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## Constitutional Law - Separation of Powers: The North Dakota Supreme Court Invalidates a Discovery Statute That Conflicted with a Rule of Procedure

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CONSTITUTIONAL LAW—SEPARATION OF POWERS:  
THE NORTH DAKOTA SUPREME COURT  
INVALIDATES A DISCOVERY STATUTE THAT  
CONFLICTED WITH A RULE OF PROCEDURE  
*State v. Hanson*, 558 N.W.2d 611 (N.D. 1996)

I. FACTS

On March 14, 1995, Dale Clayton Hanson was arrested and charged with driving under the influence of an intoxicating substance.<sup>1</sup> In preparation for trial in Morton County District Court, Hanson's attorney requested discovery of the prosecution witnesses and their statements, under Rule 16(f)(1) of the North Dakota Rules of Criminal Procedure.<sup>2</sup> The State complied with Hanson's request and in turn asked for discovery of the defense witnesses, and any statements they may have made, under Section 29-01-32 of the North Dakota Century Code.<sup>3</sup> Hanson made a motion to limit the information he must disclose to that which is defined under Rule 16 of the Rules of Criminal Procedure.<sup>4</sup> Hanson further insisted that Section 29-01-32 is unconstitutional, and as such, he had no duty to disclose information.<sup>5</sup>

The district court determined that Section 29-01-32 is unconstitutional because it violates the Separation of Powers Doctrine and Article VI, Section 3 of the North Dakota Constitution.<sup>6</sup> The district court further ruled that Hanson need only disclose information pursuant to Rule 16 of the Rules of Criminal Procedure.<sup>7</sup> On appeal and in a unanimous decision, the North Dakota Supreme Court *held* that section 29-01-32 was in direct conflict with Rule 16 of the North Dakota Rules of Criminal

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1. *State v. Hanson*, 558 N.W.2d 611, 611 (N.D. 1996).

2. *Id.* Hanson's attorney also requested discovery of documents, tangible objects, and reports of examinations and tests under Rule 16(a)(1)(C), -(D) of the North Dakota Rules of Criminal Procedure. *Id.*

3. *Id.* In addition, the prosecution asked for discovery of examinations and tests, and any other evidence the defense intended to use at trial, pursuant to Rule 16 of the Rules of Civil Procedure. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 611-12. Article VI, section 3 provides that "[t]he supreme court shall have the authority to promulgate the rules of procedure" of the courts. N.D. CONST. art. VI, § 3.

7. *Hanson*, 558 N.W.2d at 611-12.

Procedure, and was, therefore, a violation of the separation of powers doctrine.<sup>8</sup>

## II. LEGAL BACKGROUND

Article XI, Section 26 of the North Dakota Constitution creates the Separation of Powers Doctrine by stating that “[t]he legislative, executive, and judicial branches are coequal branches of government.”<sup>9</sup> This language creates the Separation of Powers Doctrine.<sup>10</sup> The Separation of Powers Doctrine establishes a balance of power between the legislative, executive, and judicial branches of government.<sup>11</sup> The creation of the three branches acts as a partition of governmental power with an “implied exclusion of each branch from the exercise of the functions of the others.”<sup>12</sup> Harmony within the government can best be achieved if each branch exercises restraint when dealing with powers exclusively vested in another branch.<sup>13</sup>

When determining whether a statute violates the Separation of Powers Doctrine, the courts must rely on a few settled principles.<sup>14</sup> First, the

8. *Id.* at 615-16. Generally, the state would not be allowed to appeal a trial court's decision unless permitted by statute. See *City of Bismarck v. Materi*, 177 N.W.2d 530, 535 (N.D. 1970). However, pursuant to Article VI, section 4 of the North Dakota Constitution, only the North Dakota Supreme Court, by agreement of at least four justices, may determine that a statute is unconstitutional. N.D. CONST. art. VI, § 4. Section 4 provides that, “[a] majority of the supreme court shall be necessary to constitute a quorum or to pronounce a decision, provided that the supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide.” *Id.* This language eliminates the possibility of one district judge invalidating a statute enacted by the legislature, without appeal. *Materi*, 177 N.W.2d at 537. As such, the court in *Hanson* allowed the state to appeal the district court's ruling. *Hanson*, 558 N.W.2d at 612.

