Woke Dicta:
The Discord Over Statutory Interpretation, Sexual Orientation Discrimination, and the Scope of Title VII

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Introduction

Following the landmark case *Obergefell v. Hodges* in the celebratory summer of 2015, the lesbian, gay, bisexual, transgender, and queer community (LGBTQ) received the long awaited Constitutional right to marry, previously only enjoyed by their heterosexual comparators.[1] The Court's ruling in favor of same-sex marriages and subsequent media coverage demonstrated mainstream society's burgeoning acceptance of LGBTQ individuals and their marital unions, reversing decades of ill treatment.[2] Yet, post-*Obergefell* society faces an untenable paradox which can only be resolved if Title III courts recognize sexual orientation discrimination as an actionable form of sex discrimination under Title VII.[3] Currently, an LGBTQ individual can legally marry a partner of the same-sex, but can subsequently face discrimination from his or her employer without the ability to seek redress under Title VII.[4] For many individuals within the LGBTQ community, securing federal protections from sexual orientation discrimination in the workplace under Title VII is an equal, if not more important, objective than marriage equality.[5]

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1 Obergefell v. Hodges, 135 S. Ct. 2584 (2015). *See* Jeremiah A. Ho, *Find Out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination*, 2017 Utah L. Rev. 463, 465 (2017).

2 Ho, *supra* note 1, at 464.

3 *See* Elizabeth Halet, *What Does the Foxx Say: An Analysis on the Potential Impact of the EEOC's Official Position That Discrimination on the Basis of Sexual Orientation is Itself a Form of Sex Discrimination*, 5 Ind. J.L. & Soc. Equal. 371, 373 (2016).

4 Ho, *supra* note 1, at 467-68.

5 Halet, *supra* note 3, at 371-72.

The debate over expanding Title VII coverage to LGBTQ employees has finally splintered the United States Courts of Appeals.[6] In April 2017, the Court of Appeals for the Seventh Circuit issued its groundbreaking decision in *Hively v. Ivy Tech Community College of Indiana*, overturning circuit precedent and recognizing sexual orientation discrimination as a form of sex discrimination under Title VII.[7] Previously, in 2015, the Equal Employment Opportunity Commission (EEOC) introduced three legal rationales in favor of including sexual orientation as a subset of sex discrimination in *Baldwin v. Foxx*, which were echoed by the majority in *Hively*.[8] Following the Seventh Circuit's *en banc* decision, Ivy Tech Community College chose not to file a petition for writ of certiorari and moved forward with settlement negotiations.[9]

Conversely, the Court of Appeals for the Eleventh Circuit affirmed the circuit's precedent in *Evans v. Georgia Regional Hospital* that sex discrimination under Title VII does not include sexual orientation discrimination.[10] On December 11, 2017, the Supreme Court declined Evans' petition for a writ of certiorari, leaving the debate over federal protections for LBGTQ individuals hanging in the balance.[11] In April 2017, the Court of Appeals for the Second Circuit dismissed a sexual orientation discrimination claim in *Zarda v. Altitude Express* because the circuit's three judge panel lacked the authority to overturn precedent.[12] However, the Second Circuit reheard arguments *en banc* this year, joining the Seventh Circuit and EEOC, holding that sexual orientation discrimination was an actionable claim of sex discrimination under Title VII.[13] At present, *Zarda* could ultimately find its way before the Supreme Court.[14]

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6 *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341-69 (7th Cir. 2017).

7 *Id*. at 351-52.

8 *See* Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015). *See also* Hively v. Ivy Tech Cmty. Coll. of Ind., 830 F.3d 698, 702-03 (7th Cir. 2016).

9 *See* Scott Jaschik, *Legal Discrimination No More*, Inside Higher Ed, Apr. 5, 2017, https://www.insidehighered.com/news/2017/04/05/appeals-court-says-lesbian-former-adjunct-can-sue-ivy-tech-bias-based-sexual.

10 *See* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017).

11 *See Evans*, 850 F.3d at 1255 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2018).

12 *See* Zarda v. Altitude Express, 855 F.3d 76, 80 (2d Cir. 2017).

13 *See* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018).

14 *See* Petition for Writ of Certiorari, Zarda v. Altitude Express, Inc., (No. 17-1623) (May 29, 2018).

In recent history, the Supreme Court has expanded federal protections for LGBTQ individuals, including prohibitions against gender stereotyping in *Price Waterhouse v. Hopkins* and same-sex harassment in *Oncale v. Sundowner Offshore Services, Inc*.[15] The Supreme Court's recent decisions reflect the shifting social attitudes toward the LGBTQ community, most notably in *Lawrence v. Texas*[16], *United States v. Windsor*[17], and *Obergefell v. Hodges*.[18] The tides seem to be turning as the momentum for LGBTQ advocates grows and equality in anti-discrimination law becomes more attainable with the support of the EEOC, Seventh Circuit, and Second Circuit.[19] However, the Supreme Court's denial of a petition for writ of certiorari in *Pidgeon v. Turner*[20] and judicial side-stepping in *Masterpiece Cakeshop, Ltd. v. Co. Civ. Rights Commission* could potentially erode the fundamental rights extended to LGBTQ individuals in *Obergefell*.[21] If and when the Court revisits sex discrimination in relation to sexual orientation discrimination, the Court will have myriad legal rationales to clarify Title VII's scope, which will undoubtedly affect a substantial minority of Americans.

