STATUTORY INTERPRETATION — TITLE VII — SEVENTH CIRCUIT HOLDS SEXUAL ORIENTATION DISCRIMINATION IS A FORM OF SEX DISCRIMINATION. — *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc).

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of . . . sex."[1] Since Title VII's enactment, the Supreme Court has interpreted this guarantee expansively to prohibit both same-sex sexual harassment[2] and discrimination based on gender stereotypes.[3] Recently, in *Hively v. Ivy Tech Community College*,[4] an en banc Seventh Circuit built on these interpretations, ruling that sexual orientation discrimination is a form of sex discrimination cognizable under Title VII.[5] *Hively*'s majority opinion and two concurrences present a diversity of interpretive approaches. Yet Judge Sykes, in dissent, was eager to characterize both Chief Judge Wood's majority opinion and Judge Posner's concurrence as similar forms of judicial self-aggrandizement. Such conflation is a mistake. Admittedly, reaching the *Hively* conclusion does require a court to apply Title VII to a set of facts unforeseen by the enacting Congress. However, unlike Judge Posner, Chief Judge Wood demonstrates how to reach the *Hively* conclusion while respecting the limits *and* responsibilities placed on courts in the context of interpreting Title VII.

Kimberly Hively was an openly lesbian, part-time adjunct professor at Ivy Tech Community College.[6] She submitted multiple applications for full-time employment, yet none were approved.[7] Instead, Ivy Tech decided against renewing her contract.[8] Hively filed a charge with the Equal Employment Opportunity Commission, alleging sexual orientation discrimination.[9] Receiving a right-to-sue letter, she filed a complaint in the U.S. District Court for the Northern District of Indiana.[10]

In response, Ivy Tech moved to dismiss the complaint for failing to state a claim.[11] District Judge Lozano granted the motion.[12] In dismiss-

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[1] 42 U.S.C. § 2000e-2(a) (2012).
[2] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).
[3] Price Waterhouse v. Hopkins, 490 U.S. 228, 250–52 (1989) (plurality opinion).
[4] 853 F.3d 339 (7th Cir. 2017) (en banc).
[5] *Id.* at 341.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Hively v. Ivy Tech Cmty. Coll., No 3:14-cv-1791, 2015 WL 926015, at *1 (N.D. Ind. Mar. 3, 2015).
[11] *Id.*
[12] *Id.*

ing the Title VII claim, Judge Lozano relied on Seventh Circuit precedent that held that "sex" discrimination was distinct from sexual orientation discrimination.[13] Accordingly, the latter could not give rise to a Title VII claim.[14]

The Seventh Circuit affirmed.[15] Writing for the panel, Judge Rovner agreed that circuit precedent mandated the dismissal of Hively's sexual orientation discrimination claim.[16] Yet Judge Rovner noted the difficulties presented by this state of law.[17] Ultimately, while Judge Rovner held that the panel was bound by stare decisis, she did so with the prescient observation that the "the writing [was] on the wall."[18]

The Seventh Circuit, sitting en banc, reversed and remanded.[19] Writing for the majority,[20] Chief Judge Wood pared down the pathbreaking nature of the decision, describing the issue as a "pure question of statutory interpretation."[21]

Chief Judge Wood built her case using two approaches. Under the "comparative method" for discerning discrimination, she isolated *only* Hively's sex, and asked if a man in her position, that is a man in a relationship with a woman, would have been treated similarly.[22] With the answer in the negative, Chief Judge Wood found "paradigmatic sex discrimination."[23] Additionally, still under the "comparative method," she characterized the Court's "gender non-conformity line of cases" as having established cognizable forms of discrimination based on sex stereotypes.[24] Under this approach, Hively's failure to adhere to

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[13] *Id.* at *3 (citing Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000)).

[14] The district court also dismissed Hively's 42 U.S.C. § 1981 (2012) claim, holding that this provision was reserved for charges of racial discrimination. *Id.* This issue was not appealed.

[15] Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 718 (7th Cir. 2016).

[16] *Id.* at 699–700 (citing Muhammad v. Caterpillar, Inc., 767 F.3d 694, 697 (7th Cir. 2014); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1062 (7th Cir. 2003); Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 951 (7th Cir. 2002); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000); *Hamner*, 224 F.3d at 704).