9. N.D. CONST. art. XI, § 26.

10. See *State ex rel Spaeth v. Meiers*, 403 N.W.2d 392, 394 (N.D. 1987) (acknowledging that the creation of the three branches of government is a separation of the powers, and recognizing that each branch is allocated different responsibilities).

11. *Hanson*, 558 N.W.2d at 615; see *State v. Kromarek*, 52 N.W.2d 713, 714 (N.D. 1952); see also *ex rel Spaeth*, 403 N.W.2d at 394 (emphasizing that Article XI, section 26 of the constitution apportions varying tenets of power to each branch of government). Other jurisdictions conform to the same theory of separation of powers. See generally *Schwarzkopf v. Sac County*, 341 N.W.2d 1 (Iowa 1983); *Collins v. Director, Dept. of Corrections*, 395 N.W.2d 77 (Mich. Ct. App. 1986); *Neighborhood Sch. Coalition v. Independent Sch. Dist.*, 484 N.W.2d 440 (Minn. Ct. App. 1992); *State ex rel Sheppard v. Nebraska Equal Opportunity Comm'n*, 557 N.W.2d 684 (Neb. 1997); *Cary v. City of Rapid City*, 559 N.W.2d 891 (S.D. 1997); *Joni B. v. State*, 549 N.W.2d 411 (Wis. 1996).

12. *Hanson*, 558 N.W.2d at 611 n.1 (quoting *ex rel Spaeth*, 403 N.W.2d at 394).

13. *Id.* at 615. The Separation of Powers principle is not confined to North Dakota law, but is a fundamental theory of American government. *Verry v. Trenbeath*, 148 N.W.2d 567, 570 (N.D. 1967); see *Kromarek*, 52 N.W.2d at 714-15. The United States also adheres to the separation of powers doctrine set forth in the United States Constitution. 16A AM. JUR. 2D *Constitutional Law* § 294 (1979). The underlying meaning of “separation of powers” is that “the whole power of one department should not be exercised by the same hands which possess the whole power of either of the other departments, and that no one department ought to possess directly or indirectly an overruling influence over the others.” *Id.* The Separation of Powers principle is sometimes considered the most important principle of government because the system of checks and balances created by the coequal branches is necessary to sustain the freedom and liberties guaranteed by the Constitution. *Id.* § 296.

14. *Verry*, 148 N.W.2d at 570.

North Dakota Constitution provides for limits on power, not grants of power.<sup>15</sup> Therefore, the person challenging the constitutionality of a statute must specify which provision of the constitution limits the power of the legislature, and prevents them from enacting the statute.<sup>16</sup> Second, the court must attempt to find the statute valid under the constitution if possible.<sup>17</sup> Finally, if there is any doubt as to the validity of a statute, the court must determine that the statute is constitutional.<sup>18</sup>

A major issue in any separation of powers dispute is assessing the exclusive functions of the legislative, judicial, and executive branches.<sup>19</sup> It is difficult, if not impossible, to determine exactly where the power of the judiciary ends and the power of the legislature begins, and vice-versa.<sup>20</sup> According to the North Dakota Supreme Court, the legislature has the power to determine the best policies for the future and enacts them into law.<sup>21</sup> The judiciary construes the law, examines its constitutionality, and determines the rights granted under the law as it is enacted.<sup>22</sup> Finally, the executive branch has the power to administer the law as it is enacted.<sup>23</sup> Since there is no bright line distinction between the respective powers, the decision of whether a function is legislative, judicial, or executive, must be made on a case-by-case basis.<sup>24</sup>

One of the first North Dakota cases to raise the Separation of Powers issue was *Glaspell v. City of Jamestown*.<sup>25</sup> *Glaspell* involved a challenge to a law whereby landowners could change city boundaries by petitioning the city council.<sup>26</sup> If the city council denied a landowners' request, the statute allowed the landowners to petition the district court, which would have the power to grant or deny the petition.<sup>27</sup> On appeal, the North Dakota Supreme Court held that the law was unconstitutional because determining city boundaries was a legislative, rather than a

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. See *Glaspell v. City of Jamestown*, 88 N.W. 1023, 1023 (N.D. 1902) (noting that some states have found that determining city boundaries is a responsibility delegated to the judiciary, while other states have found it to be a legislative function).

