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## **FEDERALISM’S FALSE HOPE: HOW STATE CIVIL RIGHTS LAWS ARE SYSTEMATICALLY UNDER-ENFORCED IN FEDERAL FORUMS (AND WHAT CAN BE DONE ABOUT IT)**

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If state and federal civil rights laws had a narrative, it might go something like this: in the beginning, state governments were the obstacles to liberty and equality. Since the end of the Civil War, states—southern states especially—were haunted by the legacy of Jim Crow—passive enablers of private discrimination at best, active participants at worst. Although interested in providing relief,<sup>1</sup> the federal government was largely powerless to act.<sup>2</sup>

About mid-way through the twentieth century, three key trends converged to change this status quo, placing vast supervisory authority in the civil rights arena in the hands of the federal government, and the federal courts in particular. First, the civil rights movement—led by the Reverend Martin Luther King, Jr. and others, and projected into the American living room by Walter Cronkite<sup>3</sup>—entered the mainstream American consciousness, cementing itself as a national problem worthy of a national response.<sup>4</sup> Second, the legacy of the New Deal left the federal government with greatly expanded powers to deal with civil rights violations. As an example, while the Supreme Court in 1883 struck down portions of the Civil Rights Act of 1875 barring

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1. *See, e.g.*, Federal Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336 (current version at 18 U.S.C. § 243 (2000)) (stating that a fine will be imposed on anyone who disqualifies a juror on the basis of their race).

2. *See, e.g.*, *The Civil Rights Cases*, 109 U.S. 3, 4, 25 (1883) (striking down the Civil Rights Act of 1875 as beyond the constitutional authority of Congress to enact).

3. *See* WALTER CRONKITE, *A REPORTER’S LIFE* 289-90, 292-94 (1996).

4. *See id.* at 294-95.

discrimination in public accommodations,<sup>5</sup> the Court—61 years later—upheld similar provisions in the newly-enacted Civil Rights Act of 1964.<sup>6</sup> In the intervening period, the Supreme Court had dramatically changed its understanding of the breadth of Congress’s power to “regulate Commerce . . . among the several States”<sup>7</sup> adopting an expansive view of congressional power during the New Deal—a view that persisted through the Civil Rights era.<sup>8</sup> This expanded power, in turn, gave Congress near *carte blanche* power to legislate in the name of preventing civil rights abuses.<sup>9</sup> Third, a strong political will to pursue federal civil rights violations through both public<sup>10</sup> and private<sup>11</sup> enforcement mechanisms in the 1960s and 1970s led to zealous enforcement of federal civil rights statutes—effectively narrowing the gap between abstract legal protections and enforceable legal rights.<sup>12</sup> In this new universe of federal civil rights enforcement, the federal judiciary played an active role. Initially, under the guidance of the Warren Court, the federal courts interpreted federal civil rights laws generously,<sup>13</sup> often looking to the broad remedial purpose of such laws in making victims of discrimination whole.<sup>14</sup> To this day, discrimination

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5. *The Civil Rights Cases*, 109 U.S. at 9-10, 25.

6. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 249, 261 (1964) (upholding Title II of the Civil Rights Act of 1964 as validly applied to the Heart of Atlanta Motel, which wished to continue its policy of refusing to rent rooms to African Americans); *Katzenbach v. McClung*, 379 U.S. 294, 297, 298, 304 (1964) (upholding Title II of the Civil Rights Act of 1964 as validly applied to the Ollie’s Barbeque, a restaurant which wished to continue its policy of refusing to seat African Americans).

7. U.S. CONST. art. I § 8, cl. 3.

8. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1260 (1986) (describing the Supreme Court’s use of the Commerce Clause in establishing broad federal regulatory power); see also *Heart of Atlanta Motel*, 379 U.S. at 261; *Katzenbach*, 379 U.S. at 304, 305.

9. E.g., Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1964); Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2000).

10. See generally Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 449-55 (2007) (describing the effect of public enforcement); U.S. COMM’N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 10 (1971) (recounting how immediately the Department of Justice reacted after the passage of the Civil Rights Act of 1964); RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE *HEART OF ATLANTA MOTEL* AND *MCCLUNG* CASES 26-27 (2001) (detailing the composition of the Civil Rights Division of the Department of Justice upon the passage of the Civil Rights Act of 1964).

11. Waterstone, *supra* note 10, at 442-43 (describing how even private enforcement of federal civil rights laws was initially driven largely by public interest groups and federal funding).

12. See Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 NW. U. L. REV. 1251, 1252-54 (2006) (describing the impact of lawyers on the development of public interest law).

13. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (holding separate but equal had no place in public education).

14. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30, 436 (1971) (adopting an

victims look primarily to federal civil rights laws and the federal courts for relief.

Of course, this narrative is correct so far as it goes. But still the full story remains largely—and surprisingly—untold. At the state level over the past quarter century, the civil rights landscape has undergone a quiet revolution. While the federal civil rights regime has weakened, numerous states, as a substantive matter, have passed civil rights statutes exceeding federal law in their scope and breadth of protection.<sup>15</sup> In Minnesota, for example, state law affords victims of discrimination greater protection than they would otherwise receive under federal law.<sup>16</sup> Persons suffering from sexual harassment, disability discrimination, or sexual orientation discrimination, for example, all receive greater protection under Minnesota law than they receive under federal law.<sup>17</sup>

As has been thoroughly documented by other commentators, federal civil right protections have progressively weakened in recent years.<sup>18</sup> As one factor in this federal decline, the federal judiciary has become increasingly hostile towards discrimination victims and their lawsuits filed in federal court. The cases of *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*<sup>19</sup> and *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*<sup>20</sup> are two recent examples illustrating this point. *Ledbetter* all but closed the door on victims of wage discrimination, holding that issuing a paycheck does not count as a new act of discrimination, even if the employer decided at an earlier time to pay certain employees less money because of their race,

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expansive interpretation of Title VII; citing the “objective of Congress . . . to achieve equality of employment opportunities” as a reason for recognizing certain acts of non-intentional discrimination as a violation of federal civil rights law).

15. See, e.g., Sande L. Buhai, *In the Meantime: State Protection of Disability Civil Rights*, 37 LOY. L.A. L. REV. 1065, 1089-96 (2004) (summarizing examples of where state disability laws are more protective than parallel federal measures).

16. Compare Minnesota Human Rights Act, MINN. STAT. ANN. § 363A.02 (West 2000) (protecting a wide variety of classifications from a broad range of discriminatory practices), with Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)-(e) (2000) (prohibiting discrimination based on race, color, national origin, sex and religion in various employment contexts), and Age Discrimination in Employment Act, 29 U.S.C. §§ 623(a)-(e) (2000) (prohibiting discrimination based on age in various employment contexts), and Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111-12 (2000) (prohibiting discrimination based on disability in various employment contexts).

17. See *infra* Part I (discussing three of the various areas where greater protection is provided under Minnesota law than under federal law).

18. See generally Waterstone, *supra* note 10, at 438 & n.14 (citing various commentators to this effect).

19. 127 S. Ct. 2162 (2007).

20. 532 U.S. 598 (2001).

sex, or religion.<sup>21</sup> *Buckhannon* limited the ability of plaintiffs' lawyers to recover attorney's fees,<sup>22</sup> making it increasingly difficult for some plaintiffs to find counsel willing to litigate their discrimination claims, especially in cases seeking only injunctive relief.<sup>23</sup> Further examples of this phenomenon—the narrow reading of federal civil rights statutes by the federal courts—are discussed in Part I of this Article.

In addition to changes in judicial interpretation of federal civil rights laws, public enforcement of these laws has waned. The Department of Justice's strong public enforcement campaign from the 1960s and 1970s has largely dried up.<sup>24</sup> The same is true for enforcement measures brought by public interest organizations, many of which received public money largely from the Legal Services Corporation.<sup>25</sup> Funding for the Legal Services Corporation has been cut over the last two decades.<sup>26</sup>

Finally, the Supreme Court during the Rehnquist era began to rein in the constitutional authority of Congress to pass civil rights legislation. For example, the Court in *United States v. Morrison*,<sup>27</sup> ruled that Congress lacked the authority to pass the Violence Against Women Act of 1994.<sup>28</sup> In reaching this holding, the Court articulated new limits on Congress's ability to regulate interstate commerce and enforce the Fourteenth Amendment.<sup>29</sup> As another example, the Court has

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21. *Ledbetter*, 127 S. Ct. at 2174 (citing *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 911 (1989)). The *Ledbetter* case dealt with unequal pay on the basis of the recipient's sex, but the holding of the case naturally extends to unequal pay on the basis of any impermissible classification. *Ledbetter*, 127 S. Ct. at 2165, 2168 (citing *Delaware State College v. Ricks*, 449 U.S. 250, 253-54, 257-58 (1980)) (identifying a case based on racial discrimination as relevant to the determination of the sex discrimination claims made by *Ledbetter*). Congress has since enacted legislation reversing *Ledbetter*. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (Jan. 29, 2009) (amending 42 U.S.C. § 2000e-5).

22. *Buckhannon*, 532 U.S. at 605 (citations omitted).

23. See Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1090-92 (2007) (discussing the negative effects of *Buckhannon* on private organizations that bring civil rights cases, specifically, the difficulty in bringing private suits for injunctive relief).

24. See Waterstone, *supra* note 10, at 457-60.

25. See *id.* at 442-45; see also Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law"*, 2005 WIS. L. REV. 455, 456-60 (characterizing the 1960s and 1970s as "classic" era of public interest law).

26. See ABA, *Capitol Building American Bar Association 2002 Legislative and Governmental Priorities Legal Services Corporation*, Jan. 2, 2003, <http://www.abanet.org/poladv/priorities/lsc.html> (last visited Dec. 28, 2008).

27. 529 U.S. 598 (2000).

28. *Id.* at 605, 627.

29. *Id.* at 617-19 (citations omitted). In many ways, *Morrison* and its progeny marked a return to a much older understanding of congressional power. For example, *Morrison* reaffirmed

resurrected its Eleventh Amendment jurisprudence, narrowing the circumstances under which private individuals can enforce their civil rights against state violators in federal court.<sup>30</sup>

Giving these two divergent trends—the expanding body of state civil rights law in many states, and the shrinking scope of federal civil rights law—it seems logical to take a hard look at state civil rights law and ask whether this body of law can do the heavy lifting once accomplished by federal law. Unfortunately, a third trend in civil rights law (and the focus of this Article) has developed: the under-enforcement of state civil rights laws in federal courts. A flip through the pages of the Federal Reporter reveals a disturbing trend: again and again, when victims of discrimination press their claims in federal court, federal judges refuse to treat state civil rights laws seriously, as an independent body of legal rules.<sup>31</sup> Instead, these judges prefer to treat state civil rights law as coextensive with federal law (often incorrectly so, and usually without any analysis or justification for the practice).<sup>32</sup> Oftentimes, federal courts seem to ignore state law altogether.<sup>33</sup>

This Article systematically examines this practice and offers a battery of remedies. We proceed as follows: Parts I and II seek to demonstrate the existence of a problem: the under-enforcement of state civil rights laws in federal court. Focusing on Minnesota's civil rights laws,<sup>34</sup> Part I of this Article examines two discrete areas of civil rights

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*The Civil Rights Cases*, 109 U.S. 3 (1883), with its strict dichotomy of private discrimination (which Congress cannot remedy under the Fourteenth Amendment enforcement power) and public discrimination (which Congress may address). *Morrison*, 529 U.S. at 620-21.