[17] In particular, Judge Rovner noted how the preclusion of sexual orientation discrimination claims, when juxtaposed against the expansion of "sex discrimination" to include gender stereotyping, the increased constitutional protections to "lesbian, gay, and bisexual persons," *id.* at 713, and the Supreme Court's embrace of the associational theory of discrimination, *id.* at 715–17, created a "paradoxical legal landscape," *id.* at 714.

[18] *Id.* at 718.

[19] *Hively*, 853 F.3d at 341.

[20] Chief Judge Wood was joined by Judges Posner, Flaum, Easterbrook, Ripple, Rovner, Williams, and Hamilton.

[21] *Hively*, 853 F.3d at 343. After acknowledging the usual tools of interpretation, Chief Judge Wood then made quick work of the fact that Congress had not amended Title VII to expressly include "sexual orientation," finding this inconclusive of congressional intent. *Id.* at 344.

[22] *Id.* at 345.

[23] *Id.*

[24] *Id.* at 346 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

heterosexual norms was the "ultimate case of failure to conform to the female stereotype."[25]

Next, Chief Judge Wood adopted the "associational theory" of discrimination.[26] Drawing upon *Loving v. Virginia*[27] and two Title VII cases from sister circuits,[28] she affirmed the proposition that "a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits."[29] Accordingly, because Hively was discriminated against because of her partner's sex, that treatment amounted to "sex" discrimination.[30]

Judges Flaum and Posner wrote concurring opinions. Judge Flaum, joined by Judge Ripple, defended the majority's holding based on the "statute's text."[31] Specifically, because Title VII's text expressly states that sex need merely be a "motivating factor" to find sex discrimination and sex must always be at least one relevant consideration in the mind of an employer discriminating based on sexual orientation, Judge Flaum offered another route the majority could have taken.[32]

Judge Posner filed a separate concurrence.[33] Judge Posner employed a method he coined "judicial interpretive updating," whereby courts are empowered to give statutes new meaning in order to "satisfy modern needs and understandings."[34] Emphasizing that this method presupposes a "lengthy" passage of time since a statute's enactment,[35] he then referenced the expansion of the courts' conception of "sex" discrimination under Title VII.[36] Yet, without answering the specific question of how sexual orientation discrimination fit within this jurisprudence, Judge Posner relied merely upon a "compelling social interest in protecting homosexuals" for the "admittedly loose 'interpretation.'"[37] Moreover, Judge Posner expressly departed from the majority in three ways. First, he rejected reliance on *Oncale v. Sundowner Offshore Services,*

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[25] *Id.*

[26] *Id.* at 347.

[27] 388 U.S. 1 (1967).

[28] Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008); Parr v. Woodmen of the World Life Ins., 791 F.2d 888 (11th Cir. 1986).

[29] *Hively*, 853 F.3d at 347.

[30] Chief Judge Wood outlined the "backdrop of the Supreme Court's [constitutional] decisions . . . in the area of broader discrimination on the basis of sexual orientation," *id.* at 349, concluding that *Hively* fit within the logic of this jurisprudence. *Id.* at 349–51. Finally, Chief Judge Wood rejected Ivy Tech's waiver and sovereign immunity arguments. *Id.* at 351.

[31] *Id.* at 357 (Flaum, J., concurring).

[32] *Id.* at 358–59.

[33] *Id.* at 352 (Posner, J., concurring).

[34] *Id.* at 352–53.

[35] *Id.* at 353.

[36] *Id.* at 355.

[37] *Id.*

Inc.[38] to establish an expansive scope for interpreting Title VII.[39] Next, he rejected reliance on *Loving* as support for the "associational theory."[40] Third, he objected to any supposition that the 1964 Congress may have, on the breadth of its chosen language, unintentionally accepted the *Hively* holding.[41] Emphasizing his refusal to be an "obedient servant[] of the 88th Congress," Judge Posner concluded that his "updat[ed]" interpretation was based "on what the last half century has taught."[42]

Judge Sykes dissented.[43] Characterizing both Chief Judge Wood's and Judge Posner's opinions as similar attempts at judicially amending Title VII,[44] Judge Sykes defended the "textualist decision method," emphasizing its importance to upholding the "constitutional design" of "representative self-government."[45] Looking to the "meaning [of] the statutory language conveyed to a reasonable person at the time of enactment,"[46] Judge Sykes insisted that a reasonable person would have seen sex and sexual orientation discrimination as categorically distinct.[47]