20. 16A AM. JUR. 2D, *supra* note 13, § 297.

21. *State v. Kromarek*, 52 N.W.2d 713, 715 (N.D. 1952).

22. *Id.*

23. *Id.*

24. 16A AM. JUR. 2D, *supra* note 13, § 297.

25. 88 N.W. 1023, 1023-24 (N.D. 1902) (arguing that the district courts did not have jurisdiction to grant relief to the petitioner because the adjustment of city limits is traditionally a legislative matter).

26. *Glaspell v. City of Jamestown*, 88 N.W. 1023, 1024 (N.D. 1902). *Glaspell* and others owned land within the city limits of Jamestown. *Id.* at 1023. Since the land was pasture and farmland which did not benefit the city, the landowners wanted it removed from the city limits. *Id.* The law allowed the removal to take place, assuming that a petition was brought before the city council. *Id.* at 1024.

27. *Id.* The city council denied the petition, so the landowners brought the matter to the district court, and the petition was granted. *Id.* at 1023.

judicial function.<sup>28</sup> Since this matter was not within the powers delegated to the judiciary by the constitution, the district court impermissibly performed a legislative function.<sup>29</sup>

The North Dakota Supreme Court continued its strict adherence to the Separation of Powers Doctrine in *State v. Baker*.<sup>30</sup> The court in *Baker* considered the constitutionality of the Recodification Act and the group created by the Act called the Code Revision Commission.<sup>31</sup> The Commission's members were chosen by the North Dakota Supreme Court, and under the court's control.<sup>32</sup> The Commission performed many functions, including revising the laws of the state.<sup>33</sup> The constitutionality of this scheme was challenged on the grounds that the Commission was performing legislative duties while under the supervision of the court.<sup>34</sup>

The court stated that its powers originate exclusively from the constitution, and "[n]o duties can be assigned to the court that it, under its judicial powers granted by the constitution, could not perform without specific legislative assignment."<sup>35</sup> The majority held that, because the Commission was performing legislative acts while under the control of the supreme court, the Recodification Act was an unconstitutional violation of the Separation of Powers Doctrine.<sup>36</sup>

Under Separation of Powers, each branch must refrain from exercising functions delegated to the other branches.<sup>37</sup> As an example, in *Spaeth v. Meiers*,<sup>38</sup> the North Dakota Supreme Court refused to grant an

28. *Id.* at 1026. The creation or change of city boundaries is a legislative function under the constitution which provides in part, "[t]he legislative assembly shall provide by general law for the organization of municipal corporations." N.D. CONST. art. VI, § 130. The determination of whether a function is legislative, judicial, or executive can vary from jurisdiction to jurisdiction. See *Glaspell*, 88 N.W. at 1026 (noting that although North Dakota courts routinely hold that creating and changing city boundaries is a legislative function, courts in other states have held that it is a purely judicial function). A court in one jurisdiction may find the function judicial, while a court in another jurisdiction may find it legislative. *Id.*

29. *Glaspell*, 88 N.W. at 1026; see also *City of Carrington v. Foster County*, 166 N.W.2d 377, 385 (N.D. 1969) (finding a statute which granted authority to the district courts to hear annexation petitions unconstitutional because it was an unlawful delegation of legislative powers which violated the Separation of Powers Doctrine).

30. 288 N.W. 202, 210 (N.D. 1939) (finding the Recodification Act of 1939 unconstitutional).

31. *State v. Baker*, 288 N.W. 202, 203 (N.D. 1939).

