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Constitutional Law - Juries: Gender-Based Peremptory Challenges Violate the United States Constitution's Fourteenth Amendment Equal Protectoin Guarantee

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CONSTITUTIONAL LAW—JURIES: GENDER-BASED PEREMPTORY CHALLENGES VIOLATE THE UNITED STATES CONSTITUTION'S FOURTEENTH AMENDMENT EQUAL PROTECTION GUARANTEE

City of Mandan v. Fern, 501 N.W.2d 739 (N.D. 1993)

I. THE CASE

On December 5, 1991, Scott Fern was arrested and charged with driving under the influence of alcohol.[1] He was tried in the county court of Morton County.[2] Fifteen men and six women were on Fern's jury panel.[3] Seven men and five women were called to the jury box for voir dire.[4] The prosecution used peremptory challenges to strike three men from the jury panel in the course of selecting a six-person jury.[5] Fern objected to the prosecution's peremptory challenges,[6] and argued that *Batson v. Kentucky*[7] barred the use of gender-based peremptory challenges.[8] While Fern did not demand a ruling on his objection to the prosecution's peremptory challenges, immediately after the conference in which the issue was discussed, the judge announced that "we have picked our jury for today."[9] A jury of four women and two men convicted Fern.[10]

Fern asserted on appeal that his equal protection rights under *Batson* were violated by the prosecution's use of gender-based peremptory challenges.[11] Thus, the issue presented to the North Dakota Supreme

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1. City of Mandan v. Fern, 501 N.W.2d 739, 742 (N.D. 1993).
2. *Id.* at 739.
3. *Id.* at 742.
4. *Id.*
5. *Id.* Fern used peremptory challenges to remove two men and one woman from the jury panel. *Id.* Even though both Fern and the prosecution were given four peremptory challenges, each side chose to use only three. *Id.*
6. *Fern*, 501 N.W.2d at 742.
7. 476 U.S. 79 (1986).
8. *Fern*, 501 N.W.2d at 742 n.1. In a conference at the bench, Fern's attorney argued that the prosecution's strikes of three males from the jury panel were based solely on gender. *Id.* The prosecutor denied this charge but also argued that he was entitled to strike whomever he desired, regardless of the reason. *Id.* In his brief to the North Dakota Supreme Court, Fern indicated that state's attorneys in North Dakota and around the country systematically exclude males from juries in DUI cases because DUI defendants are "overwhelmingly male." Brief for Appellant at 8, City of Mandan v. Fern, 501 N.W.2d 739 (N.D. 1993). Fern provided statistics indicating that, in 1992, the City of Mandan exercised 78% of its peremptory strikes in DUI cases against males. Addendum to Reply Brief for Appellant at 8, City of Mandan v. Fern, 501 N.W.2d 739 (N.D. 1993). The State of North Dakota, in 1992, exercised 71% of its peremptory challenges in DUI cases against males. *Id.* There are other reasons why a prosecutor may favor an all female jury: Melvin Belli has suggested that female jurors in criminal cases are more likely than male jurors to quickly convict a defendant and render a maximum sentence. MELVIN M. BELLI, SR., 3 MODERN TRIALS § 51.68 at 447 (2d ed. 1982).
9. *Fern*, 501 N.W.2d. at 742 n.1.
10. *Id.* at 742.
11. *Id.*

Court was whether *Batson's* principles[12] should be extended to gender discrimination in jury selection.[13] In considering Fern's argument, the court observed that the United States Supreme Court had not yet ruled on whether *Batson's* principles should extend to gender discrimination.[14] The court also recognized a split among jurisdictions on the issue.[15] The court ultimately *held*, however, that *Batson* should be extended to gender discrimination[16] and remanded the case to the trial court for factual findings consistent with the holding.[17]

II. LEGAL BACKGROUND

The United States Supreme Court first applied the Equal Protection Clause[18] to a question involving the composition of juries in *Strauder v. West Virginia*.[19] The Supreme Court held that laws prohibiting African-Americans from serving on juries denied equal protection to African-American defendants.[20] At the same time, however, the Supreme Court indicated that it would be constitutionally permissible for a state to prohibit women from serving on juries.[21]

North Dakota was once among the states which prohibited women from serving on juries. North Dakota's 1889 Constitution effectively

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12. The Supreme Court in *Batson* found that a defendant has a right to be tried by a jury whose members are selected in a nondiscriminatory manner. Batson v. Kentucky, 476 U.S. 79, 85-86 (1986). The Supreme Court stated that "[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race as a group from the jury venire on account of race . . . or on the false assumption that members of his race as a group are not qualified to serve as jurors . . . ." *Id.* (citations omitted).

13. *Fern*, 501 N.W.2d at 744.

14. *Id.* at 743. The Court has now ruled on this issue. *See infra* notes 114-117 and accompanying text (discussing J.E.B. v. Alabama ex. rel. T.B., 114 S. Ct. 1419 (1994)).

15. *Fern*, 501 N.W.2d at 744.

16. *Id.*

17. *Id.* at 749.

18. U.S. CONST. amend. XIV, § 1 (providing that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws").

19. 100 U.S. 303 (1879).

20. Strauder v. West Virginia, 100 U.S. at 309. In *Strauder*, an African-American defendant convicted in West Virginia claimed violation of his constitutional rights because state law forbade African-Americans from serving on juries. *Id.* at 304. The Court agreed, indicating that disqualification from jury service based on race "amounts to a denial of the equal protection of the laws[.]" *Id.* at 310. The Court based this conclusion on its understanding that the Fourteenth Amendment created a positive right for African-Americans: "[T]he right to exemption from unfriendly legislation against them distinctly as colored[.]" *Id.* at 307-08. It found the West Virginia statute at issue to be such "unfriendly legislation" because it placed a brand of inferiority on African-Americans by singling them out for discriminatory treatment based on race. *Id.* at 308. The *Batson* Court observed that *Strauder* "laid the foundation for the court's unceasing efforts to eradicate racial discrimination" in jury selection. *Batson*, 476 U.S. 79, 85 (1986).

21. *Strauder*, 100 U.S. at 310. The Court indicated that the aim of the Fourteenth Amendment was to "strike down all possible legal discriminations" against African-Americans. *Id.* Thus, the Court indicated that states could not disqualify jurors based on race, but could disqualify them based on gender, citizenship or education. *Id.*

made women ineligible for jury service.[22] In 1921, however, the state Legislature opened jury service to women.[23] Many other states also granted women the right to serve on juries after women won the right to vote in 1920.[24] In an exercise of its supervisory power over federal courts, the United States Supreme Court bolstered the movement to open jury service to women in *Ballard v. United States*.[25] In *Ballard*, the Court concluded that federal courts could not intentionally and systematically exclude women from jury service in a state in which women were eligible for jury service.[26] As recently as 1962, however, three states barred women from jury service while others prevented women from serving on juries through automatic exemptions.[27] In 1975, in *Taylor v. Louisiana*,[28] the Supreme Court finally ruled that women could neither be excluded from juries nor given automatic exemptions based on sex.[29] Meanwhile, the Court also extended Equal Protection Clause protections to women[30] and established a standard of intermediate scrutiny under which alleged gender-based classifications were to be reviewed.[31]

The Supreme Court first addressed the issue of whether discriminatory peremptory challenges violate equal protection in *Swain v. Alabama*.[32] The *Swain* Court observed that peremptory challenges are

22. N.D. CONST. art. I, § 13 (amending N.D. CONST. art. I, § 7, which provided that "[t]he right of trial by jury shall be secured to all, and remain inviolate; but a jury in civil cases, in courts not of record may consist of less than twelve men, as may be prescribed by law.").