Judge Sykes then addressed the majority's four affirmative justifications. First, responding to the argument that sexual orientation discrimination is inextricably linked to sex, Judge Sykes emphasized her belief that the two forms of discrimination were motivated by different forms of animus.[48] Next, Judge Sykes objected to the use of the "comparative analysis" as a tool for statutory interpretation, instead describing its proper role as a purely evidentiary test.[49] Similarly, Judge Sykes rejected the "associational theory" of finding discrimination. Cabining the related cases to the context of race discrimination, where the impugned laws were "inherently racist,"[50] Judge Sykes insisted that sexual orientation discrimination was not "inherently sexist," and thus could not be attacked on similar grounds.[51] Next, Judge Sykes dissented from the "sex-stereotyping" justification in two ways. First attacking the weight of *Price Waterhouse v. Hopkins*[52] given its status as a plurality opinion, Judge Sykes then denied that sexual orientation discrimination could

[38] 523 U.S. 75 (1998).

[39] *Hively*, 853 F.3d at 355–56 (Posner, J., concurring).

[40] *Id.* at 356.

[41] *Id.* at 357.

[42] *Id.*

[43] *Id.* at 359 (Sykes, J., dissenting). Judge Sykes was joined by Judges Bauer and Kanne.

[44] *Id.* at 360.

[45] *Id.*

[46] *Id.* at 361.

[47] *Id.* at 361–63. Supporting this "common sense meaning" were references to other statutes where Congress expressly used the term "sexual orientation" when it so intended. *Id.* at 363–65.

[48] *Id.* at 365 (noting that one is based on "misandry and misogyny," the other on "homophobia").

[49] *Id.* at 365–67.

[50] *Id.* at 368.

[51] *Id.* (emphasis omitted).

[52] 490 U.S. 228 (1989) (plurality opinion).

even be classified as a form of "sex stereotyping," given her belief that "heterosexual" norms apply neutrally between sexes.[53] Similarly, in rejecting the majority's reliance on *Oncale*, Judge Sykes reasoned that *Oncale* emphasized the need for a same-sex sexual harassment claim to be "tethered" to discrimination "because of sex," thereby further precluding the conflation of sex and sexual orientation.[54] Concluding her rebuttals, Judge Sykes dismissed the majority's invocation of the *constitutional* decisions of *Lawrence* and *Obergefell* on the grounds of irrelevancy.[55] Ultimately, Judge Sykes concluded with two systemic arguments, characterizing the majority's conclusion as both a radical "upend[ing]" of precedent[56] and illegitimate "judge-made" law contrary to our "constitutional structure."[57]

Hively created a circuit split on an issue rapidly rising in prominence. As the three opinions that recognized a sexual orientation discrimination claim demonstrate, judges may invoke varied interpretative approaches to reach the same conclusion. Still, as epitomized by Judge Sykes's dissent, critics may be quick to generalize any *Hively* conclusion as an illegitimate attempt to aggrandize judicial power.[58] Judge Posner's call for "judicial interpretive updating"[59] gives these critics the best ammunition for such attacks. Yet conflating Chief Judge Wood's and Judge Posner's opinions would be a mistake. Instead, by anchoring her opinion to the specific language of Title VII and relying only on legal developments to guide her interpretation, Chief Judge Wood demonstrates why her *Hively* conclusion best respects the proper scope of the judicial role in the context of Title VII.

Undoubtedly, there is instinctive appeal to Judge Sykes's opinion. At first glance, there is a disconnect within the majority's ostensible equation of sex and sexual orientation. Judge Sykes emphasized this by repeatedly invoking a "reasonable person['s]" understanding of those terms.[60] Accordingly, despite Chief Judge Wood's promise to treat *Hively* as a "pure question of statutory interpretation,"[61] there remains the notion that the *Hively* conclusion is reached only through judicial innovation. Seizing on this instinct, Judge Sykes characterized Chief

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[53] *Id.* at 369–71 (Sykes, J., dissenting).

[54] *Id.* at 371–72.

[55] *Id.* at 372.

[56] *Id.* at 373.

[57] *Id.*

[58] See, for example, Judge Pryor's concurrence in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), which presented the exact same issue: "[T]he appropriate venue for [the plaintiff] is before Congress, not this Court." *Id.* at 1261 (Pryor, J., concurring); *see also* David Bernstein, *The Post-Constitutional World of Judge Richard Posner*, WASH. POST (Apr. 7, 2017), http://wapo.st/2oMqjhr?tid=ss_tw&utm_term=.5ff441aadde4 [https://perma.cc/FHF3-TPEB].

[59] *Hively*, 853 F.3d at 353 (Posner, J., concurring).