32. *Id.*

33. *Id.* Other duties of the Commission were to "prepare, annotate and index a complete set of rules of practice and procedure for all courts of the state, . . . [and] to revise, annotate and index the laws of the state." *Id.*

34. *Id.*

35. *Id.* at 209. The Supreme Court of North Dakota stated that the Legislature cannot delegate duties to the courts unless it passes a test. *Id.* The test is whether the duties delegated could have been performed by the court under its general powers. *Id.*

36. *Id.*

37. *State ex rel Spaeth v. Meiers*, 403 N.W.2d 392, 394 (N.D. 1987).

38. 403 N.W.2d 392 (N.D. 1987).

application for a writ of mandamus because the dispute bringing about the application was over interpretation of the procedural rules of the legislature.<sup>39</sup> The court stated that, if the issue was whether or not the procedural rules were constitutional, then it would be within its power to make such a determination.<sup>40</sup> However, under the constitution, each branch of government makes its own rules of procedure and it is the duty of that branch to make any and all interpretations of those rules.<sup>41</sup> Consequently, the court refused to intervene in a clearly legislative matter.<sup>42</sup>

Notwithstanding its power to enact procedural rules, the court recognizes a statute affecting those rules.<sup>43</sup> The court also acknowledges statutes that supplement the rules and/or function with the existing rules.<sup>44</sup> For instance, in *City of Fargo v. Ruether*,<sup>45</sup> the City argued that Section 39-20-14 of the North Dakota Century Code conflicted with Rules 401 and 402 of the North Dakota Rules of Evidence.<sup>46</sup> At issue was the admissibility of an Alcohol Level Evaluation Roadside Tester (A.L.E.R.T.) alcohol screening test.<sup>47</sup> Section 39-20-14 states that the results of the roadside test must be used "only for determining whether or not a further test shall be given."<sup>48</sup> The City argued that this statute conflicts with Rules 401 and 402 which makes any relevant evidence admissible.<sup>49</sup> On appeal for the suppression of the A.L.E.R.T. test, the North Dakota Supreme Court found no conflict between the statute and the Rules of Evidence.<sup>50</sup> Although the Rules of Evidence prevail over conflicting statutes, the legislature is given much latitude in regards to admissibility of evidence. In addition, Rule 402 explicitly states that statutes may be enacted that make relevant evidence inadmissible.<sup>51</sup>

Only when a statute conflicts with a rule will the court invalidate the statute.<sup>52</sup> The precedent in North Dakota, and the decision in *Spaeth*, is

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39. State *ex rel* Spaeth, 403 N.W.2d at 394. The matter in dispute was whether the President of the Senate can refuse to accept a bill sent to the Senate by the House because it did not pass by a two-thirds majority. *Id.* at 393.

40. *Id.*

41. *Id.*

42. *Id.*

43. State v. Vetsch, 368 N.W.2d 547, 552 (N.D. 1985) (quoting State v. Seidel, 691 P.2d 678, 682 (Ariz. 1984)).

44. *Id.*

45. 490 N.W.2d 481 (N.D. 1992).

46. *City of Fargo v. Ruether*, 490 N.W.2d 481, 484 (N.D. 1992).

47. *Id.* at 482.

48. *Id.* at 483.

49. *Id.* at 484.

50. *Id.*

51. *Id.* "Unless there is a conflict, a statutory rule supplements our rules of evidence." *Id.* at 483.

52. State v. Vetsch, 368 N.W.2d 547, 552 (N.D. 1985); *see also* McDougall v. Eliuk, 554 N.W.2d

that each branch has exclusive control over its rules of procedure. As such, it is no surprise that the court in *Hanson* found that a statute, which controlled discovery procedures, conflicted with the court enacted rules of procedure.

### III. ANALYSIS

Writing for the majority in *Hanson*, Justice Neumann considered at whether Section 29-01-32 conflicted with an existing procedural rule, and if so, whether the statute violated the Separation of Powers Doctrine. Section 29-01-32 states in part:

1. Upon the prosecuting attorney's compliance with a written request of the defendant for disclosure under . . . Rule 16 of the North Dakota Rules of Criminal Procedure, the defendant, upon written request by the prosecuting attorney, shall reciprocate in kind and disclose to the prosecuting attorney:

a. The names and addresses of persons, other than the defendant, the defendant's attorney intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons or reports of the statements of those persons . . .<sup>53</sup>

Rule 16, on the other hand provides, in part:

(b) Disclosure of evidence by the defendant.