23. *See* 1921 N.D. LAWS ch. 81 (providing that "[a]ll citizens residing in any of the counties of this state having the qualifications of electors, and of sound mind and discretion" might be eligible to serve as jurors). The North Dakota Supreme Court held in 1934 that the legislature's statutory permission for women to serve on juries did not violate the state's constitution. State v. Norton, 255 N.W. 787, 793. Language suggesting that women were ineligible for jury duty in North Dakota was removed from the state constitution in 1975. 1974 N.D. LAWS ch. 603.

24. Note, *Beyond* Batson: *Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1924 (1992) [hereinafter *Beyond* Batson].

25. 329 U.S. 187, 193 (1946).

26. Ballard v. United States, 329 U.S. 187, 192-93 (1946).

27. *Beyond* Batson, *supra* note 24, at 1924. *See also* Hoyt v. Florida, 368 U.S. 57, 61 (1961) (holding that a state law which gave women an absolute exemption from jury service was constitutional).

28. 419 U.S. 522 (1975).

29. Taylor v. Louisiana, 419 U.S. 522, 537 (1975). This holding was based on the Sixth Amendment principle that juries be drawn from a fair cross section of the community. *Id.*

30. *See* Reed v. Reed, 404 U.S. 71, 74 (1971) (holding that a law which gave arbitrary preference to males was unconstitutional because it denied equal protection to females).

31. Frontiero v. Richardson, 411 U.S. 677, 682 (1973). The *Frontiero* plurality found that classifications based on gender were suspect and therefore subject to "close judicial scrutiny." *Id.* In Craig v. Boren, 429 U.S. 190, 197 (1976), a majority of the Court indicated that gender-based classifications "must serve important governmental objectives and must be substantially related to the achievement of those objectives". This standard of scrutiny has been refined in the Court's most recent gender discrimination decisions. In Heckler v. Matthews, 465 U.S. 728 (1984), the Supreme Court used language from Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) in applying intermediate scrutiny. *Heckler*, 465 U.S. at 744. The *Hogan* Court analyzed the question of intermediate scrutiny at length. *Hogan*, 458 U.S. at 724-25. The Court observed that the party seeking to uphold a gender-based classification must provide an "exceedingly persuasive justification" for the classification. *Id.* The Court stressed that, in gender bias cases, intermediate scrutiny "must be applied free of fixed notions concerning the roles and abilities of males and females." *Id.*

32. 380 U.S. 202 (1965).

"challenges without cause, without explanation and without judicial scrutiny."[33] The Court stated that a prosecutor's consistent use of peremptory challenges to remove African-Americans from jury panels in "case after case" would be a perversion of the peremptory challenge system and would implicate the Fourteenth Amendment.[34] The Court indicated, however, that a defendant who wished to raise this constitutional issue would have to show that a given prosecutor made "systematic" peremptory challenges against African-Americans "over a period of time."[35] *Swain* thus imposed a "crippling burden of proof" on defendants wishing to prove discrimination in the use of peremptory challenges.[36]

The Court in *Batson v. Kentucky* rejected the evidentiary burden established by *Swain*,[37] and held that racial discrimination in the selection of a venire violates the Equal Protection Clause.[38] It also established a new procedure for proving a prima facie case of purposeful discrimination in the selection of a jury.[39] The *Batson* decision applied specifically to cases involving African-American defendants in which the prosecutor had peremptorily struck African-American venire persons from the jury.[40] The Supreme Court, however, has since extended *Batson*,[41] most recently

33. Swain v. Alabama, 380 U.S. 202, 212 (1965). The *Swain* Court traced the history of peremptory challenges from fourteenth century England to the twentieth century. *Id.* at 212-17. The Court stated that peremptories have long been regarded as "a necessary part of trial by jury." *Id.* at 219. The Court further indicated that "[t]he function of the challenge is not only to eliminate extremes or partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Id.*

34. *Id.* at 223-24.

35. *Id.* at 227. The *Swain* Court found no systematic discrimination through the use of peremptory challenges in the case before it even though the defendant showed that "no Negro within the memory of persons now living has ever served on any petit jury in any civil or criminal case tried in Talladega County, Alabama." *Swain*, 380 U.S. 231-32 (Goldberg, J., dissenting).

36. Batson v. Kentucky, 476 U.S. 79, 92 (1986). The *Batson* Court indicated that lower courts which had interpreted *Swain* understood that case to have held that "repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause." *Id.* (footnote omitted). The *Batson* Court observed that this interpretation of *Swain* had made peremptory challenges by prosecutors "largely immune from constitutional scrutiny." *Id.* at 92-93.

37. *Id.* at 93.

38. *Id.* at 86. The Supreme Court stated that a prosecutor ordinarily may exercise peremptory challenges for any reason at all, but the Equal Protection Clause forbids the prosecutor from striking potential jurors based solely on race or on an assumption that African-American jurors will not be impartial. *Id.* at 89.

39. *Id.* at 96-97. To establish a prima facie case of discrimination, the defendant must first show that he or she is a member of a given racial group and that the prosecutor has struck members of that group. *Id.* at 96. The defendant may rely on the fact that peremptory challenges give those who want to discriminate a chance to do so. *Id.* The defendant ultimately must show that the facts presented raise an inference that the prosecutor used peremptory challenges to exclude potential jurors based on race. *Id.*

40. *Id.* at 89.

41. *See* Holland v. Illinois, 493 U.S. 474, 477 (1989) (indicating that a defendant who was not African-American had standing to challenge the exclusion of African-Americans from the jury because the Sixth Amendment entitles a defendant to a jury that represents a fair cross section of the community); Powers v. Ohio, 499 U.S. 400, 415 (1991) (stating that defendants, regardless of race, may raise third-party Equal Protection Clause claims for jurors who are excluded based on race by prosecutors exercising peremptory challenges); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 630 (1991) (indicating that a civil litigant may raise an Equal Protection Clause claim for a juror

holding that defendants in criminal cases may not exercise race-based peremptory challenges.[42]

The Supreme Court had not ruled on whether to extend *Batson* to discriminatory gender-based peremptory challenges at the time of the *Fern* decision.[43] Most jurisdictions which had ruled on the matter had refused to extend *Batson* to gender-based peremptory strikes.[44] In *United States v. Broussard*,[45] the Fifth Circuit ruled that *Batson* should not be extended to gender-based discrimination because race lies at the "core of the commands" of the Fourteenth Amendment[46] and because

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who is excluded based on race by an opposing party); Hernandez v. New York, 500 U.S. 352, 358 (1991) (applying *Batson*'s principles to a case involving the exclusion of Hispanic venire persons).