In spite of this strict dichotomy, federal civil rights laws have expanded legislatively over the past twenty-five years to a certain extent. Most notably, the 1990s and the present decade have seen the passage of the Americans with Disabilities Act (“ADA”), the Civil Rights Act of 1991, and the Uniformed Services Employment and Reemployment Rights Act. 42 U.S.C. § 12101 (2000); 42 U.S.C. § 2000e (2000); 38 U.S.C. § 4301 (2000). However, it appears that even this relatively newer legislation has not been immune from the three federal trends identified above: waning enforcement, narrow judicial construction, and limited constitutional authority to apply the law in all circumstances.

30. See, e.g., *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360, 363-64, 374 (2001) (holding that private litigant could not bring a damages claim under Title I of the ADA against Alabama).

31. See discussion *infra* Part II.B.

32. See discussion *infra* Part II.C.

33. See discussion *infra* Part II.C.

34. We chose to narrow our focus to Minnesota civil rights laws for three reasons. First, Minnesota seemed a particularly well-suited forum for testing our hypothesis that state civil rights laws are under-enforced in federal courts. Minnesota, as a state, has a long tradition of progressive state laws and robust civil rights protections. But Minnesota, as a district in the federal court system, sits in the Eighth Circuit Court of Appeals, one of the more conservative federal courts in the country. See Yvette K. Shultz, *Runaway Train – The Retaliation Scene After Burlington*

law: sexual harassment and disability discrimination. Contrasting the text, legislative history, and doctrinal development of state and federal law, this Part shows how Minnesota's civil rights laws offer greater substantive protection (in the abstract) when compared to federal civil rights laws. Part II then turns to the enforcement of civil rights laws in federal court. Using an analysis of cases decided during the past seventeen years by the United States Court of Appeals for the Eighth Circuit, this Part shows that Minnesota's civil rights laws are chronically and systematically under-enforced in federal court. Part III offers a series of measures aimed at restoring state civil rights law as an independent and vibrant source of protection for victims of discrimination in federal court. Specifically, this Article makes four basic recommendations, each one focusing on a different institutional actor. First, attorneys on the civil rights bar must place a renewed emphasis on the primacy of state civil rights law in both state and federal courts. Second, federal courts themselves must make greater use of the certification procedure, a mechanism by which federal courts can "certify" questions of state law to be authoritatively construed by the appropriate state supreme court. Third, state high courts need to help stem the bleeding. This Article suggests that state supreme courts follow the framework developed by the Minnesota Supreme Court in *Kahn v. Griffin*,<sup>35</sup> where the court provided a clear and principled roadmap for interpreting provisions of the Minnesota Constitution more expansively than the United States Constitution.<sup>36</sup> This framework should be imported into the civil rights arena. Finally, Congress and state legislatures should act to create a scheme where state supreme courts

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Northern v. White, 68 LA. L. REV. 1025, 1030 (2008) (the Eighth Circuit adopted the most conservative view for redress in employer action cases); Howard J. Bashman, *8th Circuit's Bush Appointees Confound the Prognosticators*, Law.com, June 19, 2006, available at <http://www.law.com/jsp/article.jsp?id=1150448725347> (noting that this is not the "most conservative of all the federal appellate courts," but "how conservative a particular federal appellate court happens to be is a function of how conservative the individual judges serving on the court are," and the most conservative and youngest appointees of Bush serve on the 8th Circuit); Matthew H. Bosworth, "An Innate Sense of Fairness": State Responses to the U.S. Supreme Court's Sovereign Immunity Decisions, 36 PUBLIUS 393 (June 22, 2006) ("[t]he relatively conservative Eighth Circuit Court of Appeals may have influenced this assessment"). This combination made Minnesota an ideal test case for critically examining whether its civil rights laws were being adequately applied and enforced in federal court. Second, we live and work in Minnesota, and thus have a better grasp of Minnesota law over the law of any other state. Finally, it made sense as a practical matter to narrow our focus to a single state in order to keep the Article from becoming bogged down in hundreds of statutes from dozens of states. We will leave it to other commentators to support (or contradict) our findings with data from other states.

35. 701 N.W.2d 815 (Minn. 2005).

36. See *id.* at 828-29.

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could review questions of state law appealed from United States Courts of Appeals. Working together, these structural reforms should restore state civil rights law to its rightful place as a primary protector of individual rights.

## I. COMPARING STATE AND FEDERAL CIVIL RIGHTS LAWS

The United States and Minnesota each have a discrete set of anti-discrimination statutes. Some common examples of federal civil rights statutes include Title VII of the Civil Rights Act of 1964 (“Title VII”), which generally forbids discrimination on the basis of race, color, national origin, sex, and religion,<sup>37</sup> the Age Discrimination in Employment Act (“ADEA”), which bans discrimination because of age,<sup>38</sup> and the Americans with Disabilities Act (“ADA”), which prohibits a wide range of discrimination aimed at persons with disabilities.<sup>39</sup> The Minnesota Human Rights Act is Minnesota’s comprehensive civil rights statute.<sup>40</sup> It generally proscribes any discrimination based on race, national origin, color, religion, sex, age, status with regard to public assistance, disability, marital status, or sexual orientation.<sup>41</sup> The goal of this Part is to closely examine both federal and Minnesota civil rights laws in two areas—sexual harassment and disability discrimination—and to demonstrate what many take for granted, that Minnesota civil rights laws offer greater protection to victims of discrimination than federal civil rights laws.

### A. Sexual Harassment

#### 1. Federal law

Federal civil rights law does not explicitly forbid sexual harassment. Instead, the bare text of Title VII simply bans sex discrimination: “It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because

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37. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) to -2(d) (2000).

38. Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1)-(3) (2000).

39. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)-(b) (2000).

40. MINN. STAT. ANN. §§ 363A.01 to .02 (West 2004).

41. *See id.* § 363A.02.

of such individual's . . . sex . . . ."<sup>42</sup>

The legislative history for sex discrimination protection under Title VII is renowned for its lack of meaningful debate. As the Supreme Court has noted, "the prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives."<sup>43</sup> According to many accounts, the one-word floor amendment adding the word "sex" to the list of protected classifications was a tactic by opponents to sabotage the entire bill.<sup>44</sup> Others have asserted that the last minute amendment was the result of a concerted lobbying effort by a small, devoted group of women's rights activists.<sup>45</sup> Whatever the motivation behind the last-minute amendment, there is broad consensus that the legislative history is unusually short (especially for landmark legislation) and mentions nothing of sexual harassment.<sup>46</sup> On the contrary, the legislative history accompanying the floor amendment adding "sex" to Title VII focused on more traditional—economic—forms of sex discrimination.<sup>47</sup> In offering the amendment, Representative Smith made this introduction:

I think we all recognize and it is indisputable fact that all throughout industry women are discriminated against in that just generally speaking they do not get as high compensation for their work as do the majority sex. Now, if that is true, I hope that the committee chairman will accept this amendment.<sup>48</sup>

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42. 42 U.S.C. § 2000e-2(a)(1).

43. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986) (citing 110 CONG. REC. 2577-84 (1964)).

44. See, e.g., CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 234* (1985) (positing that the eleventh hour amendment was "the result of a deliberate ploy of foes of the bill to scuttle it"); GARY ORFIELD, *THE BROOKINGS INST., CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE 299* (1975) ("Bitter opponents of the job discrimination title . . . decided to try to load up the bill with objectionable features that might split the coalition supporting it").

45. See, e.g., Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 *LAW & INEQ.* 163, 183 (1991) (concluding that the inclusion of the sex discrimination ban in Title VII was "the product of a small but dedicated group of women, in and out of Congress, who knew how to take advantage of the momentum generated by a larger social movement to promote their own goals, and a larger group of Congressmen willing to make an affirmative statement in favor of women's rights").

46. See 110 CONG. REC. 2577-84 (1964); see also John B. Attanasio, *Equal Justice Under Chaos: The Developing Law of Sexual Harassment*, 51 *U. CIN. L. REV.* 1, 2 n.5 (1982) ("None of the voluminous legislative history of Title VII or its 1972 Amendments specifically pertains to sexual harassment.").

47. See 110 CONG. REC. 2577-84 (1964).

48. 110 CONG. REC. 2577 (1964).

Since 1964, federal law has simply forbidden discrimination “because of . . . sex.”<sup>49</sup> For over twenty years after the passage of Title VII, the lower federal courts quarreled among themselves over whether a plaintiff complaining of hostile work environment sexual harassment could maintain an action under Title VII.<sup>50</sup> For example, in 1976, the United States District Court of New Jersey concluded that sexual harassment was not sex discrimination within the meaning of Title VII.<sup>51</sup> The court, in *Tomkins v. Public Service Electric & Gas Co.*,<sup>52</sup> considered the case of Adrienne Tomkins, a woman whose male supervisor at work subjected her to unwelcome sexual advances and physical threats.<sup>53</sup> The court reasoned that “[w]hile sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse.”<sup>54</sup> The court then went on to note, somewhat blithely, that “if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or a raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.”<sup>55</sup>

Notwithstanding the *Tomkins* decision, several lower federal courts, starting in the early 1980s, began taking sexual harassment claims seriously. In *Bundy v. Jackson*,<sup>56</sup> the D.C. Circuit went out of its way to hold that sexual harassment can violate Title VII.<sup>57</sup> Drawing an analogy to racially hostile work environments, the *Bundy* court reasoned that:

Racial or ethnic discrimination against a company’s minority clients may reflect no intent to discriminate directly against the company’s minority employees, but in poisoning the atmosphere of employment it violates Title VII . . . . How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an

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49. See 42 U.S.C. § 2000e-2(a)(1) (2000).

50. Compare *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (recognizing that it is possible to state a claim for hostile work environment sexual harassment under Title VII), with *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (holding that sexual harassment does not violate Title VII’s ban on sex discrimination), *rev’d* 568 F.2d 1044 (3d Cir. 1997).

51. *Tomkins*, 422 F. Supp. at 556.

52. 422 F. Supp. 553 (D.N.J. 1976).

53. *Id.* at 555.

54. *Id.* at 556.

55. *Id.* at 557.

56. 641 F.2d 934 (D.C. Cir. 1981).

