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COMMENT

RETHINKING TITLE VII'S PROTECTIONS AGAINST SEX DISCRIMINATION IN AN EMPLOYMENT CONTEXT

HIVELY V. IVY TECH CMTY. COLL., 853 F.3D 339 (7TH CIR.)

*Tyler Corcoran**

I. Introduction

In 1964, Congress passed Title VII of the Civil Rights Act ("Title VII"), thereby making it illegal for an employer to discriminate against any individual because of their "race, color, religion, sex, or national origin."[1] It is the scope of Title VII's prohibition against sex discrimination that is of principal concern in *Hively v. Ivy*

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[1] 42 U.S.C. § 2000e-2(a) (2012).

Tech Community College of Indiana.[2] The overarching issue presented in *Hively* is one of statutory interpretation: whether Title VII's protections against sex discrimination prohibit employers from discriminating against individuals based on the individual's sexual orientation.[3] The Seventh Circuit Court of Appeals answered this question in the affirmative, holding that individuals who allege that they "experienced employment discrimination on the basis of [their] sexual orientation [have] put forth a case of sex discrimination for Title VII purposes."[4]

The plaintiff, Kimberly Hively ("Hively"), started her career as an adjunct professor at Ivy Tech Community College of Indiana ("Ivy Tech") in 2000.[5] Between 2009 and 2014, Hively unsuccessfully applied for at least six full-time positions at Ivy Tech until her part-time contract was not renewed in July 2014.[6] In December 2013, Hively—convinced that Ivy Tech was discriminating against her based on her sexual orientation—received a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC") and filed a complaint in the U.S. District Court for the Northern District of Indiana.[7] Hively's complaint alleged that she was "[d]enied full[-]time employment and promotions based on sexual orientation" which she alleged violated Title VII.[8]

In response, Ivy Tech successfully filed a motion to dismiss for failure to state a claim on which relief can

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[2] Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017) (en banc).
[3] *Id*.
[4] *Id*. at 351–52.
[5] *Id*. at 341.
[6] *Id*.
[7] *Id*.
[8] Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 699 (7th Cir. 2016) (first alteration in original), *rev'd* 853 F.3d 339 (7th Cir. 2017) (en banc).

be granted, asserting that "sexual orientation is not a protected class under Title VII."[9] On appeal, the Seventh Circuit Court of Appeals affirmed the district court's decision after "an exhaustive exploration of the law governing claims involving discrimination based on sexual orientation" because the Seventh Circuit "felt bound to adhere to [its] earlier decisions."[10] Citing "the importance of the issue," and cognizant of the power of the full court to overrule its earlier decisions, a majority of the regularly active judges on the Seventh Circuit voted to grant a petition to rehear en banc.[11]

Historically, the United States Courts of Appeals have interpreted the prohibition against sex discrimination to not include discrimination premised on an individual's sexual orientation.[12] This interpretation—adopted by both the Seventh Circuit and most of its sister courts—is guided by the inference that when Congress passed Title VII, the word "sex" referred to "nothing more than the traditional notion of 'sex'"[13] However, the Second Circuit recently muddied the interpretive waters when it noted that, although that particular panel was powerless to overturn precedent, an

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[9] *Hively*, 853 F.3d at 341.
[10] *Id.* at 343.
[11] *Id.*
[12] *Id.* at 340.
[13] *Id.* at 341 (quoting Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563, 572 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998), *and abrogated by* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)); *see also* Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058 (7th Cir. 2003); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701 (7th Cir. 2000). *See generally* Sandifer v. U.S. Steel Corp., 678 F.3d 590 (7th Cir. 2014) ("[I]t is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

openly gay man had "pleaded a claim of gender stereotyping that was sufficient to survive dismissal."[14]

Although notably absent in the debate about the scope of sex discrimination protections in an employment context, the Supreme Court has provided opinions on some related issues.[15] In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court ruled that workplace sexual harassment is within the reach of Title VII.[16] In *Price Waterhouse v. Hopkins*, the Supreme Court held that gender-norm stereotyping falls within Title VII's prohibitions against sex discrimination.[17] Also in an employment context, *Oncale v. Sundowner Offshore Services, Inc.*, provided more clarity, stating that it does not matter if the harasser and the victim are of the same sex for the purposes of a gender nonconformity claim.[18]

More recently, the Supreme Court has issued decisions that seemingly recognize the rapid rate at which society's views on homosexuality (e.g., an individual's sexual orientation) have evolved.[19] These