42. Georgia v. McCollum, 112 S. Ct. 2348, 2354 (1992). The *McCollum* Court first applied *Batson* and found that discriminatory peremptory challenges by a criminal defendant were unconstitutional because of the harms inflicted on potential jurors and the community as a whole. *Id.* at 2353-54. The Court next applied *Edmonson*, 500 U.S. 614, and found that peremptory challenges by a criminal defendant constituted state action because they were performed within the atmosphere of the courtroom and with the support of the state. *Id.* at 2355-56. The Court last applied *Powers*, 499 U.S. at 400, and found that the government had standing to raise a claim of discrimination against a criminal defendant in order to protect the rights of parties who may have been harmed by such discrimination. *Id.* at 2357. Four members of the Court (two concurring and two dissenting) questioned the majority's reliance on *Edmonson* and its conclusion that peremptory challenges made by a criminal defendant were state action. Justice O'Connor dissented, arguing at length that the actions of parties other than the state should not be considered state action. *Id.* at 2361-64 (O'Connor, J., dissenting). Justice Scalia also dissented, agreeing with Justice O'Connor. *Id.* at 2364-65 (Scalia, J., dissenting). Chief Justice Rehnquist concurred but expressed his continuing disagreement with the *Edmonson* holding "on the issue of 'state action' under the Fourteenth Amendment." *Id.* at 2359 (Rehnquist, C.J., concurring). Justice Thomas agreed with the Chief Justice on the state action issue, and added his own view opposing the Court's "continuing attempts to use the Constitution to regulate peremptory challenges." *Id.* at 2359 (Thomas, J., concurring in the judgment).

43. The Court ruled on April 19, 1994, that gender-based peremptory challenges violate the Equal Protection Clause. J.E.B. v. Alabama *ex rel.* T.B., 114 S.Ct. 1419, 1422 (1994). *See infra* notes 114-117 and accompanying text (discussing *J.E.B.*).

44. *See* United States v. Hamilton, 850 F.2d 1038, 1042-43 (4th Cir. 1988) (refusing to extend *Batson* because racial discrimination was the evil that *Batson* was aimed at preventing); United States v. Nichols, 937 F.2d 1257, 1262 (7th Cir. 1991) (indicating that the *Batson* inquiry must be limited to racial discrimination); Daniels v. State, 581 So. 2d 536, 538-39 (Ala. Crim. App. 1990) (observing that *Batson* "offers no authority for the extension of the principles contained therein beyond racial discrimination"); State v. Adams, 533 So. 2d 1060, 1063 (La. Ct. App. 1988) (indicating that, under *Batson*, race is the only unreasonable classification for striking jurors); State v. Pullen, 811 S.W.2d 463, 467 (Mo. Ct. App. 1991) (stating that *Batson* only applies to racial discrimination); State v. Culver, 444 N.W.2d 662, 666 (Neb. 1989) (indicating that *Batson* should be applied only to race-based peremptory challenges); State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987) (observing that *Batson* does not apply to gender-based discrimination). *See also* Cleveland v. State, 865 S.W.2d 285 (Ark. 1993) (indicating that it would be "unsound" to extend *Batson* to gender); Potts v. State, 376 S.E.2d 851, 856 (Ga. 1989) (refusing to allow a male to raise a discrimination claim under *Batson* because he lacked standing to question the striking of female venirepersons); People v. Crowder, 515 N.E.2d 783, 786 (Ill. App. Ct. 1987) (indicating that a male defendant does not have standing to challenge exclusion of female venirepersons under *Batson*); Hannan v. Commonwealth, 774 S.W.2d 462, 464 (Ky. Ct. App. 1989) (stating, in dicta, that *Batson* provides no authority for application beyond racial discrimination).

45. 987 F.2d 215 (5th Cir. 1993).

46. United States v. Broussard, 987 F.2d 215, 218 (5th Cir. 1993). In Strauder v. West Virginia, the Court stated that the Fourteenth Amendment was "designed to assure to the colored race the enjoyment of all the civil rights that under that law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." 100 U.S. 303, 306 (1880). The *Batson* Court focused on the harms created by racial discrimination in justifying its decision, stating that "[e]xclusion of black citizens from service as jurors

"gender discrimination and racial discrimination are different in relevant ways."[47] Applying intermediate scrutiny, the *Broussard* court found that the government's interest in fair juries would be "frustrated by extending *Batson* to gender because it would require, on demand of counsel, an explanation for every strike."[48]

On the other hand, in *United States v. De Gross*,[49] the Ninth Circuit found equal protection principles to prohibit striking venire persons on the basis of gender and held that *Batson* should therefore be extended to such strikes.[50] In applying intermediate scrutiny, the *De Gross* court found that gender-based challenges are not substantially related to "the important governmental objective of impaneling a fair and impartial jury" because they are based on a reason other than the "sudden impression" of a potential juror's ability to be impartial.[51] Only a few jurisdictions that had ruled on the issue prior to the *Fern* decision had agreed with the *De Gross* court and held that *Batson* should be extended.[52] Other jurisdictions had held that peremptory challenges based on gender should be forbidden because they violate state constitutions,[53] while some jurisdictions interpreted state constitutional provisions requiring that juries represent a fair cross section of the community to prohibit gender-based discrimination in jury selection.[54]

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constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." 476 U.S. at 85.

47. *Broussard*, 987 F.2d at 219-20. According to the *Broussard* court, one significant difference between gender and race is that classifications based on gender are subject only to intermediate scrutiny. *Id.* at 218. This is because gender is a protected class, not a suspect class. *Id.* One reason for strict scrutiny of race-based classifications, according to the *Broussard* court, is to protect groups that are numerical minorities, which women are not. *Id.* at 220.

48. *Id.* at 219.

49. 960 F.2d 1433 (9th Cir. 1992) (en banc).

50. United States v. De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc).

51. *Id.* at 1439. Chief Justice Burger, dissenting in *Batson*, argued that "unadulterated equal protection analysis" should not be applied generally to peremptory challenges because such challenges must be based on "only limited information or hunch." 476 U.S. at 123 (Burger, C.J., dissenting). The *De Gross* court found gender-based peremptory strikes to be invalid because such challenges are based not on hunches about "a particular venireperson" but on assumptions about "members of a certain group[.]" 960 F.2d at 1439.

52. *See* People v. Irizarry, 560 N.Y.S.2d 279, 280 (N.Y. App. Div. 1990) (memorandum decision) (holding that *Batson* principles should be extended to gender-based peremptory challenges); State v. Burch, 830 P.2d 357, 364 (Wash. Ct. App. 1992) (holding that gender-based peremptory challenges violate the Equal Protection Clause).

53. *See* State v. Levinson, 795 P.2d 845, 849-50 (Haw. 1990) (holding that gender-based peremptory challenges violate both the state's equal protection clause and the fundamental rights of citizenship as guaranteed by the state constitution); State v. Gonzales, 808 P.2d 40, 48-49 (N.M. Ct. App. 1991) (holding that gender-based peremptory challenges violate the state constitutional requirement that juries represent a fair cross section of community and the constitutional provision that prohibits discrimination on the basis of gender); Tyler v. State, 623 A.2d 648, 650-51 (Md. 1993) (finding that the use of peremptory challenges to exclude jurors on the basis of gender violated the Maryland Equal Rights Amendment).