57. *Id.* at 943-44.

individual's innermost privacy, not be illegal?<sup>58</sup>

In 1986, the Supreme Court stepped in to resolve the dispute. In *Meritor Savings Bank, FSB v. Vinson*,<sup>59</sup> the respondent, Mechelle Vinson, alleged that her supervisor, Sidney Taylor, perpetually made demands for sexual favors, "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."<sup>60</sup> The Court rejected the view that the Title VII ban on sex discrimination only applied to "'tangible loss' of 'an economic character.'"<sup>61</sup> Rather, the Court concluded that sexual harassment can create a hostile work environment, which is a violation of Title VII.<sup>62</sup>

But the *Meritor* Court was careful to limit its holding in order to stay true to the text of Title VII, which after all, does not explicitly ban sexual harassment.<sup>63</sup> First, the Court held that any claim of sexual harassment must prove that the harassment was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment . . .'"<sup>64</sup> The Supreme Court went even further in *Faragher v. City of Boca Raton*,<sup>65</sup> where it declared that "[w]e have made it clear that conduct must be *extreme* to amount to a change in the terms and conditions of employment . . ."<sup>66</sup> Lower courts evaluating sexual harassment claims after *Meritor* have typically examined the level of offensiveness of the unwelcome acts or words, the frequency of the harassing encounters, the length of time over which the harassment occurred, and the surrounding context of the words or acts complained of.<sup>67</sup>

Second, the Court in *Meritor* held that the complaining party must demonstrate that the harassment has "create[d] an abusive working environment."<sup>68</sup> The lower federal courts have interpreted this element

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58. *Id.* at 945.

59. 477 U.S. 57 (1986).

60. *Id.* at 59-60.

61. *Id.* at 64 (citation omitted).

62. *Id.* at 65-66.

63. *See id.* (explaining that it is the EEOC Guidelines which establish the view that sexual harassment violates Title VII).

64. *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

65. 524 U.S. 775 (1998).

66. *Id.* at 788 (emphasis added).

67. *See generally* Nitsche v. CEO of Osage Valley Elec. Coop., 446 F.3d 841, 846 (8th Cir. 2006) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)) (outlining multiple elements to consider when viewing the totality of the circumstances in order to determine whether a work environment was sufficiently hostile under Title VII).

68. *Meritor*, 477 U.S. at 67 (citing *Henson*, 682 F.2d at 904).

to require victims of discrimination to show that the working environment was both objectively and subjectively offensive.<sup>69</sup> In other words, the working environment must be offensive to both the reasonable person<sup>70</sup> and the victim of the harassment him- or herself.<sup>71</sup> Third, the victim of discrimination must show that the harassment complained of was “unwelcome.”<sup>72</sup> And finally, the party claiming harassment must show that the alleged harassment was based on sex (as in, gender), and not on some other neutral characteristic.<sup>73</sup> For example, the “equal opportunity . . . harasser”—the supervisor who doles out harassment equally to men and women—is generally immune from a Title VII sexual harassment suit, since it cannot be argued that the supervisor acted because of sex.<sup>74</sup> These four elements continue to serve as the guideposts for establishing a sexual harassment claim under Title VII.<sup>75</sup>

## 2. Minnesota Law

Like its federal counterpart, the Minnesota Human Rights Act bans a wide range of discrimination based on sex.<sup>76</sup> Unlike Title VII, however, the Minnesota Human Rights Act explicitly defines and forbids sexual harassment. Minnesota defines sexual harassment as follows:

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69. See, e.g., *Faragher*, 524 U.S. at 787 (citing *Harris*, 510 U.S. at 21-22); *Nitsche*, 446 F.3d at 846 (citing *Faragher*, 524 U.S. at 787).

70. The Ninth Circuit differs slightly from the other federal circuits in that the Ninth Circuit uses a “reasonable woman” standard. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 878-80 (9th Cir. 1991) (citations omitted).

71. See, e.g., *Nitsche*, 446 F.3d at 846 (citing *Faragher*, 524 U.S. at 787).

72. *Meritor*, 477 U.S. at 68 (citing 29 C.F.R. § 1604.11(a) (2008)) (“The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”).

73. See *id.* at 64-66.

74. See, e.g., *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000) (holding that a supervisor who solicited sex from both male and female subordinates could not be liable under Title VII).

75. See *Nitsche*, 446 F.3d at 845 (citing *McCown v. St. John’s Health Sys., Inc.*, 349 F.3d 540, 542 (8th Cir. 2003)).

76. Specifically, the Minnesota Human Rights Act states that:

Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of . . . sex . . . to:

- (a) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
- (b) discharge an employee; or
- (c) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

MINN. STAT. ANN. § 363A.08 subdiv. 2 (West 2004).

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“Sexual harassment” includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:

(1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, education, or housing;

(2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual’s employment, public accommodations or public services, education, or housing; or

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual’s employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.<sup>77</sup>

This Article will take up the task of contrasting Minnesota’s sexual harassment statute with Title VII in a moment. First, it is important to tell the story of how Minnesota got to this point. In 1964, when Congress passed the Civil Rights Act of 1964, Minnesota had no law addressing sex discrimination or sexual harassment.<sup>78</sup> Prior to 1964, only two states—Hawaii and Wisconsin—outlawed sex discrimination.<sup>79</sup> Inspired by the new federal law, local reformers convinced the Minnesota legislature to add “sex” as a suspect classification to its civil rights laws in 1969.<sup>80</sup> The early act dealt only with employment, but clearly and forcefully laid out its legislative mandate: “The opportunity to obtain employment without discrimination because of sex is also hereby recognized as and declared to be a civil right.”<sup>81</sup>

As the debate over sexual harassment in the workplace began to take hold in the late 1970s, the Minnesota Supreme Court accepted

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77. MINN. STAT. ANN. § 363A.03 subdiv. 43 (West 2004).

78. See Freeman, *supra* note 45, at 163.

79. *Id.*

80. See Act of June 6, 1969, ch. 975, 1969 Minn. Laws 1937, 1938-39 (codified at MINN. STAT. ANN. § 363A.08 (West 2004)).

81. *Id.* at 1948.

review of a case in 1980—six years before the U.S. Supreme Court would do so—to determine whether sexual harassment was actionable under Minnesota law.<sup>82</sup> The Minnesota Supreme Court, in *Continental Can Co. v. State*,<sup>83</sup> answered that question in the affirmative.<sup>84</sup> At the time of the *Continental Can* decision, the Minnesota Human Rights Act prohibited only discrimination because of sex—not sexual harassment—much like Title VII does today.<sup>85</sup>

In 1982, Minnesota law and federal law parted ways when the Minnesota legislature added the specific ban on sexual harassment, including the definition of sexual harassment discussed above.<sup>86</sup> The legislative history of the change reveals two purposes in pushing for comprehensive legislation on sexual harassment. First, it establishes that the legislature wanted to codify the basic holding in *Continental Can*—that sexual harassment is actionable discrimination—into statutory law.<sup>87</sup> Second, the legislative history displays numerous instances where Minnesota legislators expressed an intention to *go beyond* what was already protected by federal law. For example, Representative Rodriguez helped prepare a report on sexual harassment that would later form the basis for the legislative change.<sup>88</sup> The report noted that under federal anti-discrimination law, an employee would need to show that the sexual harassment affected the “terms and conditions of employment and that these effects were directly linked to sexual harassment.”<sup>89</sup> The report further commented on the state of federal law in 1980, stating that “if the ‘employer can show that there were other reasons for adverse

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82. See *Cont'l Can Co. v. State*, 297 N.W.2d 241, 243, 246-47 (Minn. 1980); see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

83. 297 N.W.2d 241 (Minn. 1980).

84. *Id.* at 249.

85. Compare MINN. STAT. § 363.03, subdiv. 1(2)(b) & (c) (1978) (“[I]t is an unfair employment practice: . . . (2) For an employer, because of . . . sex . . . (b) to discharge an employee . . . or (c) to discriminate against an employee with respect to his hire, tenure, compensation, (or) upgrading . . . of employment.”), with Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (“It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s . . . sex . . .”).

86. Act of Mar. 23, 1982, 1982 Minn. Laws 1511.

87. Bradley A. Kletscher, *Minnesota’s Sexual Harassment Statute: It’s [sic] History and the law* (Part I), <http://www.bgs.com/default.asp?id=80> (last visited Nov. 1, 2008) (statement of Rep. Rodriguez) (“The prohibition against sex discrimination in the state human rights act includes sexual harassment directed at an employee by fellow employees which impacts a condition of employment . . . .” (quoting *Cont'l Can*, 297 N.W.2d at 249 (Minn. 1980))); see Act of Mar. 23, 1982, ch. 618, 1982 Minn. Laws 1508.

88. Kletscher, *supra* note 87.

89. *Id.* (citations omitted).

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employment action, such as excessive absenteeism or poor work performance, the courts have held that sexual harassment did not constitute sex discrimination under Title VII.”<sup>90</sup>

This legislative history is notable for three reasons. First, it makes little sense to argue that the Minnesota legislature wanted to simply codify *Continental Can* without expanding on the decision. Why would a legislature take the time and effort to amend a statute to reflect a controlling supreme court decision when it could achieve the same result by doing nothing? Second, the passing references to federal law in the legislative history indicate a dissatisfaction with the level of protection Title VII offered victims of sexual harassment in 1980. And third, the resulting text of the Minnesota Human Rights Act after the amendment confirms the view that the legislature wished to provide a relatively more expansive definition of sexual harassment.

### 3. Comparing Federal Law with Minnesota Law

In making the comparison between the Minnesota Human Rights Act and Title VII, Minnesota’s law is more expansive in several ways. First, Minnesota’s sexual harassment law is textually grounded, while federal law does not explicitly ban sexual harassment.<sup>91</sup> Instead, federal law relies on judicial interpretation, with its “severe or pervasive” requirement necessary to remain faithful to the text of the statute.<sup>92</sup>

Second, the Minnesota Human Rights Act contains an explicit rule of construction instructing courts that “[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.”<sup>93</sup> Although the Supreme Court often mentions the “remedial purpose” of Title VII,<sup>94</sup> there is no textual provision of Title VII mentioning a liberal construction of the federal statute.<sup>95</sup>

Third, many of the doctrinal developments developed in *Meritor* and after do not seem to apply to Minnesota’s law. For example, the *Meritor* Court held that the sexual harassment must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment

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90. *Id.* (citations omitted).

91. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-66 (1986).

92. *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (1982)).

93. MINN. STAT. ANN. § 363A.04 (West 2004).

94. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982)).

95. *See generally* Civil Rights Act, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (2000).