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[14] *Hively*, 853 F.3d at 342 (citing Christiansen v. Omnicom Group, Inc., 852 F.3d 195 (2d Cir. 2017)).
[15] *Id*. at 342.
[16] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).
[17] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *see also Hively*, 853 F.3d at 342.
[18] Oncale, 523 U.S. at 79.
[19] *See* Linda C. McClain, *From* Romer v. Evans *to* United States v. Windsor*: Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL'Y 351, 476 (2013). *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that same-sex couples have the right to marry); United States v. Windsor, 570 U.S. 744 (2013) (holding that the Defense of Marriage Act's definition of marriage, which excluded same-sex couples from receiving federal benefits, was unconstitutional); Lawrence v. Texas, 539 U.S. 558 (2003) (holding that a state statute criminalizing homosexual sodomy was unconstitutional under the Fourteenth Amendment); Romer v. Evans, 517 U.S. 620 (1996) (holding that an amendment to the Colorado

decisions, together with the historical interpretation that Title VII does not outlaw sexual-orientation discrimination, have created a "paradoxical legal landscape," where individuals can get fired from their jobs simply for getting married.[20] In light of this dichotomy, the *Hively* court granted a rehearing en banc to clarify both "what it means to discriminate on the basis of sex" and "whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex."[21]

Finding the traditional first steps of statutory analysis inadequate,[22] the *Hively* court adopted the *Oncale* court's interpretive approach, mostly disregarding the legislative intent in passing Title VII.[23] In an 8–3 decision, the *Hively* court held that "discrimination on the basis of sexual orientation is a

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Constitution, which prohibited any legal action designed to protect homosexuals, was unconstitutional).

[20] *See Hively*, 853 F.3d at 342 (quoting *Hively,* 830 F.3d at 714).

[21] *Hively*, 853 F.3d at 343.

[22] E.g., reviewing the "plain language" of the statute and analyzing the "legislature's intent" in passing the statute. *Id.* at 343. *See generally* WILLIAM ESKRIDGE, JR., & PHILIP FRICKEY, LEGISLATION AND STATUTORY INTERPRETATION (2d ed. 2007); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407 (1989).

[23] The *Oncale* approach held that Title VII prohibits "sexual harassment of any kind that meets the statutory requirements," including male-on-male harassment in the workplace. *Oncale*, 523 U.S. at 80. The *Oncale* court was unmotivated by the legislative intent in passing Title VII because "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79.

form of sex discrimination," and that employers are therefore prohibited from engaging in sexual-orientation discrimination.[24] Invoking "the logic of the Supreme Court's decisions," and persuaded by the "common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex," the Seventh Circuit created a split amongst the United States Courts of Appeals with its *Hively* decision.[25]

To be clear, although it is unlikely Ivy Tech will appeal the Seventh Circuit's opinion to the Supreme Court, this case is still not entirely over.[26] Rather, *Hively* simply reversed the decision granting Ivy Tech's motion to dismiss for failure to state a claim upon which relief can be granted, remanding the additional issues back to the district court for further litigation.[27]

The immediate effect of the *Hively* decision is that victims of sexual-orientation discrimination in the Seventh Circuit's jurisdiction now have a cognizable Title VII sex discrimination claim;[28] such a sex discrimination

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[24] *Hively*, 853 F.3d at 341.
[25] *Id.* at 351.
[26] *See* Matthew Haag & Niraj Chokshi, *Civil Rights Act Protects Gay Workers, Federal Appeals Court Rules*, N.Y. TIMES, April 4, 2017, at A17.
[27] For example, whether Ivy Tech committed discriminatory actions against Hively based on her sex has yet to be determined.
[28] *See, e.g.*, Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1048 (7th Cir. 2017); Hamzah v. Woodman's Food Mkt., Inc., 693 F. App'x 455, 458 (7th Cir. 2017); United States EEOC v. Rent-A-Center East, Inc., 246 F. Supp. 3d 952, 956 (C.D. Ill. 2017); Trahanas v. Northwestern Univ., No. 15-CV-11192, 2017 U.S. Dist. LEXIS 104098, at *12 (N.D. Ill. July 6, 2017); Somers v. Express Scripts Holdings, No. 1:15-cv-01424-JMS-DKL, 2017 U.S. Dist. LEXIS 54970, at *42 n.8 (S.D. Ind. Apr. 11, 2017).

claim is supported by invoking either the tried-and-true comparative method or the associational theory.[29]

II. Analysis

The Supreme Court is now likely to enter the debate concerning the scope of Title VII's sex discrimination prohibition given the circuit split.[30] To be certain, it is of fundamental importance for the Supreme Court to provide ultimate authority on whether employers are prohibited from engaging in sexual-orientation discrimination. If the Supreme Court grants certiorari and reviews the issue on first impression, then the four contrasting philosophies relating to statutory interpretation provide helpful insight into the likely ruling.[31]

Similarly, now that the Supreme Court is likely to pick up this issue,[32] it is critical to have a clear understanding of the legal theories justifying an interpretation that sexual-orientation discrimination is a form of sex discrimination. The first of the two approaches relies on the comparative method where the court tries to "isolate the significance of the plaintiff's sex to the employer's decision" by controlling every variable but the plaintiff's sex.[33] The comparative method, therefore, attacks the key point of a Title VII sex discrimination claim: "whether the [plaintiff's] protected characteristics played a role in the adverse employment

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[29] *Hively*, 853 F.3d at 345–49.