[60] *Id.* at 360–63 (Sykes, J., dissenting).

[61] *Id.* at 343 (majority opinion).

Judge Wood's opinion as a "covert" manifestation of Judge Posner's concurrence.[62] The maneuver is powerful. Under the prevailing conception of our "constitutional structure," Judge Posner's call for judges to defy Congress's intent and wield an "updating" power is easily characterized as representing the worst excesses of judicial activism.[63] Hence, Judge Posner's self-professed candor, coupled with the instinct that some judicial innovation was at work in Chief Judge Wood's opinion, allowed Judge Sykes to characterize the majority opinion as a similarly illegitimate, and perhaps more insidious, attempt to "smuggle" in an enlarged judicial role.[64] In doing so, Judge Sykes potentially tars the entire *Hively* conclusion with the same brush of constitutional illegitimacy.

While rhetorically powerful, the equation of Chief Judge Wood's majority opinion and Judge Posner's concurrence papers over two points of distinction. First, Chief Judge Wood's majority opinion was moored to the specific context of interpreting Title VII's prohibition against "discriminat[ion] . . . because of . . . sex." This modest scope is in stark contrast to Judge Posner's general pronouncements of a broad "judicial interpretive updating" power.[65] Situating the *Hively* conclusion within the context of Title VII is key, for it is the specific statutory language of Title VII that justifies Chief Judge Wood's conclusion.

In fact, Title VII not only allows, but calls for a broader interpretative approach.[66] Despite defining certain words in great detail,[67] Title VII intentionally left some of the more operative words undefined.[68] Importantly, as judicial enforcement was intentionally favored as the means for ensuring Title VII's success, it was the courts that were to be responsible for clarifying the scope of Title VII.[69] Accordingly, in the exercise of this role, courts have had to understand various key elements

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[62] *Id.* at 360 (Sykes, J., dissenting).

[63] *Id.* at 373. In fact, when Judge Calabresi previously advocated for a similar judicial "updating" power, *see* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982), the strongest objections were grounded in separation of powers concerns. *See, e.g.*, Archibald Cox, Book Review, 70 CALIF. L. REV. 1463, 1470–74 (1982).

[64] *Hively*, 853 F.3d at 360 (Sykes, J., dissenting).

[65] *Id.* at 353 (Posner, J., concurring). To be sure, Judge Posner conditioned his approach on a "lengthy interval between enactment and (re)interpretation." *Id.* However, this limit speaks less to the characteristic of the relevant statute and may just be a proxy for a "shift in the political and cultural environment." *Id.*

[66] *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1249 (2001); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 386–87 (2010).

[67] *See* Paul Burstein, *The Impact of EEO Law: A Social Movement Perspective*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 129, 132–34 (Bernard Grofman ed., 2000) (describing the enactment of Title VII as a "critical moment" in ensuring employment nondiscrimination, *id.* at 133).

[68] *See id.* at 135.

[69] *Id.* at 136; *see also* TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME 329–30 (2014) (describing Congress's preference for judicial enforcement); Lemos, *supra* note 66, at 386–87.

necessary to enforce Title VII.[70] Most important for current purposes is what discrimination "because of" a protected characteristic entails.[71]

Chief Judge Wood never trumpeted this judicial role, yet her *Hively* opinion fulfilled it anyway. To recognize this, it is important to understand what *Hively* was *not* about. Chief Judge Wood's opinion was not about the meaning of "sex," and at no point does she question whether "sex" in the context of Title VII ought to be interpreted strictly as gender.[72] Instead, the crux of the *Hively* inquiry was the exact question entrusted to courts: namely, what constituted discrimination "because of" a protected characteristic. In keeping with this duty, Chief Judge Wood's two lines of reasoning, the comparative method and associational theory, were both means of answering this question.[73] By acknowledging a fixed conception of "sex," while maintaining her statutory duty to flesh out what discrimination "because of" a protected trait may entail, Chief Judge Wood's opinion respected both the limits and responsibilities that Title VII places on courts.[74]

Another key difference between Chief Judge Wood's and Judge Posner's opinions is in the type of materials they relied on to arrive at their conclusions. Throughout her opinion, Chief Judge Wood was guided strictly by legal developments: namely, judicial understandings of what constitutes discrimination because of a protected characteristic. In contrast, not only did Judge Posner explicitly disclaim reliance on some of these constitutional and statutory precedents, but he also premised his "updating" of Title VII on "shift[s] in the political and cultural environment," and "scientific literature."[75]

This distinction is also crucial, as Chief Judge Wood's reliance on purely *legal* developments demonstrated respect for both the limits and

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[70] Most scholars have focused on the lack of a specific definition of "discrimination." *See, e.g.*, Burstein, *supra* note 67, at 135.