. . .” in order to be covered by Title VII.<sup>96</sup> This is simply not required under Minnesota law. Although subsections (1) and (2) of Minnesota’s sexual harassment definition deal with terms and conditions,<sup>97</sup> subsection (3) does not. The third subsection bans “conduct or communication [which] has the purpose or effect of substantially interfering with an individual’s employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.”<sup>98</sup> On the face of the statute, liability can attach for “substantially interfering with an individual’s employment,” *or* for “creating an intimidating, hostile or offensive . . . environment.”<sup>99</sup> Also, culpable behavior includes that which has the “*purpose or effect*” of bringing about these situations.<sup>100</sup> The plain reading of the statute simply does not require that the harassment be “severe or pervasive,” nor does the statute necessarily require that the alleged harassment affect a term or condition of employment.<sup>101</sup>

Fourth, the Court in *Meritor* held that the complaining party must demonstrate that the harassment has “create[d] an abusive working environment,”<sup>102</sup> which requires a showing that the working environment is both objectively and subjectively offensive.<sup>103</sup> In other words, the working environment must be offensive to both the reasonable person, and the victim of the harassment him- or herself.<sup>104</sup> But the Minnesota definition of sexual harassment does not appear to require a showing of subjective offensiveness.<sup>105</sup> Why else would the Minnesota Human Rights Act forbid “conduct or communication [which] has the *purpose . . .* of substantially interfering with an individual’s employment . . .”?<sup>106</sup> The only possible situation where a

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96. *Meritor*, 477 U.S. at 67 (alteration in original) (quoting *Henson*, 682 F.2d at 904).

97. See MINN. STAT. ANN. § 363A.03 subdvs. 43(1)-(2) (West 2004).

98. MINN. STAT. ANN. § 363A.03. subd. 43(3).

99. *Id.* (emphasis added).

100. *Id.* (emphasis added).

101. Compare MINN. STAT. ANN. § 363A.03 subd. 42(1)-(3) (containing no minimum standard for a harassment claim), with *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904) (establishing that sexual harassment must be “severe or pervasive” to be actionable).

102. *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904).

103. See, e.g., *Nitsche v. CEO of Osage Valley Elec. Coop.*, 446 F.3d 841, 846 (8th Cir. 2006) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

104. *Id.*

105. See generally MINN. STAT. ANN. § 363A.03 subd. 43(1)-(3) (containing no requirement of subjective offensiveness in defining “Sexual Harassment”).

106. MINN. STAT. ANN. § 363.03A subd. 43(3) (emphasis added).

would-be harasser manifests the *purpose* but not the *effect* (only one of which is required) of creating a hostile workplace environment is that of the unsuccessful harasser: the manager who attempts to sexually harass a subordinate worker but is laughed off as joking or harmless. In such a situation, the would-be victim is clearly not subjectively offended by the manager's conduct, but if the manager acted with purpose of sexually harassing the subordinate employee, then the conduct qualifies as sexual harassment under the Minnesota definition.<sup>107</sup>

Moving beyond the "unsuccessful harasser," the Title VII requirement of subjective offensiveness can cause problems for victims of harassment. As an evidentiary matter, it is usually not enough for such victims to state in a deposition or to testify at trial that they were subjectively offended.<sup>108</sup> Take the case of *Cottrill v. MFA*,<sup>109</sup> where the Eighth Circuit affirmed a grant of summary judgment in favor of the employer because the plaintiffs, a group of women, were not subjectively offended (according to the court) by their employer's behavior.<sup>110</sup> According to the *Cottrill* court, the plaintiffs did not show sufficient evidence that they were subjectively offended by their supervisor's behavior, which included spying on the women in the

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107. Although we conclude that the Minnesota Human Rights Act does not require a showing of subjective offensiveness, two outlier Minnesota courts have endorsed subjective offensiveness as an element of a sexual harassment claim under the Minnesota Human Rights Act. These courts are in error. The first to mention the requirement was the court in *Police Officers Federation of Minneapolis v. City of Minneapolis*. No. C4-99-2041, 2000 WL 719860 at \*2 (Minn. Ct. App. June 6, 2000) (unpublished opinion). The court in *Police Officers Federation* cited another Minnesota Court of Appeals case, *Johns v. Harborage I, LTD*, which merely recited the Title VII standard. *Id.* (citing *Johns*, 585 N.W.2d 853, 861 (Minn. Ct. App. 1998) (quoting *Meritor*, 477 U.S. at 66)). Thus, *Police Officers Federation's* reliance on precedent was misplaced. The second Minnesota court to explicitly require a showing of subjective offensiveness is another unpublished, and thus not precedential, opinion, *Monson v. Northern Habilitative Services, Inc.* No. A05-1102, 2006 WL 771919 at \*7 (Minn. Ct. App. May 24, 2006) (unpublished opinion). Like the *Police Officers Federation* court, the court in *Monson* applied the wrong precedent. *Monson* cited the Minnesota Supreme Court case of *Goins v. West Group*, 635 N.W.2d 717, 724-25 (Minn. 2001), where the Supreme Court adopted the Title VII offensiveness standards for hostile work environment claims based on the plaintiff's *sexual orientation*. *Id.* (quoting *Faragher*, 524 U.S. at 787). The *Goins* opinion had nothing to do with sexual harassment. *See Goins*, 635 N.W.2d at 720. The *Monson* court was wrong to import the standards from a sexual orientation case to a sexual harassment case, because Minnesota sexual harassment cases are decided under Minnesota's detailed sexual orientation statute. *See, e.g.*, MINN. STAT. ANN. § 363A.08 subd. 1 ("Except when based on a bona fide occupational qualification, it is an unfair employment practice for a labor organization, because of . . . sexual orientation . . .").

108. *See, e.g.*, *Cottrill v. MFA, Inc.*, 443 F.3d 629, 636-37 (8th Cir. 2006) (finding that in order to be subjectively offensive, the plaintiff must be aware of the activity at the time it was occurring).

109. 443 F.3d 629 (8th Cir. 2006).

110. *Id.* at 636, 638-39.

bathroom, and planting urine, an unidentified sticky substance, and what was believed to be poison ivy on the women's toilet seats, leading to severe, painful, and, in one case permanent rashes and other skin conditions.<sup>111</sup> Such evidentiary burdens should not present problems under Minnesota law, however, since victims of discrimination need not show, under the Minnesota Human Rights Act, that the behavior complained of is subjectively offensive.

Fifth (and last), under federal law, the party claiming harassment must show that the alleged harassment was based on sex, and not on some other neutral characteristic.<sup>112</sup> But again, Minnesota does not follow this requirement. The Minnesota Supreme Court explicitly rejected this requirement in *Cummings v. Koehnen*,<sup>113</sup> where the Court held that sexual harassment need not affect one sex more than the other.<sup>114</sup> The court reasoned that:

Requiring a plaintiff to show that conduct . . . resulted in the differential treatment of male and female employees would lead to absurd results. Such a requirement would leave two classes of employees unprotected from sexual harassment in the workplace: employees who work in a single-gender workplace and employees who work with an "equal opportunity harasser," who harasses sexually both males and females. There is nothing in the [Minnesota Human Rights Act] to indicate the legislature intended to leave these classes of employees unprotected, and we cannot presume the legislature intended such an absurd result.<sup>115</sup>

Importantly, the Minnesota Supreme Court accepted in *Cummings* the notion that the Minnesota Human Rights Act's sexual harassment provisions outlawed more conduct than did the simple ban on sex discrimination in effect in Minnesota between 1969 and 1982.<sup>116</sup> The appellant in *Cummings* cited *Continental Can* "for the proposition that sexual harassment must have a disparate effect on one gender to be actionable under the Minnesota Human Rights Act."<sup>117</sup> The Court rejected this argument, noting that "*Continental Can* interpreted an

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111. *See id.* at 631-33, 638-39, 641.

112. *See id.* at 636 (citing *Schoffstall v. Henderson*, 223 F.3d 818, 826-27 (8th Cir. 2000)).

113. 568 N.W.2d 418 (Minn. 1997).

114. *See id.* at 422, 424.

115. *Id.* at 422-23 (citing MINN. STAT. ANN. § 645.17(1) (West 2004) (requiring that when interpreting statutes, there must be a presumption by the courts that "the legislature did not intend a result that is absurd")).

116. *See id.* at 423-24.

117. *Id.* at 423 n.6.

earlier version of the [Minnesota Human Rights Act], and is therefore not dispositive of the issue before us. At the time *Continental Can* was decided, the [Minnesota Human Rights Act] did not prohibit sexual harassment specifically.”<sup>118</sup> The court went on to conclude that given the statutory definition of sexual harassment under the current Minnesota Human Rights Act, the legislature did not intend for victims of sexual harassment to prove that the harassment was aimed at one particular sex.<sup>119</sup>

In sum, the Minnesota Human Rights Act affords victims of discrimination greater substantive protections when compared to federal law. Minnesota law contains a textual ban on sexual harassment, a clause directing courts to interpret the statute liberally, no requirement that the harassment be “extreme,” “severe or pervasive,” or “affect a term or condition of employment,” no requirement that the complaining party prove he or she was subjectively offended, and, finally, no requirement that the victim demonstrate that the harasser makes a disparate impact on one sex over the other.

### B. Disability Discrimination

Sexual harassment is not the exclusive area where Minnesota’s civil rights laws offer greater protection than their federal counterparts. Minnesota also offers broader protection for the disabled. This extra protection is largely accomplished by defining a much larger group of people as “disabled,” as compared to federal law.

#### 1. Federal Disability Law

Federal law defines disability as: “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”<sup>120</sup> Although this definition comes from the ADA, which Congress passed in 1990,<sup>121</sup> the definition of “disability” was drawn nearly verbatim from the Rehabilitation Act of 1973.<sup>122</sup> The Equal Employment Opportunity Commission (“EEOC”) has issued

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118. *Id.*

119. *See id.* at 424.

120. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2) (2000).

121. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12300 (2000)).

122. 29 U.S.C. § 705(9)(B) (2000).

guidelines to help define the concept of “substantially limits.” According to the EEOC,

the term “substantially limits” means: [u]nable to perform a major life activity that the average person in the general population can perform; or [s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.<sup>123</sup>

Since the ADA was passed, the federal courts have interpreted the “substantially limits” requirement strictly, drastically limiting the number of people who qualify for protection under the ADA. For example, in *Sutton v. United Air Lines, Inc.*,<sup>124</sup> the Supreme Court ruled that two severely myopic twin sisters were not disabled within the meaning of the ADA because their vision problems did not “substantially limit” the sisters’ major life activity of working.<sup>125</sup> The Court went on to note that the “substantially limits” requirement meant that the sisters must be unable to “work in a broad class of jobs.”<sup>126</sup> Similarly, in *Murphy v. United Parcel Service, Inc.*,<sup>127</sup> the Court rejected the plaintiff’s argument that he was disabled because his high blood pressure kept him from doing his job as a UPS mechanic.<sup>128</sup>

The Supreme Court has further narrowed the scope of the ADA’s coverage by holding that a person’s corrective measures must be taken into account before determining whether that person is disabled.<sup>129</sup> In *Sutton*, the Court explicitly held that “if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures . . . must be taken into account when judging whether that person is ‘substantially limited’ in a major life activity and thus ‘disabled’ under the [ADA].”<sup>130</sup> Finally, in 2002, the Supreme Court

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123. 29 C.F.R. § 1630.2(j)(1)(i)-(ii) (2007).