[30] William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 329 (2017).

[31] The four contrasting approaches to statutory interpretation are illuminated by the majority opinion, the two separate concurring opinions, and the dissenting opinion. *See Hively*, 853 F.3d 339.

[32] Eskridge, *supra* note 30, at 329.

[33] *Hively*, 853 F.3d at 345.

decision."[34] The second approach supporting the theory that Title VII's prohibition against sex discrimination includes acts based on an individual's sexual orientation relies on the associational theory.[35] The associational theory holds that when people are "discriminated against because of the protected characteristic of one with whom [they] associate[]," then they are "actually being disadvantaged because of [their] own traits."[36]

With a firmer understanding of both the comparative method and the associational theory, it is now possible to understand the legal reasoning underlining *Hively*. Serendipitously, *Hively* presents four different strains of statutory analysis: the majority's opinion offers a text-book case study in purposivism;[37] Judge Flaum's concurring opinion demonstrates a

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[34] *Id.*

[35] *Id.* at 347.

[36] *Id.*; *see also* Holcomb v. Iona Coll., 521 F.3d 130, 132 (2d Cir. 2008) ("[A]n employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race."); Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 884 (7th Cir. 1988) (stating that the key question for an associational race discrimination claim is whether the plaintiff's race was the cause of the discrimination); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("[R]estricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

[37] Purposivism is the theory where a "formulation as to the purpose behind the enactment of a particular statute guides the jurist in analyzing the statute's language." Asher Hawkins, Note, *The Least "Constructive" Provisions?*, 59 N.Y.L. SCH. L. REV. 625, 638 (2014–2015) (citing Richard A. Posner, *Justice Breyer Throws Down The Gauntlet*, 115 YALE L.J. 1699, 1710 (2006)).

textualist approach;[38] Judge Sykes' dissent adopts the originalist approach;[39] and Judge Posner's concurring opinion, for its part, embraces a form of legal pragmatism (hereinafter "Posnerism").[40]

In a utilitarian sense, the *Hively* court certainly reached the most correct decision in holding that sex discrimination includes discriminatory acts taken based on an individual's sexual orientation. The alternative methods of statutory interpretation (i.e., textualism, originalism, and Posnerism) would each bring different

[38] *Hively*, 853 F.3d at 357 (Flaum, J., concurring). Textualism is the approach whereby a jurist primarily analyzes the enacted text as "the key tool in statutory interpretation." Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1762 (2010); *see* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23–25 (Amy Gutman ed., 1997).

[39] *Hively*, 853 F.3d at 359 (Sykes, J., dissenting). Originalism is the theory that seeks to "implement the democratically elected legislature's original design, as embodied in a statute's text and history." Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 237 (1997); *see also* Nicholas S. Zeppos, *The Use of Statutory Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1078 (1992) ([O]riginalism resolves the interpretative questions in statutory cases by asking how the enacting Congress would have decided the question.").

[40] *Hively*, 853 F.3d at 352 (Posner, J. concurring). Judge Posner, in his concurrence, seemingly eschewed all traditional theories of statutory interpretation and adopted a form of pragmatism: "I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted." *Hively*, 853 F.3d at 357 (Posner, J. concurring).

negative externalities to society.[41] But *Hively* was correct in that it logically follows from existing legal precedent.[42]

III. Conclusion

To be clear, *Hively* was a landmark decision that reflects society's evolving understanding of the meaning of "sex." Drawing on the logic used by the Supreme Court in ruling on cases concerning sex discrimination,[43] the *Hively* court felt empowered to overturn its own precedent—thereby recognizing society's growing acceptance for individuals with a nontraditional sexual orientation. This recognition is the beauty of applying purposivism when interpreting old or ambiguous statutes: the judiciary can force outdated and anarchistic laws to reflect modern societal mores *now*.

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[41] *See* Gluck, *supra* note 38, at 1764–68; s*ee also* William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 673–74 (1999).
[42] *See generally Hively*, 853 F.3d at 351.
[43] *Id.* at 341–42.