(2) Information not subject to disclosure. [T]his subdivision does not authorize the discovery or inspection . . . of statements made by the defendant or by prospective prosecution or defense witnesses to the defendant, or to the defendant's agents or attorneys.

(f)(1) Upon written request of the defendant, the prosecution shall furnish to the defendant a written list of the names and addresses of all prosecution witnesses, and any statements made by them, whom the prosecuting attorney intends to call in the presentation of the case in chief, together with any

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56, 58-59 (Mich. Ct. App. 1996) (concluding that the Supreme Court's rule-making powers are superior to the powers of the legislature in matters of court procedures); *State v. Johnson*, 514 N.W.2d 551, 554 (Minn. 1994) (finding that when dealing with court procedures, the rules promulgated by the Supreme Court take precedence over statutes); *State v. Olson*, 482 N.W.2d 212, 215 (Minn. 1992) (stating that the North Dakota Supreme Court has the ultimate authority over the procedural rules of the court). *But see* *Butler v. Woodbury County*, 547 N.W.2d 17, 20 (Iowa. Ct. App. 1996) (concluding that the courts may proscribe procedural rules subject to the rules enacted by the legislature); *In re E.B.*, 330 N.W.2d 584, 588 (Wis. 1983) (recognizing that the legislature has ultimate control over the courts' procedural rules).

53. N.D. CENT. CODE § 29-01-32 (1995), *repealed* by S.L. 1997, ch 51, § 40 (emphasis added).

records of prior felony convictions of any of those witnesses which are within the knowledge of the prosecuting attorney.<sup>54</sup>

The State conceded that the Rule 16 requirement for disclosure of statements or reports of statements by defense witnesses conflicts with a portion of Section 29-01-32.<sup>55</sup> The State argued that the section of the statute that required disclosure of "names and address of persons the defendant intends to call as witnesses at trial" was not in conflict with Rule 16 in that Rule 16 does not expressly address the disclosure of names and addresses of defense witnesses.<sup>56</sup> Consequently, the State argued that only the portion of the statute in conflict with Rule 16 could be found unconstitutional.<sup>57</sup>

The court looked to Article VI, Section 3 of the constitution, which provides that: "[T]he supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state . . ." <sup>58</sup> Although the constitution states that the supreme court has the authority to promulgate the rules of procedure for the courts, the State argued that interplay between rules and statutes is common and valid,<sup>59</sup> evidenced by evidentiary statutes.<sup>60</sup>

For example, the court examined Rule 43(a) of North Dakota Rules of Civil Procedure and Rule 26 of North Dakota Rules of Criminal Procedure which provide in part that "evidence shall be admitted which is admissible under the statutes of this state, . . . or other rules adopted by the North Dakota Supreme Court."<sup>61</sup> The court acknowledged that the procedural rules allow for a great deal of deference to be given to the legislature.<sup>62</sup> The court looked to other law that contains phrases such as "unless otherwise provided by law," and found this language to be necessary in the rule before there can be any interplay between statutes

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54. N.D. R. CRIM. P. 16 (emphasis added).

55. *State v. Hanson*, 558 N.W.2d 611, 613 (N.D. 1996).

56. *Id.*

57. *Id.*

58. N.D. CONST. art VI, § 3.

59. *Hanson*, 558 N.W.2d at 613-14. Interplay between statutes and rules has been found valid in some cases. See *City of Fargo v. Ruether*, 490 N.W.2d 481, 484 (N.D. 1992) (concluding that there was no conflict between § 39-20-14 and rules 401 and 402 of the Rules of Evidence); *City of Fargo v. Dawson*, 466 N.W.2d 584, 586 (N.D. 1991) (finding no disagreement between rule 23(a) of the Rules of Procedure and §§ 27-07.1-31, -32 of the North Dakota Century Code, which all address with waiver of a jury trial).