54. *See* People v. Wheeler, 148 Cal. Rptr. 890, 903 (Cal. 1978) (indicating that peremptory challenges based on group bias violate the state constitution); Commonwealth v. Soares, 387 N.E.2d 499, 516 (Mass. 1979) (observing that gender is one generic group affiliation which, under the state constitution, may not permissibly be used as a basis for juror exclusion); State v. Gilmore, 511 A.2d

III. ANALYSIS OF THE OPINION

The North Dakota Supreme Court addressed the question of gender bias in jury selection for the first time in *City of Mandan v. Fern*.[55] In an opinion written by Justice Levine, the court opened its analysis of the defendant's discrimination claims with an examination of *Batson*.[56] The court stated that *Batson* prohibits peremptory strikes by prosecutors based on race because racial discrimination during jury selection harms excluded jurors, undermines public confidence in the judicial system, and stimulates community prejudice.[57] The court indicated that it found Fern's argument for extension of *Batson* to gender to be persuasive.[58]

The court observed that seven jurisdictions had held that *Batson*'s principles should be extended to gender[59] and that three other jurisdictions had found gender discrimination in peremptory challenges unlawful on other grounds.[60] The court indicated that it found the Ninth Circuit's reasoning in *De Gross* to be persuasive.[61] The *De Gross* court found that gender discrimination is similar to racial discrimination because it stimulates community prejudice, impeding equal justice for women.[62] It indicated that gender-based peremptories are similar to race-based peremptories because they are not based upon the qualifications of the potential juror.[63] The *De Gross* court also found that gender-based strikes can reduce public confidence in the justice system.[64] It concluded that because gender-based peremptory strikes are founded on the "false assumption"[65] that members of certain groups are either unqualified to

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1150, 1159 (N.J. 1986) (stating that peremptory challenges based on bias founded on the potential juror's membership in a cognizable group violate the state constitution).

55. 501 N.W.2d 739 (N.D. 1993).

56. City of Mandan v. Fern, 501 N.W.2d 739, 743 (N.D. 1993).

57. *Id.* (citing *Batson*, 476 U.S. at 87). The court also indicated that *Batson* allows a defendant to establish a prima facie case of discrimination using only the facts of her case. *Id.* (citing *Batson*, 476 U.S. at 96). Once a prima facie case is made, the state must provide a neutral explanation for the allegedly race-based challenges. *Batson*, 476 U.S at 97.

58. *Fern*, 501 N.W.2d at 744. In holding that *Batson* should be extended to gender, the court recognized that the United States Supreme Court was preparing to consider the issue. *Id.* at 743 n.2. The Court has now decided this issue. *See infra* notes 114-117 and accompanying text (discussing J.E.B. v. Alabama *ex rel.* T.B., 114 S.Ct. 1419 (1994)). The North Dakota Supreme Court further indicated that it would not consider the issue of gender discrimination in jury selection under the state constitution because it found that Fern failed to properly raise a state constitutional claim. *Id.* at 744 n.3. *See infra* note 137 (discussing the inadequacy of Fern's state constitutional argument).

59. *Id.* at 744. *See supra* notes 52-53 (listing decisions barring gender-based peremptory challenges based on federal or state Equal Protection Clause grounds).

60. *Fern*, 501 N.W.2d at 744 n.4. *See supra* note 54 (listing decisions barring gender-based peremptory challenges on other than federal or state Equal Protection Clause grounds).

61. *Fern*, 501 N.W.2d at 744.

62. United States v. De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992).

63. *Id.* at 1439.

64. *Id.* The *De Gross* court indicated that "full community participation" in the justice system is an important factor contributing to public confidence in the system. *Id.* If potential jurors are excluded based on race or gender, "full community participation" becomes difficult to achieve. *Id.*

65. *Id.* The *De Gross* court explained that "[i]f the decision to exclude a juror is based solely on the sex of the juror, the decision to exclude must necessarily be based on . . . false assumptions[.]" *Id.*

serve as jurors or unable to consider a case impartially, such strikes are not substantially related to the important governmental objective of achieving a fair and impartial jury and are therefore prohibited by the Equal Protection Clause.[66] The *Fern* court indicated that it found this reasoning to be "enlightened and enlightening."[67]

The court then began its own consideration of whether *Batson* should be extended to gender, and indicated that intermediate scrutiny is the appropriate standard of review for cases of alleged gender discrimination.[68] Under this standard, established by the United States Supreme Court in *Craig v. Boren*,[69] "[gender] discrimination is not unconstitutional if it is substantially related to the achievement of important governmental objectives."[70] The North Dakota Supreme Court observed that peremptory challenges help in achieving an important governmental objective, the formation of fair juries.[71] Following the logic of the *De Gross* court, however, the court found that gender-based peremptories do not aid in achieving this end because such peremptories are based on false assumptions as to the qualifications or impartiality of the challenged jurors.[72] The court concluded that gender-based peremptories are not substantially related to an important governmental objective and are thus unconstitutional.[73]

The court reasoned that the United States Supreme Court in *Batson* abandoned *Swain*[74] as a reaction to the continued presence of racial discrimination in courtrooms despite more than a century of judicial work aimed at eliminating it.[75] On the other hand, the court stated, gender bias in courtrooms had only recently been recognized as a problem,[76] even though it "has longstanding cultural and historic roots."[77] The court

66. *Id.*

67. *Fern*, 501 N.W.2d at 744.

68. *Id.*

69. 429 U.S. 190 (1976).

70. Craig v. Boren, 429 U.S. 190, 197 (1976).

71. *Fern*, 501 N.W.2d at 744 (citing United States v. De Gross, 960 F.2d 1433, 1439).

72. *Fern*, 501 N.W.2d at 744-45.

73. *Id.* at 745. The court indicated, however, that while gender-based peremptories are constitutionally impermissible, peremptories based on other grounds, like a juror's occupation, would generally be constitutional because such peremptories serve the important government objective of selecting fair and impartial juries. *Id.*

74. Swain v. Alabama, 380 U.S. 202 (1964). The Supreme Court in *Batson* rejected the evidentiary burden that *Swain* imposed on a defendant's attempt to prove racial discrimination in the jury selection process. *See supra* note 36 (discussing the requirements of *Swain* as understood by the *Batson* Court).

75. *Fern*, 501 N.W.2d at 745. The Supreme Court in *Powers* observed that the Court has recognized racial discrimination in jury selection as unconstitutional since 1880, but "[d]espite the clarity of . . . [the Court's] commands to eliminate the taint of racial discrimination in the administration of justice, allegations of bias in the jury selection process persist." Powers v. Ohio, 111 S.Ct. 1364, 1366 (1991).

76. *Fern*, 501 N.W.2d at 745.