This Comment will first address the background of Title VII of the Civil Rights Act of 1964, identify Title VII's protected classes, and the EEOC's extension of federal protections to LGBTQ individuals. Next, this Comment will discuss the current judicial climate concerning sex discrimination, and the groundbreaking *Hively* and *Zarda* decisions compared to *Evans'* affirmation of circuit precedent. This analysis will include an examination of the Second Circuit, Seventh Circuit, and EEOC's three-part legal justification for expanding Title VII coverage, including (1) the comparator theory that sexual orientation discrimination inherently involves impermissible sex-based considerations, (2) the associational theory applying *Loving's* prohibition against racial discrimination to a post-*Obergefell* society, and (3) the *Price Waterhouse* theory that sexual orientation discrimination relies on impermissible sex-stereotyping.

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15 *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82 (1998); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

16 *See* Lawrence v. Texas, 539 U.S. 558 (2003).

17 *See* United States v. Windsor, 570 U.S. 744 (2013).

18 *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

19 *See Zarda*, 883 F.3d at 132; Halet, *supra* note 3, at 373, 388.

20 *See* Pidgeon v. Turner, 538 S.W.3d 73 (Tex. 2017), *cert. denied*, 138 S. Ct. 505 (2018).

21 *See* Masterpiece Cakeshop, Ltd. v. Col. Civ. Rights Comm'n, 138 S. Ct. 1719, 1732 (2017).

LGBTQ individuals face an objectionable paradox: they possess the legal right to marry a same-sex partner but lack the ability to seek legal recourse against sexual orientation discrimination in the workplace. This legal backdrop developed from an inconsistent application of Title VII and from the limitations of the associational and sex-stereotyping theories. Judge Posner's concurrence in *Hively* advocates for judicial interpretative updating and provides social and historical justifications for the comparator theory that sexual orientation discrimination inherently involves sex-based considerations. The succinct legal reasoning provided by the comparator theory, buttressed by Posner's judicial interpretative updating, is the most persuasive mode of interpreting Title VII to best serve its original aim of ending discrimination in the workplace.

I. BACKGROUND

When Congress passed the Civil Rights Act in 1964, Title VII prohibited an employer from discriminating against an employee because of the employee's "race, color, religion, sex, or national origin."[22] Title VII did not define any of the protected classes and instead prohibited discrimination where one or more of the listed characteristics is a "substantial" or "motivating factor" in the employer's adverse employment decision.[23] This is strikingly different from the Age Discrimination in Employment Act, which applied federal protections only to individuals over forty years of age, as well as the Americans with Disabilities Act, which extended protections specifically to employees with disabilities.[24]

Currently, an LGBTQ individual's geographic location, or his employment in the private sector, can create substantial disadvantages when he seeks a legal remedy for sexual orientation discrimination.[25] While twenty-one states have adopted LGBTQ protections for discriminatory employment practices, the "dignity of LGBTQ families will not be fully realized" until Congress or the Supreme Court formally recognize anti-discrimination protections for an often marginalized sector of society.[26] In the absence of federal protections,

22 Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1964).
23 Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(m) (1964).
24 *See* Jessica A. Clarke, *Protected Class Gatekeeping*, 92. N.Y.U.L. REV. 101, 103 (2017).
25 Halet, *supra* note 3, at 374.
26 *Id.* at 373, 374.

companies have been left to their own devices to extend anti-discrimination policies to LGBTQ employees, whether out of their own goodwill or as a convenient public relations strategy.[27] However, the record number of businesses receiving high scores on the Human Rights Campaign's Corporate Equality Index is insufficient evidence that sexual orientation discrimination is prevented in all sectors of the economy.[28]

Defining discrimination on the basis of sex has proven to be more difficult than defining discrimination based on other protected classes, especially because the inclusion of sex discrimination in Title VII was possibly an unintended consequence of Congressman Howard W. Smith's last ditch effort to sabotage the Act.[29] While there is evidence suggesting Congressman Smith was an ally to the growing women's movement, other sources allege Smith proposed the amendment to include sex as a protected category based on his miscalculated assumption that his Congressional colleagues would reject a measure affording women federal protections against discrimination.[30] Regardless of Smith's motivation, there is little to no legislative history concerning the scope of sex discrimination, resulting in broad discretion for judicial interpretation that has contributed to the paradoxical application and results of sex discrimination law.[31] Doctrinal inconsistencies involving sex discrimination pose a problem for judges when interpreting sexual orientation discrimination within the statutory text.[32]

Because of the equivocal legal definition of "sex," the treatment of LGBTQ individuals under Title VII has produced incongruous results across circuit courts.[33] The two primary interpretations of Title VII's sex discrimination coverage include discrimination based on biological sex and discrimination based on gender nonconformity.[34] The

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27 *See id.* at 375.