60. *Hanson*, 558 N.W.2d at 613-14; see also *Ruether*, 490 N.W.2d at 483 (explaining that statutes not in conflict with rules are used to supplement the rules).

61. See N.D. R. CRIM. P. 26; N.D. R. CIV. P. 43(a).

62. *Hanson*, 558 N.W.2d at 614; see also *People v. McDonald*, 505 N.W.2d 903, 905 (Mich. Ct. App. 1993) (stating that the legislature may enact statutory rules of evidence as long as they do not conflict with rules promulgated by the supreme court); *State v. Lanam*, 459 N.W.2d 656, 658 (Minn. 1990) (stating that the legislature has the power to enact evidentiary statutes that do not conflict with the rules of evidence).



and rules.<sup>63</sup> However, the court rejected the state's argument of valid interplay in this case, because the portion of Article VI, Section 3 that confers onto the supreme court the power to create the Rules of Procedure does not contain such language.<sup>64</sup> Therefore, the court found the creation of the Rules of Procedure to be the exclusive function of the supreme court.<sup>65</sup>

The court then looked at Article XI, Section 26 of the North Dakota Constitution which states that "[t]he legislative, executive, and judicial branches are coequal branches of government."<sup>66</sup> The court interpreted the creation of coequal branches of government to mean there is an apportionment of power between the separate branches, each having responsibility in certain areas.<sup>67</sup>

The court ultimately determined that the portion of Section 29-01-32 that requires disclosure of names and addresses of defense witnesses is in direct conflict with Rule 16, because Rule 16 requires no such disclosure.<sup>68</sup> By the order of Article VI, Section 3, any statute in conflict with a rule of procedure must yield to the rule.<sup>69</sup> Therefore, the court found that portion of Section 29-01-32 unconstitutional.<sup>70</sup> The court further concluded that Section 29-01-32 focused primarily on the requirement that the defense disclose names, addresses, and other information about defense witnesses, since the legislature would not have enacted the statute without such provisions.<sup>71</sup> If the main premise of the statute is unconstitutional, then any peripheral statutory requirements are also unconstitutional. Consequently, the court held that all of Section 29-01-32 was unconstitutional, and affirmed the ruling of the trial court.<sup>72</sup>

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63. *Hanson*, 558 N.W.2d at 614. For example, Article VI, Section 3 of the North Dakota Constitution provides that: "The supreme court shall have authority . . . , unless otherwise provided by law, to promulgate rules and regulations for the admission to practice, conduct, disciplining, and disbarment of attorneys at law." N.D. CONST. art VI, § 3 (emphasis added).

64. *Hanson*, 558 N.W.2d at 614. "The supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state; . . ." N.D. CONST. art VI, § 3.

65. *Hanson*, 558 N.W.2d at 614.

66. N.D. CONST. art. XI, § 26.

67. *Hanson*, 558 N.W.2d at 614.

68. *Id.* at 615.

69. *Id.*; *City of Fargo v. Dawson*, 466 N.W.2d 584, 586 n.4 (N.D. 1991).

70. *Hanson*, 558 N.W.2d at 615.

71. *Id.*; see also *City of Carrington v. Foster County*, 166 N.W.2d 377, 385 (N.D. 1969) (invalidating an entire statute because an integral portion of it was unconstitutional). Finding part of a statute unconstitutional does not necessarily mean that the entire statute is unconstitutional. *Arneson v. Olson*, 270 N.W.2d 125, 137 (N.D. 1978). The entire statute is unconstitutional only if "all provisions are so connected and dependent upon each other that it cannot be presumed that the legislature would have enacted the valid sections without the unconstitutional sections." *Id.*

72. *Hanson*, 558 N.W.2d at 615.