[71] *See* William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections* (Yale Law Sch. Pub. Law Research Paper, Working Paper No. 616, 2017), https://ssrn.com/abstract=3024259 [https://perma.cc/DUW4-BARU] (detailing how the Supreme Court has read this language broadly).

[72] In fact, advocates of a more progressive approach have expressed their disappointment with *Hively*. *See, e.g.*, Brian Soucek, Hively*'s Self-Induced Blindness*, 127 YALE L.J.F. 115 (2017).

[73] *Hively*, 853 F.3d at 345. The fact that the associational theory is derived from the separate context of racial discrimination, *id.* at 346–49, underscores how the interpretation of "discrimination," not "sex," was the crux of the *Hively* inquiry.

[74] To be sure, Judge Sykes does respond to this reasoning. Chiefly, she cabins a broad interpretative approach to the narrow set of "common law statutes." *Id.* at 360 (Sykes, J., dissenting). However, this glides over the fact that it should be the specific statutory language, rather than any categorical labels, that should govern. *See* Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common-Law Statutes" Different? in* INTELLECTUAL PROPERTY AND THE COMMON LAW 89 (Shyamkrishna Balganesh ed., 2013). More importantly, to the extent that Judge Sykes recognizes that *some* statutes do allow for this broader interpretive approach, her disagreement with Chief Judge Wood lies less in principle and more in application.

[75] *Hively*, 853 F.3d at 353, 354–56 (Posner, J., concurring).

duties of the judicial role. First, this strict reliance on legal developments demonstrated recognition of the limits of judicial competency. There is a prevailing understanding that the further courts deviate from applying "law," the flimsier their mandate and expertise.[76] In contrast, judges are well suited, and routinely called upon, to interpret the scope of judicial precedent and the corresponding implications.[77]

Moreover, Chief Judge Wood's focus on reconciling the relevant legal precedent was also a necessary means of fulfilling her judicial *responsibility* under Title VII. In regular statutory interpretation, precedent already plays an outsized role.[78] Yet, because the understanding of what discrimination "because of" sex means is fleshed out by a corpus of judicial precedents, courts arguably have a greater responsibility to achieve a workable, internally consistent understanding of this language.[79] As recognized by Judge Rovner, the question in *Hively* was the result of discordant strands of Title VII jurisprudence.[80] Judicially broadened understandings of discrimination, juxtaposed with the preclusion of protections for lesbian and gay employees, had led to a "paradoxical legal landscape."[81] It might well have been necessary to tolerate these inconsistencies had narrow statutory language specifically mandated so. Yet Title VII arguably calls for the exact opposite. Chief Judge Wood's focus on building upon, rather than contradicting, the corpus of Title VII precedent was a necessary step toward fulfilling her Title VII responsibility.

Ultimately, judicial interpretations of Title VII are not without consequence. Most fundamentally, as courts continue to clarify the scope of what constitutes prohibited discrimination "because of" a protected characteristic, vulnerable employees may rely on these pronouncements to understand the protections accorded to them by law. Given this potential impact, it is perhaps understandable that some judges may relish the opportunity to "update" this landmark statute, while others may be instinctively wary of any attempts to subvert our "constitutional structure." Yet, anchored to the specific language of Title VII, and focused on reconciling prior judicial understandings of the statute, it is Chief Judge Wood's opinion that truly shows how the *Hively* conclusion is rooted in a principled understanding of the judicial role.

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[76] Most recently, when presented with schemes for discerning politically gerrymandered districts based on empirical data, Chief Justice Roberts questioned whether the courts could rely on such "sociological gobbledygook." Transcript of Oral Argument at 40, Gill v. Whitford, No. 16-1161 (U.S. argued Oct. 3, 2017), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_bpm1.pdf [https://perma.cc/BM3V-5VPY].

[77] *See generally* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT (2016).

[78] *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362–63 (1988) (describing the strong statutory stare decisis principle).

[79] Eskridge, *supra* note 71, at 67 (arguing that an "anti-messiness principle" counsels in favor of judicially administrable Title VII rulings).

[80] Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 714 (7th Cir. 2016).

[81] *Id.*