77. *Id.* at 746.

indicated that attorney reliance on jury selection manuals which propound gender stereotypes was evidence of the continuing problem of gender bias in the courtroom.[78] The court concluded that gender-based peremptories were a product of a long history of gender discrimination,[79] and, consequently, that there was ample justification to extend *Batson* to gender discrimination.[80]

The court thus rejected the rationale of the *Broussard* court, which held that the use of gender-based peremptories did not violate the Equal Protection Clause.[81] The *Broussard* court's holding rested upon its conclusion that classifications based on race and gender differ in significant ways and should therefore be evaluated differently.[82] While granting that the standards for judging racial and gender discrimination are different, the *Fern* court criticized the *Broussard* court's application of these standards.[83] The *Broussard* court's argument, as interpreted by the *Fern* court, was that gender discrimination in jury selection is acceptable because it cannot succeed in preventing all members of a given gender from serving on a jury.[84] The *Fern* court criticized this rationale as condoning discrimination because it "overlooks entirely the excluded venireperson's right to equal protection."[85] While the court admitted that fair juries might be produced by the process endorsed by the *Broussard* court, it reasoned that "[w]hen the process is riddled with unfair, unseemly and unacceptable gender discrimination, it is of small moment that the process did not entirely contaminate the product."[86] The court further indicated that allowing discriminatory exclusion of jurors contami-

78. *Id.* (citing *Beyond* Batson, *supra* note 24, at 1920). Melvin Belli's treatise on trial practice contains sections examining considerations attorneys should take into account when choosing between male or female jurors. BELLI, *supra* note 8, at §§ 51.67, .68. Belli states that "a male juror is generally more sound than a female juror." *Id.* § 51.67. Belli also advises that females are more opinionated than men and reach decisions more quickly. *Id.* § 51.68.

79. *Fern*, 501 N.W.2d at 746.

80. *Id.*

81. *Id.* at 747.

82. United States v. Broussard, 987 F.2d 215, 219 (5th Cir. 1993). *See supra* text accompanying notes 46-47 (discussing the differences between gender and racial classifications).

83. *Fern*, 501 N.W.2d at 747.

84. *Id.* at 747-48. The *Broussard* court found that women, because they are not a minority, do not face the same barriers to jury participation faced by racial minorities. 987 F.2d at 220. The court further observed that peremptory strikes based solely on gender are generally not effective in removing all members of a given gender from a jury. *Id.* The court thus found gender discrimination in jury selection to be "chilled by the numbers[.]" *Id.* The court did not find gender discrimination to be less harmful than racial discrimination, but instead indicated that Swain v. Alabama, 380 U.S. 202 (1965), provided an adequate framework for evaluating gender discrimination. *Broussard*, 987 F.2d at 220. Thus, the court found no reason to extend *Batson*. *Id.*

85. *Fern*, 501 N.W.2d at 748. The court criticized the *Broussard* court for "questioning . . . [women's] need for protection because of their numerical superiority." *Id.* The court further noted the Supreme Court's refusal to accept an interpretation of the Equal Protection Clause that varies the level of scrutiny " 'according to the ability of different groups to defend their interests in the representative process.' " *Id.* at 748 n.9 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989)).

86. *Fern*, 501 N.W.2d at 748.

nates public confidence in the judicial system because it makes discrimination an integral part of the system.[87] The court concluded that "[i]nstitutionalizing gender bias is something we should not do until the Supreme Court of the United States clearly directs us to."[88]

Having established the unconstitutionality of gender-based peremptories, the court next turned to an analysis of how a case of alleged gender discrimination in jury selection should be handled.[89] The court indicated that a trial court faced with a gender discrimination question must first determine whether the defendant has presented a prima facie case of discrimination, and then must allow the prosecutor an opportunity to provide a gender-neutral explanation for the allegedly discriminatory actions.[90] The court observed that Fern's trial court did not follow this procedure.[91] The court therefore set out instructions for an evaluation of Fern's claim upon remand.[92]

The court first examined how a defendant may establish a prima facie case of discrimination under *Batson*.[93] Under *Batson*, a party seeking to establish a prima facie case of discrimination must first show that a peremptory challenge was exercised against a member of a "constitutionally cognizable" group and then must demonstrate that the challenge was based on that group membership.[94] The *Batson* Court further indicated that the trial court must consider all relevant circumstances in deciding whether a challenge is discriminatory.[95] The *Fern* court endorsed this totality of circumstances approach, and thus rejected the *Broussard* view

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Fern*, 501 N.W.2d at 748.

92. *Id.* at 748-50. Justice Levine relied heavily on *Batson* in exploring how a gender discrimination claim should be evaluated. *Id.* Her view that *Batson* provides the proper framework for this process was fully shared only by Justice Meschke. *Id.* at 750. Chief Justice VandeWalle, in a special concurrence joined by Justices Neumann and Sandstrom, suggested that the *Batson* process should not be applied to cases of alleged gender discrimination. *See infra* notes 105-12 and accompanying text (discussing Chief Justice VandeWalle's concurrence).

93. *Fern*, 501 N.W.2d at 748.

94. *Id.* *Batson* specifically allowed a defendant to make a prima facie case of discrimination by demonstrating membership in a cognizable racial group and then showing that peremptory challenges were exercised to remove potential jurors of the same racial group. 476 U.S. at 96. *Batson* has since been extended to embrace other situations. *See supra* notes 41-42 and accompanying text (discussing the extension of *Batson* to situations in which jurors and defendants are not members of the same racial group, to defendants and plaintiffs in civil cases, and to the state in criminal cases).

95. *Batson*, 476 U.S. at 96-97. The *Batson* Court stated that the existence of a pattern of strikes against African-American jurors during the selection of a jury might support an "inference of discrimination." *Id.* at 97. At the same time, the prosecutor's statements and questions during voir dire "may support or refute an inference of discriminatory purpose." *Id.* The *Batson* Court indicated that it was confident that experienced trial judges would be able to examine the circumstances surrounding a prosecutor's peremptory challenges and determine whether discriminatory challenges were exercised. *Id.*

that "the use of a single peremptory challenge against a man or a woman" might establish a prima facie case of gender discrimination.[96]

The court therefore indicated that a trial court should look at a variety of factors when evaluating a gender discrimination claim.[97] These factors include: the composition of the jury panel in comparison to the composition of the jury finally selected, the number of challenges exercised against a particular group, the conduct of the prosecutor while examining jurors, and the existence of a pattern of exclusion of members of a particular group in similar cases.[98] If a reasonable observer could conclude that the circumstances demonstrate a "fairly obvious" discriminatory intent, a prima facie case is established.[99]

If a prima facie case of discrimination is established, the burden shifts to the prosecutor to give a neutral explanation for the suspicious challenges.[100] The juror's specific responses and demeanor during voir dire may be used as a basis for this neutral explanation,[101] but intent to exclude on the basis of group membership is not a neutral reason for exclusion.[102] The court concluded that trial judges were in the best position to make judgments on gender-bias claims in jury selection.[103] Because such judgments will hinge on credibility, the court indicated that a judgment on a gender-bias claim would not be set aside unless clearly erroneous.[104]