#### IV. IMPACT

Following *Hanson*, the North Dakota Supreme Court again had to consider the issue of Separation of Powers in *Traynor v. Leclerc*.<sup>73</sup> *Traynor* involved the constitutionality of North Dakota Century Code Section 29-15-21 which allows an individual or an attorney to demand in writing that a judge be removed from a case.<sup>74</sup> *Traynor* sought a declaratory judgment and injunction in district court, but he did not want to argue the case in front of the assigned judge.<sup>75</sup> As such, *Traynor* invoked Section 29-15-21, but the presiding judge denied the request on the grounds that the statute was unconstitutional.<sup>76</sup>

*Traynor* petitioned for supervisory writs to vacate the order by the presiding judge that denied the request for a change.<sup>77</sup> Upon granting the petitions and holding that the statute was constitutional, the supreme court echoed its reasoning in *Hanson* that the constitution apportions different classes of power to each branch of government,<sup>78</sup> and a rule of procedure, when in conflict with a statute, must prevail over the statute.<sup>79</sup> The court added that when deciding issues of conflict between rules of procedure and statutes, the court will try to harmonize them if possible.<sup>80</sup> The court also stated that statutes have a "conclusive presumption of constitutionality" unless clearly violative of the constitution.<sup>81</sup>

The North Dakota Supreme Court expanded *Hanson*, in that it considered the public policy underlying the enactment of the statutes.<sup>82</sup> Although the supreme court has the authority to enact rules of procedure, the legislature has an interest and a duty to enact laws that ensure a fair trial.<sup>83</sup> Therefore, the Separation of Powers Doctrine does not necessarily bar the legislature from creating statutes that further public policy interests, even if the legislation in some way affects the courts.<sup>84</sup>

The *Hanson* decision did not alter the way the courts have traditionally looked at Separation of Powers issues. The more important impact

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73. 1997 N.D. 47, ¶ 14, 561 N.W.2d 644, 649 (holding that a change of judge statute was not a violation of the Separation of Powers Doctrine).

74. *Traynor v. Leclerc*, 1997 N.D. 47, ¶ 2, 561 N.W.2d at 645-46 (citing N.D. CENT. CODE § 29-15-21 (1995)).

75. *Id.*

76. *Id.* ¶ 4, 561 N.W.2d at 646.

77. *Id.*

78. *Hanson*, 558 N.W.2d at 611 n.1.

79. *Id.* at 615.

80. *Traynor*, 1997 N.D. 47, ¶ 8, 561 N.W.2d at 647 (citing *Murdoff v. Murdoff*, 517 N.W.2d 402, 403 (N.D. 1994)).

81. *Id.* ¶ 8 (quoting *State v. Ertelt*, 548 N.W.2d 775, 776 (N.D. 1996)).

82. *Id.* ¶ 13, 561 N.W.2d at 648 (quoting *State v. Holmes*, 315 N.W.2d 703, 710 (Wis. 1982)).

83. *Id.*

84. *Id.*

of *Hanson* may be procedural. Section 29-01-32, which was invalidated in *Hanson*, provided for reciprocal discovery in criminal cases.<sup>85</sup> With the decision in *Hanson*, defense attorneys do not need to reveal the names of witnesses they intend to call. As a result, the question remains whether this will affect the prosecution's ability to effectively prepare for a case, and whether this will lead to "trial by ambush,"<sup>86</sup> which courts have historically frowned upon.<sup>87</sup> "The discovery statutes are there to eliminate trial by ambush."<sup>88</sup> Trial by ambush goes against the concept of "fundamental fairness."<sup>89</sup> Reciprocal discovery furthers the goals of a fair and speedy presentation of the evidence, and a fair ascertainment of the truth.<sup>90</sup> Discovery procedures should be such that surprise would be removed from criminal trials, as well as civil trials.<sup>91</sup>

*Hanson* may also pave the way for challenges to statutes incorporating other rules of procedure. For example, refer to Section 32-03.2-11, which details the manner in which a party must seek punitive damages.<sup>92</sup> Section 32-03.2-11(1) provides in part:

Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an applicable legal basis for