124. 527 U.S. 471 (1999).

125. *Id.* at 475, 488-89, 492-93.

126. *Id.* at 491.

127. 527 U.S. 516 (1999).

128. *Id.* at 519, 521.

129. *See* *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (citing *Sutton*, 527 U.S. at 482); *see also* *Murphy*, 527 U.S. at 521.

130. *Sutton*, 527 U.S. at 482; *see also* *Albertson’s*, 527 U.S. at 565-66 (reasoning that the extent to which a person has learned to compensate for his limitation by making subconscious adjustments should be considered in deciding whether the person is disabled within the meaning of the ADA).

gave the ADA its stingiest construction yet, holding that a plaintiff invoking the ADA's protection "must have an impairment that *prevents or severely restricts* the individual from doing activities that are of a central importance to most people's lives."<sup>131</sup>

Several commentators have criticized these decisions for narrowing the scope of the ADA beyond recognition.<sup>132</sup> Some commentators have reached the conclusion that the Supreme Court's recent ADA jurisprudence is so out of balance that only immediate legislative action by Congress can save the ADA.<sup>133</sup> Very recently, Congress amended the ADA to effectively legislatively reverse some of the Supreme Court's interpretations of the law. The ADA Amendments Act of 2008<sup>134</sup> ("ADAAA"), which took effect January 1, 2009, has directed courts to ignore most mitigating measures when evaluating whether a particular person is disabled. The ADAAA also "reject[ed] the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* . . . that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled . . . .'"<sup>135</sup>

It is too early to gauge the effect of the new law. But it is worth noting, as a general matter, that piecemeal legislative fixes to civil rights laws are a limited remedy for narrow judicial interpretation. First, such changes are relatively rare. Second, civil rights amendments can exact a

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131. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195-98 (2002) (emphasis added) (citing 42 U.S.C. § 12102(2)(A) (2000)).

132. See, e.g., Waterstone, *supra* note 10, at 448; Robert Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 539 (1997) (discussing the courts' misapprehension of the ADA's definition of disability); Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1299-1308 (2000) (detailing the federal courts' restrictive interpretations of the definition of disability); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 325 (2000) (recounting the legislative history supporting defining disability without regard to mitigating measures).

133. See NAT'L COUNCIL ON DISABILITY, RIGHTING THE ADA 99-123 (2004), available at [http://www.ncd.gov/newsroom/publications/2004/pdf/righting\\_ada.pdf](http://www.ncd.gov/newsroom/publications/2004/pdf/righting_ada.pdf) (calling for an "ADA Restoration Act," and pointing out that "[i]ncisive and forceful legislative action is needed to address the dramatic narrowing and weakening of the protection provided by the ADA"); see also Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?* 21 BERKELEY J. EMP. & LAB. L. 91, 91-92, 162 (2000) (suggesting that Congress should amend the definition of disability found in the ADA).

134. Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12101, and 29 U.S.C. § 705 (2008)).

135. *Id.*

political toll on members of Congress who answer to business and other interests. Finally, and most fundamentally, such remedial legislation does nothing more than plug a few holes. The underlying problem—the interpretive methodology that leads many jurists to interpret civil rights laws narrowly remains in effect.

## 2. Minnesota Disability Law

Minnesota first banned discrimination on the basis of disability in 1973,<sup>136</sup> the same year Congress passed the Rehabilitation Act of 1973. Initially, Minnesota law defined the term “disability” more or less identically to federal law.<sup>137</sup> But in 1989, one year before the passage of the ADA, the Minnesota legislature made a one word change to the definition of disability in the Minnesota Human Rights Act.<sup>138</sup> The legislature changed the definition from “substantially limiting a major life activity” to “materially limiting a major life activity.”<sup>139</sup> So how much difference can one word make? A lot, it turns out.

The Minnesota Supreme Court has confirmed that the Minnesota legislature intended to depart from the federal definition of disability and define the term more expansively.<sup>140</sup> In the words of the Minnesota Supreme Court, “The [Minnesota Human Rights Act] originally required the impairment to substantially limit one or more life activities. In 1989, the legislature amended the word substantially to materially, thus lowering the standard in which the impairment impacts on one or more life activities. This standard now is different from the applicable federal standard.”<sup>141</sup> The Minnesota Supreme Court applied this broad definition in *Hoover v. Norwest Private Mortgage Banking*,<sup>142</sup> where the court held that fibromyalgia qualified as a disability under Minnesota

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136. Act of May 21, 1973, ch. 729, 1973 Minn. Laws 2161-66.

137. Compare sec. 1 subdiv. 25 (defining disability as “a mental or physical condition which constitutes a handicap”), with Rehabilitation Act of 1973, 29 U.S.C. § 705(9)(A) (defining disability as “physical or mental impairment that constitutes or results in substantial impairment to employment”).

138. *Sigurdson v. Carl Bolander & Sons, Co.*, 532 N.W.2d 225, 228 n.3 (Minn. 1995) (citing Act of May 25, 1989, ch. 280 § 1, 1989 Minn. Laws. 1099, 1100 (1989)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12300 (2000)).

139. *Sigurdson*, 532 N.W.2d at 228 n.3; see also Robert Whereatt, *Legislators Gave Disabled People New Protections, Accommodations*, STAR TRIBUNE, May 26, 1989 (explaining the effect of the changes to the Minnesota Human Rights Act).

140. See *Sigurdson*, 532 N.W.2d at 228 & 228 n.3.

141. *Id.* at 228 n.3.

142. 632 N.W.2d 534 (Minn. 2001).

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law, even though the same condition often failed to qualify as a disability under federal law.<sup>143</sup>

Held up together, Minnesota and federal disability laws are two ships moving in opposite directions. While the Minnesota legislature has acted to broaden the definition of disability in Minnesota, the Supreme Court has acted to narrow the definition of disability under federal law.

By highlighting these two discrete areas of anti-discrimination law—sexual harassment and disability discrimination—we do not mean to provide an exhaustive list areas where Minnesota civil rights law provides greater protection to plaintiffs than federal civil rights law. These areas are illustrative. They serve as examples, meant to shed light on a basic truth: held together, Minnesota’s civil rights laws offer more depth, breadth, and scope of substantive protection than analogous federal laws.

## II. THE UNDER-ENFORCEMENT OF MINNESOTA’S CIVIL RIGHTS LAWS IN FEDERAL COURTS

Consider the story of Rashid Arraleh, a black Muslim immigrant from Somalia.<sup>144</sup> Mr. Arraleh brought a claim for harassment because of race and national origin in the Federal District Court of Minnesota.<sup>145</sup> According to Arraleh, during the six months he worked for Ramsey County in St. Paul, he was subjected to a hostile and offensive work environment.<sup>146</sup> Among the litany of comments directed at Arraleh or made in his presence:

- “Today, your skin doesn’t look as white as it normally does”;
- Being referred to as “Mr. Cocoa”;
- “Is your hair for real?”;
- “It’s very difficult to work with you people”;
- African-Americans are “very difficult to work with” because

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143. *See id.* at 543 n.5, 544 (Minn. 2001) (citations omitted).

144. *See Arraleh v. County of Ramsey*, 461 F.3d 967, 971 (8th Cir. 2006).

145. *Id.* at 970-71.

146. *Id.* at 970-73, 980.

they are “very emotional” and “take things too personally”;

- “[B]lack people are expected to leave their blackness behind”;<sup>147</sup> and
- “Giving [Arraleh] a job is like raising terrorist kids.”<sup>148</sup>

Like many litigants, Arraleh brought discrimination claims under both state and federal law.<sup>149</sup> This is not surprising. The somewhat complex rules of jurisdiction in civil rights cases dictate that most cases will end up in federal court.<sup>150</sup> If a plaintiff has both federal and state causes of action arising out of the same set of factual circumstances (in this case, the hostile work environment), the plaintiff must bring all his claims in one lawsuit, or else the latent claims will be forfeited.<sup>151</sup> For example, Arraleh could not bring a discrimination suit in federal court based on federal civil rights law, lose, and then simply file another suit in state court alleging state causes of action. The doctrine of res judicata would bar the second suit.<sup>152</sup> This is not to say that federal law and state law would always yield the same result, but rather that if a plaintiff invokes the power of the courts to resolve a dispute, he should bring all his potential claims together in one forum, rather than piecemeal. This res judicata concern may explain why most victims of discrimination bring claims under both federal and state law where both are available.<sup>153</sup> Many plaintiffs file in federal court. Others end up in federal court when the defendant removes the action.<sup>154</sup> Because of

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147. *Id.* at 978 n.4, 980 (Heaney, J., dissenting).

148. *Id.* at 973.

149. *Id.* at 970-71.

150. *See* 42 U.S.C. § 1988 (a) (2000) (discussing the complex rules of civil rights jurisdiction and the impact on federal versus state jurisdiction).

151. *See, e.g.,* *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466-67 (1982) (holding that seeking review of an administrative decision in state court on the plaintiff’s civil rights charge barred a subsequent federal suit).

152. *See id.* at 463, 466-67, 485.

153. *See Snyder v. Murray City Corp.*, 73 P.3d 325, 332 (Utah 2003) (articulating the elements and concerns of res judicata). *See also* Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349, 353-60 (2007) (discussing discrimination under both state and federal law).

154. Defendants have the power to “remove” cases originally filed in state court to federal court in most civil rights actions. *See* 28 U.S.C. § 1441(a) (2000). “[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” *Id.* In other words, defendants can remove to federal courts if there is diversity of citizenship between the parties, *see* 28 U.S.C. § 1332(a) (2000), or a federal question involved, *see* 28 U.S.C. § 1331. Put another way, it is only the

these procedural rules, many discrimination claims based on state law theories end up litigated in federal court.<sup>155</sup>

In the end, Arraleh lost his court battle when the Eighth Circuit ruled that no reasonable juror could conclude that Arraleh was subjected to a racially hostile work environment,<sup>156</sup> an inappropriate<sup>157</sup> but unsurprising result. But here comes the interesting part. Throughout the main text of Eighth Circuit's opinion, there is no reference to Arraleh's state law discrimination claims.<sup>158</sup> The court simply disposes of Arraleh's federal claims one by one.<sup>159</sup> However, within a footnote to the opinion's one line conclusion, the court begins and ends its discussion of state law: "Because [Arraleh's] claims under the Missouri Human Rights Act are premised on the same factual bases as his [federal] claims, they must also fail."<sup>160</sup> What's troubling is that Arraleh did not bring any claims under the Missouri Human Rights Act. He brought several claims under the *Minnesota* Human Rights Act.<sup>161</sup> This makes sense, after all, since Arraleh worked for Ramsey County, a subdivision of the state of Minnesota.

