent of law firm partners, about 15 percent of general counsels of large companies, and, unbelievably only make up 2 percent of managing partners of large firms.

It is remarkable that men continue to make more money than women. According to one study, the median salary at large national firms after three years is \$15,000 higher for men than for women. So we have not exactly achieved full and equal access. We are still underpaid, under-represented as partners of big firms, and under-represented on the bench.

About the bench—let me talk for a minute about our courts. We have women judges in greater numbers than ever before in New Mexico....

In the Second Judicial District, ten of the twenty-six judges are women—now that is a respectable 38 percent.

However, as soon as you leave Bernalillo County things change. If we reach state-wide and look to communities in Las Cruces and Silver City, Raton and Farmington, Hobbs and Clovis, our numbers as a whole drop to less than 20 percent—and that 20 percent absolutely fails to represent the 51 percent of the population of New Mexico that is female.

Only three out of ten judges on the court of appeals are women—30 percent. And only three women have ever, ever served on the New Mexico Supreme Court. Three! Sixty-six men—only three women. That's less than five percent.

So, women in the law is indeed a remarkable story. Remarkable for what has been accomplished. And it's remarkable to realize how much is still needed. This holding of the great success and the undeniable shortcomings is a bit of a trick—for myself, it's essential to be honest and aware of both how far we have come and what we still must demand and what we still deserve. The cup my friends, is in fact *simultaneously* half full and half empty.

And so here we are, well into our journey. Right now, the era of the "firsts" is giving way to the era of the "nexts." And as I reflect on this new period, a happy buzz of interest and curiosity bubbles up inside me. What is going to be next? Our reflection shifts from the historical question, How do we get in there? to the contemporary question, We are here, now what are we going to do? Our effort is being rearranged, from pushing ourselves in and demanding a place at the table, to an effort characterized by asking ourselves, What can we as women bring to the practice of law?

Martha Barnett, a former president of the ABA said: "I'm tired of being an adjective. I'm tired of being the first woman. I used to think I wanted to be a

noun. But now I've decided I want to be a lawyer. And I'm a verb. I'm a verb, not with a question mark, but with an exclamation point. That is the way I feel women lawyers feel—that it is time to stop thinking in the next generation about first and second. It is not an issue.”

There is no question that diversity enriches and strengthens, that it contributes to what the late judge Alvin Rubin described as “a distinctive medley of views influenced by difference in biology, cultural impact, and life experience.” Women, like different racial, ethnic, or economic groups, bring uniquely valuable perspectives, aptitudes, and concerns to the practice of law. And so we can be certain that our presence is and will continue to be a huge part of the evolution of the legal profession. So I ask you, which piece of that change do you want to be a part of? At some point each of us chose this path—we could have been doctors or teachers, bankers or cooks.

What is your motivation to be here? What is authentically you? In what ways does the legal profession fit into your most personal dreams? Bring that—bring those ideas and interests and passions—and your part in the evolution will be positive and worthy.

The first 100 women I mentioned earlier, they each acted from their knowledge of themselves, of who they were—they lived from their core. I try to move through each day mindful of where I should work within the status quo and where I can nudge the status quo to work with me. We must all use the talent and time we have to nurture, to better society, and to promote and advance the causes of women as lawyers—because if we don't, we all lose.

So, in the words of Justice Ruth Bader Ginsburg: “May the impressive progress continue, and the persistent problems gain positive solutions.”⁸⁸

So where *do* we go from here? Unfortunately, gender bias, discrimination, and harassment still exist in this State. Women are still paid less than men in New Mexico.⁸⁹ Women are still subjected to gender discrimination and harassment at work.⁹⁰ Judge Minzner's two opinions discussed above poignantly illustrate where the power to attain equality for New Mexican women lies. It lies in all three branches of government and in the people. Gender diversity certainly exists in the people, but it continues to be missing in the three branches of government. Women are needed in the legislative and executive branches of government to push for the passage and enforcement of laws and regulations that address the remaining gender inequalities. Yet, women seeking public office face tremendous barriers.

The challenge for women competing in politics or business is less misogyny than unconscious sexism: Americans don't hate women, but they do frequently stereotype them as warm and friendly, creating a mismatch with the stereotype we hold of leaders as tough and strong. So voters (women as well as men, though

88. Judge Linda Vanzi, Remarks at a Women's Law Caucus Awards Ceremony (Mar. 27, 2008) (transcribed and edited from Judge Vanzi's notes on file with author).

89. “Women are poorer than men in almost all New Mexico counties, and earn, on average, only 78 percent of what men earn. For women of color, the earnings gap is significantly larger.” Southwest Women's Law Center, Equal Pay Report, <http://swwomenslaw.org/equalpay.htm> (Apr. 22, 2008).

90. See, e.g., *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 976 P.2d 999.

a bit less so) may feel that a female candidate is not the right person for the job because of biases they're not even aware of.⁹¹

Women are also needed to run for judicial office so that their perspective will be a part of the decision-making process and so that participants in the judicial process perceive the judiciary as unbiased. In 1990 the State Bar Task Force on Women and the Legal Profession issued a report which stated:

In our system of government, it is imperative that all persons have confidence in the fairness and neutrality of our judicial process. If participants in the judicial system, whether they be litigants, attorneys or the public at large, sense that one group is more credible, more powerful and more effective in the judicial arena than another group, then a system premised on the concept of equal rights and equal access to justice for all, is weakened.⁹²

Some progress towards gender diversity in the judiciary has been made in New Mexico but the progress has been slow.

Justice Minzner played important roles in New Mexico government as an educator at the State's only law school and as a member of the judiciary. Her extensive, active participation in state government and in her community affected current and future female members of state government as well as the female citizens of the state. In *Clark* she established the parameters of authority between the legislative and executive branches of government. The *Clark* opinion gives guidance to future women public officials as to the steps necessary to continue the path toward equality for women in New Mexico. Certain steps must be taken by future legislators and others by future governors to accomplish the change needed to attain equality for women. A woman's voice and perspective is necessary in both branches of government.

Similarly the *NARAL* opinion reveals the need for individuals working for women's equality in all three branches of government, as well as in its citizenry. The *NARAL* opinion was the final step in a long march which began with the Legislature and the citizens passing the ERA in 1972 as a result of the advocacy effort of many New Mexicans. Justice Minzner, writing for the supreme court, insured that the invidious consequences of the gender-based discrimination that prevailed under the common law and civil law traditions preceding the ERA were prohibited. The need for advocates, public officials, and lawyers to work for equality for women continues to exist today.

For those of us who benefitted from Justice Minzner being our role model and watching her quiet fight for equality, we have an obligation to rise to the challenges she left us. We must stand on Justice Minzner's shoulders and fight for equality for women and become role models for those around us. We need to be involved in our communities and in our government to work towards a social environment that nurtures and preserves us, our mothers, our sisters, and our daughters. We need to embrace and work towards a goal of ensuring that women in this country actually experience the same freedoms and benefits afforded men. If we do that, we can

91. Nicholas D. Kristof, *Our Racist, Sexist Selves*, N.Y. TIMES, Apr. 6, 2008, at WK14.

92. Report of State Bar Task Force on Women and the Legal Profession, at 23 (1990).