85. N.D. CENT. CODE § 29-01-32 (1995), *repealed* by S.L. 1997, ch.51, § 40.

86. Prosecutors might not be affected by the absence of Section 29-01-32. Telephonic interview with Robert Woods, Defense Attorney (Oct. 1, 1997). A prosecutor may not be able to cross-examine as thoroughly if the prosecutor does not know who the defense witnesses are until trial, but with reasonable investigation, the identity of those witnesses should be readily ascertainable. *Id.* Also, the burden of proof is on the prosecutor, and his or her efforts should be towards meeting that burden instead of refuting testimony of defense witnesses. *Id.* If a prosecutor presents a strong case, defense witnesses are not as significant. *Id.* Knowing the identity of defense witnesses is obviously helpful for a prosecutor, but is not a necessary tool for a fair trial. Interview with Bruce Quick, Defense Attorney, in Grand Forks, N.D. (Feb. 25, 1998) (Mr. Quick worked as a prosecutor from 1979 to 1989). If production of the names of the defense witnesses is found to be necessary for the prosecutor, then the Joint Procedures Committee can amend the Rules of Criminal Procedure just as the Committee did with the alibi defense. *Id.*; see N.D. R. CRIM. P. 12.1.

87. See *Tormaschy v. Tormaschy*, 1997 N.D. 2, ¶ 13, 559 N.W.2d 813, 816 (stating that trial by ambush is not an acceptable trial practice); see also *Kunzman v. Enron Corp.*, 941 F.Supp. 853, 857-58 (N.D. Iowa 1996) (arguing that Enron's failure to disclose the names of two witness was trial by ambush).

88. *State v. McKee*, 314 N.W.2d 866, 869 (S.D. 1989) (Henderson, J., concurring).

89. *Strong v. Brushafer*, 519 N.W.2d 668, 673 (Wis. Ct. App. 1994). Wisconsin courts have held that the prosecutor and the accused should be on a level playing field. *State v. Maday*, 507 N.W.2d 365, 369 (Wis. Ct. App. 1993); WIS. STAT. § 971.23 (1975). "[T]he truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise." *Maday*, 507 N.W.2d at 369 (quoting 2 W. LAFAVE & J. ISREAL, CRIMINAL PROCEDURE § 19.3, at 475-76 (1984)).

90. *People v. Loyer*, 425 N.W.2d 714, 727 (Mich. Ct. App. 1988) (Boyle, J., concurring and dissenting).

91. *State v. Eads*, 166 N.W.2d 766, 769 (Iowa 1969). Reciprocal discovery may trigger concerns under the Fifth and 14th Amendments of the United States Constitution. See generally *Williams v. Florida*, 399 U.S. 78 (1970); *Wardius v. Oregon*, 412 U.S. 470 (1973).

92. N.D. CENT. CODE § 32-03.2-11 (1987 & Supp. 1997).

awarding exemplary damages and must be accompanied by one or more affidavits showing the factual basis for the claim.<sup>93</sup>

By virtue of this statute, the legislature is controlling the pleadings of a case.<sup>94</sup> One could argue that these pleadings would fall under the rules of procedure, and thus under the control of the courts. Therefore, this statute could be a violation of the Separation of Powers Doctrine as established with *Hanson*. Following *Traynor*, one must also inquire as to the public policy the legislature is trying to further by not allowing an attorney to plead punitive damages in the complaint.

## V. CONCLUSION

In *Hanson*, the North Dakota Supreme Court held that reciprocal discovery of the names and addresses of defense witnesses under Section 29-01-32 is an unconstitutional violation of the Separation of Powers Doctrine. The supreme court has long adhered to the Separation of Powers Doctrine, so the main issue continues to be distinguishing what is a legislative function, and what is a judicial function, as apportioned by the constitution.

*Brett L. Bornsen*<sup>95</sup>

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93. *Id.*

94. *See id.* (requiring a party seeking exemplary damages to amend the pleadings to contain such damages).

95. I am a proud graduate of NDSU. I would like to thank my parents, my sister, Shannen, and Toby. I also want to thank Liz V., Robyn Y., Jamie M., Lee D., and all my close friends. This article is dedicated to the memory of my second mother, Margaret Yon, and my grandparents whom I miss very much.