It would be easy to cast the *Arraleh* court's mistake as a one-time mess-up—a cut-and-paste error, maybe the handiwork of a law clerk working long hours at the federal courthouse. However, in federal court, such carelessness and utter disregard for the primacy of state law is not the exception; it is the rule. A casual flip through the pages of the Federal Reporter seems to reveal a disturbing trend: again and again, when victims of discrimination press their claims in federal court, federal judges refuse to treat state civil rights laws seriously, as an independent body of legal rules.<sup>162</sup> Instead, these judges prefer to treat state civil rights law as coextensive with federal law (often incorrectly

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rare case where (1) the plaintiff files suit in state court, (2) there is no diversity between the parties, and (3) no federal question is raised, that the defendant would lack the power to remove the action to federal court.

155. See 28 U.S.C. § 1367 (2000) (granting federal courts supplementary jurisdiction over pendent state law claims).

156. See *Arraleh v. County of Ramsey*, 461 F.3d 967, 980 (8th Cir. 2006). The Eighth Circuit upheld a grant of summary judgment in favor of Ramsey County, concluding that no reasonable juror could conclude that Arraleh was subjected to a racially hostile work environment. See *id.*

157. *Id.* at 980 (Heaney, J., dissenting).

158. See *id.* at 970-80 (citations omitted) (discussing only the federal law claim).

159. See *id.* at 974-80 (citation omitted).

160. *Id.* at 980 n.5 (quoting *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) (analyzing a claim brought under the Missouri Human Rights Act and the ADA)).

161. *Id.* at 970-71.

162. Federal judges are required to faithfully apply the substance of state laws. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

so, and usually without any analysis or justification for the practice). Oftentimes, federal courts seem to ignore state law altogether.

This Part seeks to move beyond anecdotes and provide concrete evidence that federal courts systematically under enforce Minnesota's civil rights laws.

### A. Methodology

The basic methodology of this Article's analysis is simple. Our goal was to locate and code every Eighth Circuit decision between 1990 and 2007 that decided any issue under both federal and Minnesota civil rights law.<sup>163</sup> After locating the relevant decisions, we coded each decision along two dimensions.<sup>164</sup> First, did Minnesota law and federal law yield the same result or a different result? If the results were different, which law offered broader protection? Second, what depth of treatment was given to state law in the court's analysis? In answering this second question, we grouped the cases into three categories: a full and separate analysis of state law, a "collapsed" analysis of state law, meaning the court simply asserts, as the *Arraleh* court did, that state law issues are decided under federal standards, and, finally, no analysis of state law.<sup>165</sup>

### B. Results

The results are damning. In no case did the Minnesota Human Rights Act perform any better than its federal counterpart. Surprisingly, two cases, representing less than 2% of the total cases reviewed, actually held that the Minnesota Human Rights Act protected *fewer* substantive rights than federal law. The first is *Bevan v. Honeywell, Inc.*,<sup>166</sup> where the Eighth Circuit affirmed a verdict for the plaintiff on a claim brought

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163. We performed the initial task of locating these decisions by conducting a Westlaw search in the Eighth Circuit's database for "Minnesota Human Rights Act," and then weeding out each case that did not directly address an issue under both the Minnesota Human Rights Act and its federal analogue.

164. This coding process is inherently subjective. We did our best to stay true to the descriptive characteristics of the categories.

165. See *Arraleh*, 461 F.3d at 974-75, 977, 980 n.5. We are drawing conclusions about the federal court's interpretation of state law based on how one particular court has interpreted the law of one specific state. We make the assumption that this sample is somewhat representative of larger national trends. Others are encouraged to replicate this methodology using other courts and other bodies of state law.

166. 118 F.3d 603 (8th Cir. 1997).

under the ADEA and also affirmed a verdict for the defendant on a claim of age discrimination arising under the Minnesota Human Rights Act.<sup>167</sup> Both claims arose out of the same set of facts.<sup>168</sup> The second case is *Todd v. Ortho Biotech, Inc.*,<sup>169</sup> where the Eighth Circuit interpreted the Minnesota Human Rights Act to impose a more stringent standard for showing an employer defendant's vicarious liability (as compared to federal law) in a sexual harassment case.<sup>170</sup> The *Todd* court's cramped reading of Minnesota's civil rights laws directly led to an amendment by the Minnesota legislature in 2001, which had the result of legislatively reversing the *Todd* decision insofar as it interpreted Minnesota law.<sup>171</sup>

The primary result is this: *in not a single case did the Eighth Circuit interpret the Minnesota Human Rights Act to protect more substantive rights than are protected by federal civil rights law.*<sup>172</sup> The Eighth circuit approached a full depth of discussion of state law issues in less than 3% of this type of case. In 63% of these cases, the Eighth Circuit gave Minnesota law only a brief mention, without any meaningful analysis. Finally, in 34% of the relevant cases, the Eighth Circuit completely ignored state law.<sup>173</sup> The goal of this Article is not to

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167. *See id.* at 612-13, 614 (citations omitted). This case may reflect more of a factual distinction than a legal distinction. While the federal claim was tried to a jury, the state law claim was decided by a judge. *Id.* at 608. It is possible that both the jury and judge applied the same legal standards but simply reached opposite result because of divergent interpretations of the facts.

168. *See id.* at 605-08.

169. 138 F.3d 733 (8th Cir. 1998).

170. *Id.* at 737-38 (citations omitted). The Eighth Circuit originally applied the same, more stringent, standard to both the state and federal claims. However, even after the court's decision on the federal claim was vacated and remanded by the Supreme Court, forcing it to alter its decision on the federal claim, the Eighth Circuit stood by its original, cramped reading of the Minnesota Human Rights Act. *Id.*, *vacated*, 525 U.S. 802 (1998), *remanded to* 175 F.3d 595 (8th Cir. 1999).

171. *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171, 176, 184 (Minn. Ct. App. 2007).

172. In a 2005 case, the Eighth Circuit invalidated an arbitration award on the grounds that the award violated the public policy contained in the Minnesota Human Rights Act's ban on age discrimination. *Ace Elec. Contractors, Inc. v. Int'l. Bhd. of Elec. Workers, Local Union No. 292, A.F.L.-C.I.O.*, 414 F.3d 896, 898 (8th Cir. 2005). In reaching this conclusion, the court appeared to read the Minnesota Human Rights Act to ban so-called reverse age discrimination (favoring older workers vis-à-vis younger workers). *Id.* at 901. Because the Supreme Court ruled in 2004 that the federal ADEA did not authorize a cause of action for reverse age discrimination, *see Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004), the Eighth Circuit by necessity interpreted the Minnesota Human Rights Act more broadly than the ADEA. *Ace Electrical* is notable because this result is highly unusual. However, we did not include *Ace Electrical* in our analysis because the case did not fit our methodology: there was no plaintiff seeking the protection of both federal and state discrimination law.

173. It is possible that in some of these decisions, the appellant did not appeal the adverse lower court decisions made on state law grounds. In many cases, it is impossible to tell for sure based on the court of appeals' opinion. We assume that in most cases, the appellant sought review of both his state and federal claims.

systematically relitigate these cases, demonstrating one by one why and how each one erred. Rather, our goal is to look at these data in the aggregate, and draw broad conclusions about the enforcement of state law in federal courts.

Many of the decisions ignore distinctions between state and federal civil rights law discussed in Part I of this Article. For example, the Eighth Circuit regularly applies the federal standards for sexual harassment cases to claims of sexual harassment arising under the Minnesota Human Rights Act.<sup>174</sup> *Clearwater v. Independent School District No. 166*,<sup>175</sup> is one such example. In that case, the Eighth Circuit declared, quite improperly that “[Clearwater’s] hostile work environment [sexual harassment] claim is based on Title VII and the [Minnesota Human Rights Act]. We review these state and federal claims under the same standards . . . .”<sup>176</sup>

There are numerous cases where the Eighth Circuit has incorrectly applied federal standards for state law disability claims.<sup>177</sup> For example, in *Somers v. City of Minneapolis*,<sup>178</sup> the Court stated that “[u]nder the ADA, Somers is disabled if he has ‘a physical or mental impairment that substantially limits one or more of the major life activities of such

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174. See, e.g., *Peterson v. Scott County*, 406 F.3d 515, 521 (8th Cir. 2005); *Erenberg v. Methodist Hosp.*, 357 F.3d 787, 792 (8th Cir. 2004) (citing *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999); *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 542 (Minn. 2001)); *Wilson v. Brinker Int’l, Inc.*, 382 F.3d 765, 768 (8th Cir. 2004); *Walsh v. Nat’l Computer Sys., Inc.*, 332 F.3d 1150, 1154 (8th Cir. 2003); *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 830 (8th Cir. 2002); *Clearwater v. Indep. Sch. Dist. No. 166*, 231 F.3d 1122, 1124 n.2 (8th Cir. 2000).

175. 231 F.3d 1122 (8th Cir. 2000).

176. *Id.* at 1124 n.2.

177. See, e.g., *Thao v. City of St. Paul*, 481 F.3d 565, 567 n.3 (8th Cir. 2007) (citing MINN. STAT. § 363A.12, subdiv. 1; *Gorman v. Barch*, 152 F.3d 907, 912 (8th Cir. 1998); *Roberts v. KinderCare Learning Ctrs.*, 86 F.3d 844, 846 n.2 (8th Cir. 1996)); *Liljedahl v. Ryder Student Transp. Servs., Inc.* 341 F.3d 836, 841 (8th Cir. 2003) (“Claims arising under the [Minnesota Human Rights Act] are analyzed using the same standard applied to ADA claims.”) (citations omitted); *Longen v. Waterous Co.*, 347 F.3d 685, 688 n.2 (8th Cir. 2003) (“The [Minnesota Human Rights Act] parallels the ADA. Thus, we analyze the claims at the same time.”) (citations omitted); *Heisler v. Metro. Council*, 339 F.3d 622, 625 (8th Cir. 2003) (incorrectly asserting that “Minnesota courts facing disability claims under the [Minnesota Human Rights Act] apply the same standards federal courts apply to ADA claims”) (quoting *Somers v. City of Minneapolis*, 245 F.3d 782, 788 (8th Cir. 2001)); *Philip v. Ford Motor Co.*, 328 F.3d 1020, 1023 n.3 (8th Cir. 2003) (“Claims arising under the [Minnesota Human Rights Act] are analyzed using the same standard applied to ADA claims.”) (citing *Maziarka v. Mills Fleet Farm Inc.*, 245 F.3d 675, 679 n.3 (8th Cir. 2001); *Fenney v. Dakota, Minn. & E. R.R. Co.*, 327 F.3d 707, 711 n.5 (8th Cir. 2003) (“We have noted that the [Minnesota Human Rights Act] parallels the ADA, and thus we conclude that the District Court properly treated Fenney’s [Minnesota Human Rights Act] claim as co-extensive with his ADA claims.”) (citations omitted).

178. 245 F.3d 782 (8th Cir. 2001).

individual' or is 'regarded as having such an impairment.' Claims under the [Minnesota Human Rights Act] are analyzed the same as claims under the ADA."<sup>179</sup> As discussed in Part I, and contrary to the court's assertion, disability discrimination claims brought under state law are *not* analyzed using the same standards developed under federal law.