Chief Justice VandeWalle stated in a special concurrence that, while gender discrimination should not be condoned, it may not be appropriate to use *Batson's* factors to raise an inference of gender discrimination.[105] Justices Neumann and Sandstrom joined this concurrence, and thus the majority of the court shared the Chief Justice's doubts about the applicability of the *Batson* test to gender.[106] Chief Justice VandeWalle indicated that while every potential juror who is struck from a jury panel will be either a man or a woman, it is not likewise true that every struck juror will be a member of a different race.[107] Thus, the Chief Justice reasoned, it may not be appropriate to apply a method designed to allow the inference of racial discrimination—the *Batson* test—to instances of alleged gender

96. *Fern*, 501 N.W.2d at 749.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* (citing *Batson*, 476 U.S. at 98).
101. *Fern*, 501 N.W.2d at 749 (citing State v. Burch, 830 P.2d 357, 364 (Wash. Ct. App. 1992).
102. *Id.* (citing Hernandez v. New York, 500 U.S. 352, 361-62 (1991)).
103. *Id.* (citing People v. Wheeler, 148 Cal. Rptr. 890, 906 (Cal. 1978)).
104. *Id.* (citing *Batson*, 476 U.S. at 98, and *Hernandez*, 500 U.S. at 369).
105. *Fern*, 501 N.W.2d at 750 (VandeWalle, C.J., concurring specially).
106. *Id.*
107. *Id.*

discrimination.[108] It would be more appropriate, the Chief Justice suggested, to apply a procedure like the one set forth in *Swain v. Alabama*.[109] Under a *Swain* procedure, the defense would be required to show that, in case after case, the prosecution had excluded jurors of a given gender.[110] The prosecution would then be required to give a gender-neutral explanation for the allegedly gender-based challenges made in the particular case.[111] Concluding, the Chief Justice stated that he was "not convinced" that *Batson* provided the only fair framework for determining whether discriminatory peremptory strikes had been made, but he admitted that he did not know what the appropriate method for making such a determination should be.[112]

IV. IMPLICATIONS OF THE DECISION

The ultimate holding of *Fern* was that gender-based peremptory challenges are unconstitutional.[113] The United States Supreme Court effectively endorsed this holding when it reached a similar conclusion in *J.E.B. v. Alabama ex rel. T.B.*[114] The *J.E.B.* Court found gender discrimi-

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108. *Id.*

109. 380 U.S. 202 (1965). The Chief Justice's opinion seems to reflect the reasoning of the *Broussard* court which observed that "[w]e are persuaded that *Swain* is a sound accommodation of the interests of fair trial and interests in selection free of gender bias." 987 F.2d 215, 220 (5th Cir. 1993). *Broussard* was criticized at length by Justice Levine in her opinion for the court. *See supra* notes 81-88 and accompanying text (discussing the *Fern* court's reaction to the *Broussard* court's conclusion that *Batson* should not be extended to gender-based peremptory challenges).

110. *Swain*, 380 U.S. at 223-24. *See supra* text accompanying notes 32-36 (discussing *Swain*). During the 21 years that *Swain* was law, the required showing of systematic discrimination was made in only two recorded cases. *Beyond* Batson, *supra* note 24, at 1923 n. 29. *See* State v. Brown, 371 So. 2d 751, 754 (La. 1979) (finding that the defendant made a prima facie case of discrimination by demonstrating that the prosecutor's use of peremptory challenges showed a "continual and conscious rejection of blacks"); State v. Washington, 375 So. 2d 1162, 1164-65 (La. 1979) (finding that the defendant made a prima facie case of discrimination when "objective evidence of systematic exclusion of blacks" through peremptory challenges was combined with the prosecutor's admissions that he excluded African-American jurors "solely on the basis of race").

111. *Id.*

112. *Id.*

113. *Fern*, 501 N.W.2d at 744.

114. 114 S.Ct. 1419, 1422 (1994). The case involved a paternity and child support claim. J.E.B. v. Alabama *ex rel.* T.B., 114 S.Ct. 1419, 1421 (1994). The state struck nine male jurors from the panel through the use of peremptory challenges, and an all-female jury found the petitioner to be the father and ordered payment of child support. *Id.* The petitioner objected to the state's peremptory challenges, alleging a violation of the Equal Protection Clause. *Id.* The trial court rejected the petitioner's claim. *Id.* The Alabama Court of Civil Appeals affirmed the trial court, and indicated that it was bound to follow Alabama precedent on the issue. J.E.B. v. State *ex rel.* T.B., 606 So. 2d 156, 157 (Ala. Civ. App. 1992). Daniels v. State, 581 So. 2d 536 (Ala. Crim. App. 1990), was among the cases used by the Court of Civil Appeals as precedent. *J.E.B.*, 606 So. 2d at 157. *Daniels* was the first case in which an Alabama court discussed the issue of extending *Batson* to gender-based peremptory strikes. *Daniels*, 581 So. 2d at 538. In *Daniels*, the Alabama Court of Criminal Appeals relied on United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988), in holding that *Batson* should not be extended beyond racial discrimination. *Daniels*, 581 So. 2d at 539. The *Hamilton* court, in analyzing *Batson*, observed that "there is no evidence to suggest that the Supreme Court would apply normal equal protection principles to the unique situation involving peremptory challenges." *Hamilton*, 850 F.2d at 1042. The *Hamilton* court therefore did not apply intermediate scrutiny to the question and instead relied on its analysis of the Supreme Court's intent to conclude that "the Court

nation in jury selection to be similar to racial discrimination because both racial minorities and women "share a history of total exclusion" from jury service.[115] The Court further found that gender discrimination in jury selection, like racial discrimination, harms "the litigants, the community, and the individual jurors who are wrongfully excluded[.]"[116] Based on the similarities between gender and racial discrimination in jury selection, and the similar harms created by such discrimination, the Court concluded that it was appropriate to extend the protections of *Batson* to those claiming gender discrimination in jury selection.[117] Because the *J.E.B.* Court embraced a rationale similar to that of the *Fern* court in finding gender-based peremptory challenges unconstitutional, it will be useful to refer to the *J.E.B.* opinion in analyzing the implications of *Fern*.

Several questions were left unanswered by the North Dakota court in *Fern*. Perhaps the most significant of these was the question of what standard a court should apply in evaluating gender discrimination claims. Justice Levine, writing for the court, provided clear guidelines as to how a court should deal with a claim of gender discrimination in jury selection.[118] The procedure she suggested was derived directly from *Batson*.[119] Under this standard, a party may establish a discrimination claim based solely on the facts of her own case.[120] Justice Levine, however, was joined in her endorsement of this standard by only Justice Meschke.[121] The Chief Justice, in a special concurrence joined by Justices Neumann and Sandstrom, raised doubts about the application of the *Batson* standard to gender discrimination claims.[122] He observed that every peremptory strike must involve a woman or a man, and that if *Batson's* standards were applied, every strike conceivably could provide a basis for a discrimination claim.[123] Chief Justice VandeWalle, however, did not provide a

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intended *Batson* to apply to prohibit the exercise of peremptory challenges on the basis of race only." *Id.* at 1042-43. The United States Supreme Court, confronting the issue of gender discrimination in the exercise of peremptory challenges for the first time, reversed the Alabama Court of Civil Appeals and found gender-based peremptory challenges to be unconstitutional. *J.E.B.*, 114 S.Ct. at 1430.