### C. Analysis

These results are disturbing for several reasons. First, and most obviously, the Eighth Circuit is often misapplying substantive Minnesota law. But more subtly, the extremely poor depth of treatment of state law issues is troubling and problematic—a practice evincing disrespect for the primacy of state civil rights law. On this point, the problem goes far beyond reaching the “correct” result in any given case; after all, a court that happens to reach the correct result in a given case by flipping a coin could not justify its methodology after the fact based on the correctness of the result.

At the level of the individual plaintiff, this under-enforcement undermines one of the primary functions of courts in society: providing those who feel wronged with a fair hearing.<sup>180</sup> Even to the civil rights plaintiff who loses his case, there is a cathartic value in airing his grievances before a neutral decision-maker. The plaintiff can move on knowing that his voice was heard. But when state law claims are not treated seriously, this value is undermined. A plaintiff's original grievance is only compounded by a sense that he was not treated fairly in court.

At the systemic level, the under-enforcement of state civil rights law in federal court poses further problems. First, the problem is self-perpetuating. As a matter of precedent, the practice of under-enforcement is entrenched, with each passing case supplying another citation used to justify the practice in the next case. Second, the practice of under-enforcement undermines the principles and values of federalism. When Congress passed the Civil Rights Act of 1964, the drafters made explicit their wish to leave budding state anti-discrimination regimes alone—not preempted in any way by federal law.<sup>181</sup> The practice of under-enforcement described in this Part

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179. *Id.* at 788 (citing 42 U.S.C. § 12102(2); *Treanor v. MCI Telecomm. Corp.*, 200 F.3d 570, 574 (8th Cir. 2000)).

180. The constitution guarantees every citizen's right to present a claim or defense in court. *See* U.S. CONST. art. III, § 2; U.S. CONST. amend. VI & VII.

181. *See* 42 U.S.C. § 2000e-7 (2000) (“Nothing in this subchapter shall be deemed to exempt

operates as a kind of de facto federal preemption, removing the incentive for passing civil rights legislation at the state level and undermining the states' role as laboratories of democracy.<sup>182</sup>

While the under-enforcement of state civil rights law in federal court appears prevalent as a descriptive matter, we can only speculate as to the cause of the problem. For practicing members of the civil rights bar, there is little incentive to spend finite time and energy separately litigating state law claims that will not gain clients any currency above and beyond the result that can already be achieved on the federal claims. In several of the analyzed opinions, there are hints that the plaintiffs' lawyers did not press their state law claims very forcefully, and in some cases probably acquiesced to having their client's state law claims subsumed into their federal claims.<sup>183</sup> Plaintiffs' lawyers' behavior in this respect is essentially strategic. After all, these attorneys operate in an environment that exists independently of them, and they are (and should be) more concerned with the outcome for their particular client than with the development of case law within the federal judiciary. This might mean not wasting time and resources making a stink over a state law claim, when the time and energy is better spent elsewhere. Given federal courts poor record in interpreting state law, lawyers making such a strategic decision seem to be vindicated.

But the civil rights bar is certainly not entirely to blame for the under-enforcement of state civil rights laws in federal courts. The federal courts themselves deserve a share of the blame. One possible explanation for the under-enforcement is that federal courts are slowly making a return—at least in the area of civil rights—to *Swift v. Tyson*,<sup>184</sup>

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or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State . . .”).

182. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See generally Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 *FORDHAM L. REV.* 799, 802, 808 (2006).

183. See, e.g., *Fenney v. Dakota, Minnesota & E. R.R. Co.*, 327 F.3d 707, 711 n.5 (8th Cir. 2003) (noting that neither party contested the district court's decision to treat the Minnesota Human Rights Act as co-extensive with the ADA) (citing *Maziarka v. Mills Fleet Farm Inc.*, 245 F.3d 675, 678 n.3 (8th Cir. 2001)); Brief of Appellant at 1-8, *Rush v. Metro. Council Transit Operations*, 13 F. App'x. 477 (8th Cir. 2001) (citations omitted) (acknowledging that both statutes are treated under the same standards, but making no attempt to argue that the Minnesota Human Rights Act's definition of disability is less stringent than the ADA's); *Heaser v. Toro Co.*, 247 F.3d 826, 830 n.2 (8th Cir. 2001) (“We have noted that the [Minnesota Human Rights Act] parallels the ADA, and neither party contests the district court's treatment of Heaser's [Minnesota Human Rights Act] claims as co-extensive with her ADA claims.”) (citing *Wilking v. County of Ramsey*, 153 F.3d 869, 872 (8th Cir. 1998)) (citations omitted).

184. 41 U.S. 1 (1842).

where the Supreme Court held that federal courts hearing cases brought under their diversity jurisdiction should develop and apply a federal common law.<sup>185</sup> Another possibility is that the federal courts are especially likely to ignore state law in this area because the applicable body of precedent is underdeveloped. As discussed above, many civil rights cases end up in federal court for jurisdictional reasons, either filed there by the plaintiff, or removed there by the defendant.<sup>186</sup> Because of this, the body of Minnesota cases authoritatively construing the Minnesota Human Rights Act is far less developed than the Minnesota cases interpreting contractual disputes, or tort liability, for example. This relative scarcity of case law interpreting the Minnesota Human Rights Act surely creates a temptation to simply follow the well-developed body of precedent built up over a generation of interpreting federal anti-discrimination statutes. Finally, it is possible that some federal judges are simply disdainful of state civil rights law.

Whatever the cause, the result is clear. By now, the practice of under-enforcing Minnesota's civil rights law is deeply ingrained in the federal judiciary, both psychologically and as matter of precedent. These mutually reinforcing problems need immediate attention if Minnesota's civil rights laws are to carry forward into the future with any substantive force.

### III. REVERSING THE TREND: A BATTERY OF SOLUTIONS FOR RESTORING STATE CIVIL RIGHTS LAW

The situation is not hopeless. There are several measures that can be taken with the aim of restoring state civil rights law as an independent and vibrant source of protection for victims of discrimination. First, attorneys on the civil rights bar must make a renewed emphasis on the primacy of state civil rights law in federal court. Second, federal courts themselves must make greater use of the certification procedure, a mechanism by which federal courts can "certify" questions of state law to be authoritatively construed by the appropriate state supreme court.<sup>187</sup> Third, state high courts need to help stem the bleeding. State supreme courts should follow the framework developed by the Minnesota Supreme Court in *Kahn v. Griffin*,<sup>188</sup> where the court provided a clear

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185. *Id.* at 18-19.

186. *See supra* notes 149-50 and accompanying text.

187. *See, e.g.*, *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993).

188. 701 N.W. 2d 815 (Minn. 2005).

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and principled roadmap for interpreting provisions of the Minnesota Constitution more expansively than the United States Constitution.<sup>189</sup> This framework should be imported into the civil rights arena. Finally, Congress and state legislatures should act to create a scheme where state supreme courts could review questions of state law appealed from the United States Courts of Appeals. Working together, these structural reforms should restore state civil rights law to its rightful place as a primary protector of individual rights.

*A. A Renewed Emphasis on State Law by the Civil Rights Bar*

As discussed above, plaintiffs' attorneys should not be blamed entirely for the under-enforcement of Minnesota's civil rights laws in federal courts. If anything, the findings of this Article provide justification to the attorney who makes little or no attempt to focus on state anti-discrimination law in a federal forum. But, in the adversarial system, courts cannot be expected to change course on their own. Here, the civil rights bar, both public and private, has a role to play. These attorneys should make a renewed emphasis on the primacy of state civil rights law in their briefs and arguments.

The obvious drawback to this solution is that it presents major collective action and free rider problems. If only one segment of the civil rights bar undertakes this renewed emphasis on state civil rights law, the entire civil rights bar will reap the diffuse benefits of the renewed effort. And, if only a handful of attorneys make an effort to renew the federal courts' attention on state civil rights laws, the effort will likely not be successful in bringing about systemic change—and the lawyer making the effort will feel like she wasted her time and money (not to mention that of her client). While a renewed emphasis on state law by the civil rights bar is an important part of the solution to the under-enforcement problem, it is far from sufficient by itself. Other measures must be taken.

*B. Federal Courts Should Make Greater Use of the Certification Procedure*

A relatively recent invention in American law, the federal certification procedure allows a federal court to “certify” a question of state law to be authoritatively answered by the appropriate state supreme

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189. *Id.* at 828.

court.<sup>190</sup> The Supreme Court has approved of the certification procedure as a model of judicial federalism and an economical way to get an authoritative interpretation when difficult issues of state law are at issue.<sup>191</sup> More and more states, including Minnesota, have also approved of the procedure, making it easier than ever before to certify questions of state law to state supreme courts.<sup>192</sup> The decision to invoke the certification procedure lies entirely within the discretion of the federal court.<sup>193</sup> However, some federal courts have listed a series of factors which demonstrate that a particular state law question is a good candidate for certification. The factors can be broken down into three basic inquiries: (1) how close is the question of state law; (2) how sufficient are the sources of law (such as precedent) upon which the federal court must rely; and, (3) how do considerations of comity come into play in light of the particular issue and case to be decided.<sup>194</sup> The closer the question, the less sufficient the sources, the greater the need for comity, the more likely the federal court is to certify the issue of state law.<sup>195</sup>

Federal courts should make greater use of the certification procedure because state civil rights laws and civil rights issues often meet these factors. Not every question will be close, but discrimination claims often contain rich factual scenarios with multiple inferences capable of being drawn from the available evidence. As discussed earlier, the body of law federal courts must look to is often insufficient.<sup>196</sup> Finally, state civil rights laws are not just garden variety state statutes; they embody broad concepts of public policy. In this circumstance, the need for comity from the federal courts is at its highest ebb.

The certification procedure, however, like the renewed emphasis on state law by the civil rights bar, suffers from a serious practical defect:

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190. *See, e.g., Todd*, 9 F.3d at 1222.

191. *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960) (citing *Allegheny County v. Mashuda Co.*, 360 U.S. 185, 189 (1959)).

192. *See* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, § 4248, 496-97 n.31-33 (3rd ed. 2007) (lists states and their corresponding certification procedures).

193. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

194. *See, e.g., Marston v. Red River Levee & Drainage Dist.*, 632 F.2d 466, 468 n.3 (5th Cir. 1980).

195. *Id.*

196. *See, e.g., McAdams v. United Parcel Serv., Inc.*, 30 F.3d 1027, 1029 n.3 (8th Cir. 1994) (“Because of the paucity of published caselaw on the [Minnesota Human Rights Act], we look to precedent arising from similar federal laws . . . .”) (citations omitted).

the self-selection problem. Because certification is discretionary, the only federal courts that would ever certify a question of state law to the state's supreme court are courts which are mindful of state law in the first place.<sup>197</sup> Remember *Arraleh*? It is unlikely that a court which cannot correctly identify what state's civil rights laws are before it will entertain the idea of certifying a question of state law to the appropriate state court. So, while greater use of the certification procedure would surely help federal courts apply state civil rights laws by building up the body of state law precedent, this certification procedure would likely do little to change matters for the intransigent or uninterested federal court. The certification procedure can also take a good deal of time to complete. According to one study of the Ohio Supreme Court's handling of certified questions, the time between federal court certification and Ohio Supreme Court resolution averaged nearly one year.<sup>198</sup>

Despite these shortcomings, greater reliance on the certification procedure in close cases would help dislodge state civil rights law from its current position of near irrelevance in federal forums.

*C. State Supreme Courts Should Import the Framework Developed by the Minnesota Supreme Court in Kahn v. Griffin into the Civil Rights Arena*

State supreme courts also have a role to play. By developing principled standards for interpreting state civil rights law in light of federal precedent, state supreme courts can help encourage a thoughtful and thorough approach to applying state civil rights law—without actually reviewing dozens of cases. Such standards would go a long way towards filling the vacuum left by the relative absence of case law interpreting state civil rights statutes.

The interpretation of the state constitutions provides an excellent analogy to the interpretation of state civil rights law. In the case of Minnesota, the state Constitution contains many provisions that are similar (if not identical) to the federal Constitution. Although the

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197. Wendy L. Watson, McKinzie Craig, & Daniel Orion Davis, *Federal Court Certification of State-Law Questions: Active Judicial Federalism*, 28 JUST. SYS. J. 98, 101 (2007) (“[T]he certification procedure is a classic case of the fox guarding the hen-house; it gives federal courts complete control over which questions to certify and thus allows federal courts to determine the circumstances under which state courts can interpret state law.”).

198. *Id.* at 102 (citing Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 217 (2003)).

Minnesota Supreme Court has always maintained the position that the Minnesota Constitution could be interpreted more broadly than the U.S. Constitution,<sup>199</sup> the court was often criticized for not using a principled basis for deciding whether or not the Minnesota Constitution protected more rights than its federal counterpart.<sup>200</sup> One commentator, writing about state constitutional law in general, wrote: “[S]ystematic studies demonstrate that most state courts, when presented with the opportunity, have chosen not to depart from federal precedents when interpreting the rights-granting provisions of state constitutions . . . . [T]he majority of state courts, on most issues, engage in an analysis in lockstep with their federal counterparts.”<sup>201</sup>

In *Kahn*, a federal district court in Minneapolis certified the question: “Does the Minnesota Constitution provide greater protections to the right to vote than does the United States Constitution such that failure to hold prompt elections following decennial redistricting violates . . . the Minnesota Constitution . . . [or state statutory law]?”<sup>202</sup>

In *Kahn*, the Minnesota Supreme Court took the opportunity to go beyond the question presented, and adopted a decision tree methodology to decide—in a principled fashion—whether a particular provision of the Minnesota Constitution protected more rights than the analogous section of the U.S. Constitution.<sup>203</sup> The court summarized its approach like this:

[W]e will not, on some slight implication and vague conjecture, depart from federal precedent . . . . But, when we reach a clear and strong conviction that there is a principled basis for greater protection of the individual civil and political rights of our citizens under the Minnesota Constitution, we will not hesitate to interpret the constitution to independently safeguard those rights . . . . [W]e are most inclined to look to the Minnesota Constitution when we determine that our state

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199. *Kahn v. Griffin*, 701 N.W.2d 815, 828 (2005) (citing *Minnesota v. Harris*, 590 N.W.2d 90, 97 (Minn. 1999); *Minnesota v. Fuller*, 374 N.W.2d 722, 726 (1985)).

200. *Compare Ascher v. Comm’r of Pub. Safety*, 519 N.W.2d 183, 186-87 (Minn. 1994) (holding that random sobriety checkpoints, without the police having an objective individualized articulable suspicion of criminal activity before stopping a driver, violate the state constitutional protection against unreasonable searches and seizures, although the Supreme Court, in *Michigan Dep’t of State Police v. Stitz*, 496 U.S. 444, 447, 455 (1990), had held such checkpoints do not violate the Fourth Amendment), *with Kahn*, 701 N.W. 2d at 836 (holding that given the particular facts and circumstances presented by the certified question, the Minnesota Constitution did not provide greater protections to the right to vote than does the U.S. Constitution).

201. Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty First Century*, 35 IND. L. REV. 335, 338 (2002).

202. *Kahn*, 701 N.W.2d at 818.

203. *See id.* at 828-29.

constitution's language is different from the language used in the U.S. Constitution or that state constitutional language guarantees a fundamental right that is not enumerated in the U.S. Constitution . . . . We take a more restrained approach when both constitutions use identical or substantially similar language. But we will look to the Minnesota Constitution when we conclude that the United States Supreme Court has made a sharp or radical departure from its previous decisions or approach to the law and when we discern no persuasive reason to follow such a departure . . . . We also will apply the state constitution if we determine that the Supreme Court has retrenched on Bill of Rights issues, or if we determine that federal precedent does not adequately protect our citizens' basic rights and liberties.<sup>204</sup>

Although it may seem odd at first blush to interpret a state constitution at least partially by reference to the U.S. Constitution, the *Kahn* framework deserves credit for acknowledging—and dealing with—the elephant in the room: the federal precedent that seemed too often to dictate the interpretation of Minnesota's Constitution. The Minnesota Supreme Court in *Kahn* acknowledged explicitly for the first time federalism's "double source of protection for . . . rights,"<sup>205</sup> the role of "the highest court of this state"<sup>206</sup> in providing "the first line of defense for individual liberties,"<sup>207</sup> and the important role of private litigants in the development of state constitutional law.<sup>208</sup>

State supreme courts should adopt the *Kahn* methodology to help courts decide when to interpret state civil rights laws more expansively than federal civil rights laws. First, such a holding would make clear that textual differences between the laws, for example, the difference between Minnesota's sexual harassment statute and Title VII's ban on sex discrimination, would be treated differently under the analysis. The same is true for the textual differences between Minnesota and federal law in the areas of sexual orientation and disability discrimination. Second, such a framework would protect Minnesota's civil rights laws in federal courts from getting swept away when the federal courts "retrench" on a federal civil rights issue. This part of the analysis would

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204. *Id.* at 828 (citations omitted); see also Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Judicial Federalism*, 70 ALB. L. REV. 865, 866-68, 912-16 (2007).

205. *Kahn*, 701 N.W.2d at 824 (internal quotations omitted) (quoting William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 552 (1986)).

206. *Id.* at 828.

207. *Id.*

208. *Id.* at 829.

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shield Minnesota's civil rights law from automatically meeting the same fate as federal civil rights laws in the Supreme Court's recent civil rights jurisprudence; Minnesota law would not automatically fall in lockstep behind cases like *Ledbetter* and *Buckhannon*. Third, the final prong of the Minnesota Supreme Court's framework—"if we determine that federal precedent does not adequately protect our citizens' basic rights and liberties"—would leave courts free to unhinge state civil rights law from federal law entirely if federal law simply failed to offer the protection contemplated by the state civil rights regime.

It is too soon to adequately gauge the success of the *Kahn* framework as a matter of state constitutional law, but the methodology adopted in that case shows a great deal of promise and naturally lends itself to extension into the state civil rights arena. By providing the appropriate framework for evaluating state civil rights claims in light of federal precedent, state high courts can send a strong message that state civil rights law be taken seriously in every forum.

*D. The Nuclear Option: Giving States the Power to Review Federal Appellate Decisions*

If the solutions discussed so far do not solve the under-enforcement problems in federal courts, it may be time for drastic measures. One such measure would be giving state supreme courts the ability to review purely state law issues decided by federal appellate courts.

Generally speaking, the United States Supreme Court does not review matters of purely state law.<sup>209</sup> Therefore, when a civil rights plaintiff receives an appellate decision involving both state and federal claims, she has usually reached the end of the road on the state law issue. By contrast, she is free to petition the Supreme Court for a writ of certiorari on any federal issue.<sup>210</sup> Giving the state supreme courts the power to review questions of purely state law would give such a plaintiff the opportunity to appeal the state law decisions to the ultimate interpreting state supreme court, just as she can appeal any federal issues to the ultimate interpreter of federal law: the United States Supreme Court.

Such a scheme would require legislation action by both Congress

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209. See *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986) ("[W]e have no authority to review state determinations of purely state law.").

210. See, e.g., *Todd v. Ortho Biotech, Inc.*, 138 F.3d 733 738 (8th Cir. 1998) (holding that under Title VII and Minnesota law, an employer may escape liability for its supervisor's act of sexual harassment by taking appropriate action in a timely manner).

and the states who wished to participate, much like the certification procedure required under this dual legislative action. To be sure, if a state tried to adopt such a scheme unilaterally, such action would be pre-empted by several federal statutes, most notably by the statute granting the Supreme Court exclusive jurisdiction over appeals from the United States Courts of Appeals.<sup>211</sup> These federal statutes would need to be amended. Even if both Congress and the states got behind such a scheme, it is possible that such a scheme could be found unconstitutional by the Supreme Court for violating the Diversity Clause or the doctrines of federalism and separation of powers.<sup>212</sup>

But giving the state court the ultimate authority to interpret state law would serve to enhance cooperative federalism and restore state civil rights to plaintiffs in federal courts. The under-enforcement problem would be fixed if state supreme courts could step in and review the federal court's most egregious errors.

#### CONCLUSION

Federal and state civil rights laws are not coextensive. In Minnesota's case, state civil rights laws offer numerous substantive protections to victims of discrimination unavailable under federal civil rights law. Focusing on sexual harassment and disability discrimination, this Article has tried to demonstrate that these state laws are systematically and chronically under-enforced in federal court. In addressing this pervasive problem, this Article offers a variety of remedial measures aimed at restoring Minnesota's civil rights laws to their position as an independent and vibrant body of legal protections. Working together at these changes, lawyers, judges, and legislators can change a broken system and renew the promise of federalism in the civil

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211. See 28 U.S.C. § 1254 (2000).

212. The Diversity Clause states that: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . . to controversies . . . between citizens of different states . . ." U.S. CONST. art. III, § 2 cl. 1. Although some would likely argue that the Diversity Clause guarantees an absolute right to a federal forum, this position is undermined by the current state of the law, which limits diversity jurisdiction to cases where more the \$75,000 is in controversy. 28 U.S.C. § 1332(a) (2000). If the diversity statute is constitutional, then it should stand for the proposition that there is no absolute, vested right to a federal forum. In addition, several commentators have suggested abolishing diversity jurisdiction, a plan which is presumable not unconstitutional. See, e.g., Warren E. Burger, Chief Justice, U.S. Supreme Court, Address to the American Law Institute (May 20-23, 1975), in 52 A.L.I. Proc. 29, 36-38 (1975) (stating that "something must be done" about the court's docket and recommending that Congress abolish diversity of citizenship, eliminate three-judge district courts, and remove all mandatory jurisdiction of the Supreme Court not constitutionally required).

rights arena once again.