115. *Id.* at 101. The Court further indicated that it was unneccessary to analyze whether women or minorities had suffered more from discrimination. *Id.* Instead, the court simply "acknowledge[d] that 'our Nation has had a long and unfortunate history of sex discrimination.'" *Id.* (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)).

116. *J.E.B.*, 114 S.Ct. at 1427.

117. *Id.* at 1429-30. The Court observed that "[e]qual opportunity to participate in the fair administration of justice is fundamental to our democratic system." *Id.* at 1430. Thus, discrimination based on race or gender jeopardizes "the integrity of our judicial system[.]" *Id.*

118. *Fern*, 501 N.W.2d at 749. *See supra* note 92 (discussing Justice Levine's instructions on how a gender discrimination in jury selection claim should be addressed).

119. *Id.* at 748-49 (citing Batson v. Kentucky, 476 U.S. 79, 96-97 (1986)).

120. *Batson*, 476 U.S. at 96.

121. *Fern*, 501 N.W.2d at 750.

122. *Id.* at 750 (VandeWalle, C.J., concurring specially). *See supra* notes 105-112 and accompanying text (discussing the problems of applying *Batson* to situations not involving racial groups).

123. *Fern*, 501 N.W.2d at 750 (VandeWalle, C.J., concurring specially). The Chief Justice suggested that the *Swain* standard might be more appropriate to use in evaluating cases of alleged

definite alternative to the *Batson* test in his special concurrence.[124] Fortunately, the United States Supreme Court seems to have resolved the issue addressed by the *Fern* Court's split opinions: in *J.E.B.*, the Court indicated that the *Batson* standard should be applied to claims of gender discrimination in the use of peremptory challenges.[125]

Another question left unanswered by the *Fern* Court was whether the prosecution in a criminal case may challenge allegedly discriminatory strikes made by the defense. In *Georgia v. McCollum*[126], the Supreme Court held that *Batson* extended to race-based peremptory challenges made by criminal defendants.[127] The *De Gross* court,[128] in a decision relied on extensively by Justice Levine, held discriminatory gender-based peremptory challenges by either the prosecution or defense in a criminal case to be unconstitutional.[129] The *J.E.B.* Court, while not ruling specifically on the issue, seemed to endorse the reasoning of *McCollum*.[130] If the North Dakota Supreme Court follows the reasoning of *McCollum*, *De Gross*, and *J.E.B.* in future cases, it is likely to extend *Fern*'s ban on discriminatory peremptory challenges to those made by criminal defendants.

A final question left unanswered by the *Fern* court was whether gender discrimination in jury selection should be barred in civil cases. The *J.E.B.* Court addressed gender-based peremptory challenges made in a civil context and found such challenges to be unconstitutional.[131] *J.E.B.*,

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gender discrimination. *Id.* *See supra* notes 109-111 and accompanying text (discussing application of the *Swain* standard). The *Broussard* court also suggested that the *Swain* standard might be appropriate to gender discrimination cases, but did not agree that gender-based peremptory challenges violate the Equal Protection Clause. United States v. Broussard, 987 F.2d 215, 220 (5th Cir. 1993). *See supra* notes 45-48 and accompanying text (discussing the *Broussard* court's application of the constitution to gender-based peremptory strikes).

124. *See supra* notes 105-112 and accompanying text (discussing the alternatives to the *Batson* approach suggested by the Chief Justice in his special concurrence).

125. J.E.B. v. Alabama *ex rel.* T.B., 114 S.Ct. 1419, 1429-30 (1994). In finding that the *Batson* standard should be applied, the Court was careful to make clear that peremptory challenges may still be used to remove potential jurors, regardless of gender. *Id.* at 1429. "Gender simply may not serve as a proxy for bias" when peremptory challenges are exercised. *Id.* The Court stated that strikes based on characteristics overwhelmingly associated with a given gender could be found to be legitimate under this standard. *Id.* For example, it may be allowable for a party to strike all nurses or all persons with military experience from a jury panel. *Id.* at n.16. When such a strike is challenged, and the party opposing the strike makes a prima facie showing of discrimination as required by *Batson*, the party making the strike is required "merely" to provide an explanation "based on a juror characteristic other than gender[.]" *J.E.B.*, 114 S.Ct. at 1430. The Court indicated that such an explanation may be acceptable "absent a showing of pretext." *Id.* at 1429.

126. 112 S.Ct. 2348 (1992).

127. Georgia v. McCollum, 112 S. Ct. 2348, 2354 (1992). *See supra* note 42 and accompanying text (discussing the Supreme Court's extension of *Batson* to peremptory challenges made by criminal defendants).

128. United States v. De Gross, 960 F.2d 1433, 1439-42 (9th Cir. 1992).

129. *Id.* at 1439-42. *See also* City of Mandan v. Fern, 501 N.W.2d 739, 744 (N.D. 1993).

130. J.E.B. v. Alabama ex. rel. T.B., 114 S.Ct. 1419, 1427 (1994). The Court indicated that cases like *McCollum* established "that individual jurors themselves have a right to nondiscriminatory selection procedures." *Id.* The Court stated that "this right extends to both men and women." *Id.* at 1428.

131. *Id.* at 1429.

however, was not a typical civil case: the state itself filed the paternity action and exercised the discriminatory challenges.[132] Justice O'Connor, who had previously objected to the extension of *Batson* to private litigants,[133] joined the majority in *J.E.B.*, but indicated in a concurrence that the Court's decision should be "limited to a prohibition on the government's use of gender-based peremptory challenges."[134] If the North Dakota Supreme Court follows Justice O'Connor's rationale, it may allow civil litigants to exercise gender-based peremptory challenges. On the other hand, even Justice O'Connor, in her concurrence to *J.E.B.*, indicated that she did not think it was likely that future courts would limit the bar on gender-based peremptories to those exercised by the government.[135] Thus, private civil litigants in North Dakota may be barred from using gender-based peremptory challenges.

If the United States Supreme Court had refused to extend *Batson*'s principles in *J.E.B.*, it is likely that the North Dakota Supreme Court would still have been able to justify a ban on gender discrimination in jury selection under the state constitution.[136] The issue of whether gender-based peremptory challenges are unconstitutional under the state constitution was not discussed in *Fern*.[137] The court, however, is permitted to construe the state constitution to provide more protection than is provided by the federal constitution,[138] and it seems to review gender discrimination claims under the state's equal protection provisions at a greater level of scrutiny than is used by the United States Supreme Court

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132. *J.E.B.*, 114 S.Ct. at 1432 (O'Connor, J., concurring).

133. *See* Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 631(1991) (O'Connor, J., dissenting) (indicating that "a peremptory strike by a private litigant is fundamentally a matter of private choice and not state action"); *see also supra* note 42 (discussing the positions of the justices who have challenged the extension of *Batson* to civil cases).

134. *J.E.B.*, 114 S.Ct. at 1432 (O'Connor, J., concurring). Justice O'Connor argued that *Batson* should not prevent private actors, be they civil litigants or criminal defendants, from exercising race or gender based peremptory challenges. *Id.* She stated that such parties are not state actors. *Id.*

135. *J.E.B.*, 114 S.Ct. at 1432 (O'Connor, J. concurring). Justice O'Connor speculated about what the Court might do in future cases in which private parties exercised peremptory challenges. *Id.* She wondered whether the Court would bar a battered woman "on trial for wounding her abusive husband" from using gender-based peremptories. *Id.* at 1433. She concluded that the Court probably would, even though she hoped otherwise. *Id.*

136. The North Dakota Constitution provides that "[n]o special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." N.D. CONST. art. I, § 21. In addition, the constitution provides that "[a]ll laws of a general nature shall have a uniform operation." N.D. CONST. art. I, § 22.

137. City of Mandan v. Fern, 501 N.W.2d 739, 744 n. 3 (N.D. 1993). Justice Levine stated that Fern's attorney attempted to raise the state constitutional issue but that his mere citation of article I, sections 21 and 22, of the North Dakota Constitution was not enough to raise the issue. *Id.*

138. *See* City of Bismarck v. Altevogt, 353 N.W.2d 760 (N.D. 1984) (indicating that "we may provide the citizens of our state, as a matter of state constitutional law, greater protection than the safeguards guaranteed in the Federal Constitution").

in considering claims under the federal Equal Protection Clause.[139] In previous decisions under the state constitution, the court has indicated that it considers gender to be a suspect class.[140] Suspect classifications are subject to "strict judicial scrutiny."[141] Under strict scrutiny, the court will "strike down the challenged classification unless it promotes a compelling government interest and the distinction drawn is necessary to further its purpose."[142] In light of the North Dakota Supreme Court's stated opposition to gender discrimination in jury selection or elsewhere,[143] it is reasonable to conjecture that even if the federal constitutional basis of *Fern* had been removed by the *J.E.B.* Court, discriminatory gender-based jury selection would not long have been tolerated in North Dakota.

Perhaps the most helpful information provided by the *Fern* decision was a detailed explanation of the North Dakota court's position on gender discrimination. The court had rarely dealt with the issue of gender discrimination on a federal constitutional level and had not previously detailed its standard of scrutiny in such cases.[144] *Fern* clearly sets out the standards under which the court will review the issue.[145] The court recently ruled on two other significant cases which dealt with the issue of gender discrimination. In *Swenson v. Northern Crop Ins., Inc.*[146] the court suggested that gender discrimination in employment might amount

139. The United States Supreme Court applies intermediate scrutiny to gender discrimination claims. Craig v. Boren, 429 U.S. 190, 197 (1976). This was the standard applied by Justice Levine in considering Fern's claim under the federal constitution. *Fern*, 501 N.W.2d at 744.

140. *See* State *ex rel.* Olson v. Maxwell, 259 N.W.2d 621, 627 (N.D. 1977) (indicating that "classifications based on sex are 'inherently suspect' under our State Constitution").

141. *Id.*

142. Kavadas v. Lorenzen, 448 N.W.2d 219, 221 (N.D. 1989).

143. *Fern*, 501 N.W.2d at 750 (VandeWalle, C.J., concurring specially).

144. Tang v. Ping, 209 N.W.2d 624 (N.D. 1973), was apparently the first case in which the court dealt with the issue of gender discrimination under the federal Equal Protection Clause. Citing the Supreme Court's decision in Frontiero v. Richardson, 411 U.S. 677 (1973), the court indicated that "classifications based upon sex are inherently suspect and must be subjected to strict judicial scrutiny." *Tang*, 209 N.W.2d at 627. It thus found that application of a state statute which defined minors as males under age 21 and females under age 18 "would deny males ages eighteen through twenty the equal protection of the law as prescribed by the Fourteenth Amendment of the United States Constitution." *Id.* The court, however, apparently did not apply strict scrutiny when it made this decision, asking instead whether the classification had a "reasonable relationship" to the law in question. *Id.* In Hastings v. James River Aerie No. 2337—Fraternal Order of Eagles, 246 N.W.2d 747 (N.D. 1976), the court dealt with the question of whether allowing a husband to recover for loss of consortium under the Dram Shop Act while denying a wife the same right would be a violation of equal protection. *Id.* at 751. The court found that denying a wife the right to recovery would be a violation of equal protection under both the North Dakota and United States Constitutions. *Id.* The court did not, however, indicate the basis for this conclusion. *Id.* Instead, it cited an Ohio case which observed that such a classification is "unreasonable" and a Federal District Court case which observed that there is no "rational basis" for denying a wife the right to recover for loss of consortium. *Id.* at 751-52 (citing Leffler v. Wiley, 239 N.E.2d 235 (1968) and Karczewski v. Baltimore and Ohio R.R. Co., 274 F. Supp. 169 (1967)).

145. *Fern*, 501 N.W.2d at 744 (indicating that the North Dakota Supreme Court will apply intermediate scrutiny to gender discrimination claims under the federal constitution).

146. 498 N.W.2d 174 (N.D. 1993).

to intentional infliction of emotional distress.[147] In *Schweigert v. Provident Life Ins. Co.*,[148] the court reviewed the framework it uses to analyze cases involving gender discrimination.[149] Considered with these cases, *Fern* can provide important insight to practitioners bringing gender discrimination claims before the court.

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147. Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 182 (N.D. 1993). *Swenson* dealt with a gender discrimination claim based on the state Equal Pay Act and tort law. *Id.* at 176. The court affirmed the lower court's decision rejecting the plaintiff's gender discrimination claim, *id.* at 177-78, but found material facts in dispute as to the plaintiff's Equal Pay Act claim. *Id.* at 180. The court likewise found that the plaintiff's tort claim alleging intentional infliction of emotional distress was an issue that should have been presented to a jury. *Id.* at 182. Justice Levine, author of the majority decision in *Fern*, argued in a special concurrence that gender discrimination in employment in itself should be seen as conduct outrageous and tortious enough to raise a jury issue. *Id.* at 187-89 (Levine, J., concurring specially).

148. 503 N.W.2d 225 (N.D. 1993).

149. Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225, 229 (N.D. 1993). *Schweigert* dealt with a gender discrimination claim brought by a woman who claimed she had been terminated based on her gender. *Id.* at 226. The trial court evaluated the discrimination in a manner inconsistent with state law. *Id.* at 229. Nonetheless, the North Dakota Supreme Court affirmed the trial court's dismissal of the claim, finding that the decision was not clearly erroneous. *Id.* at 230-31. In reaching this decision, the court reviewed the framework it uses to analyze cases involving gender discrimination. *Id.* at 229. An employee who claims discrimination must first establish a prima facie case. *Id.* Once this is done, a presumption of discrimination is established which the employer may rebut by proving that its actions had a nondiscriminatory basis. *Id.* If a prima facie case of discrimination is established, the burden of persuasion is on the employer, who must then convince the fact finder that there was no discrimination. *Id.*