28 *See id.*

29 *See* William N. Eskride, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Y.L.J. 322, 347 (2017).

30 Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1014-16 (2015). *See also* Eskridge, supra note 29, at 347.

31 *See* Camille Patti, *Hively v. Ivy Tech Community College: Losing the Battle but Winning the War for Title VII Sexual Orientation Discrimination Protection,* 26 TUL. J.L. & SEXUALITY 133, 135 (2017).

32 *See id.* at 135, 136.

33 *See id.* at 144.

34 Halet, *supra* note 3, at 379.

Supreme Court expanded the scope of sex discrimination in *Price Waterhouse v. Hopkins*, when the Court held that, if a plaintiff could prove that his or her gender expression played a substantial or motivating part in an adverse employment decision, he or she could have an actionable claim under Title VII for unlawful gender stereotyping.[35] In *Price Waterhouse*, Ann Hopkins was denied a promotion for failure to conform to her supervisors' expectations of female gender norms.[36] In reaching its conclusion, the Supreme Court took a comprehensive view of Title VII, focusing on the employer's discriminatory intent and society's recognition that gender stereotypes should not be involved in employment decision making.[37] Gender-stereotyping discrimination has proven to be a possible, although not guaranteed, avenue for LGBTQ plaintiffs to obtain redress under Title VII.[38]

In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court concluded that same-sex harassment, relating to the sex of the accused employer and the harassed employee, warranted Title VII protections.[39] Joseph Oncale was sexually discriminated by male coworkers while working on an oil platform in the Gulf of Mexico.[40] His complaints to his supervisors went unanswered and he filed a sex discrimination claim under Title VII.[41] The Court noted that it previously "rejected any conclusive presumption that an employer cannot discriminate against members of his own race," which evokes similarities to the associational theory of sexual orientation discrimination held by *Hively*, *Zarda*, and the EEOC.[42] However, despite expanding the scope of sex discrimination to include same-sex sexual harassment, courts have consistently declined to include sexual orientation discrimination within Title VII's purview.[43]

Congress has continually failed to prohibit sexual orientation and gender identity discrimination, most notably in the annual ill-fated

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35 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

36 Halet, *supra* note 3, at 379 (citing *Price Waterhouse*, 490 U.S. at 233, 235).

37 *Id.* (citing *Price Waterhouse*, 490 U.S. at 241).

38 *See id.* at 380.

39 *See* Oncale v. Sundowner Offshore Servs. Inc. et al., 523 U.S. 75, 82 (1998).

40 *See id.* at 77.

41 *See id.*

42 *See id*. at 78.

43 *See id.* at 82; Higgins v. New Balance Ath. Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745; 750-51 (4th Cir. 1996); De Santis v. Pac. Tel. & Tel. Co., Inc., 608 F.2d 327, 330-31 (9th Cir. 1979); Centola v. Potter, 183 F. Supp. 2d 403, 408 (D. Mass. 2002).

efforts to pass the Employment Non-Discrimination Act (ENDA) beginning in 1994, excluding the 109th Congress.[44] Most recently, the 114th Congress introduced Senate Bill 1858, known as the Equality Act of 2015, but it too failed to go to vote before the 114th Congress.[45]

The Trump-Pence Administration casts significant doubt on passage of the Equality Act, or similar bills during the current administration's tenure and the Republican majority in Congress.[46] Additionally, the shifting Supreme Court bench could favor Zarda's former employer, Altitude Express, Inc., if the Court grants the petition for writ of certiorari in *Zarda*.[47]

Despite the exclusion of LGBTQ individuals from federal discrimination laws, social attitudes toward sexual identity and gender expression have changed dramatically.[48] Court decisions over the past two decades have expanded constitutionally protected rights to LGBTQ individuals.[49] Most notably, courts have recognized critical rights under the Equal Protection Clause of the Fourteenth Amendment, including the right to privacy concerning sexual relations in *Lawrence v. Texas* and the right to marry in *Obergefell v. Hodges*.[50]

In *Obergefell*, Justice Kennedy stated "the identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution," adding that the Court must learn from history without allowing precedent to impede necessary changes in the law.[51] Justice Kennedy reasoned that excluding LGBTQ individuals from the right to marry also denied LBGTQ couples "the constellation of benefits that the States have linked to marriage," which are guaranteed to all citizens under the Fourteenth Amendment.[52] Additionally, Justice Kennedy cautioned against opposition to marriage equality, even if based on religious or philosophical premises, because

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44 Halet, *surpra* note 3, at 377.

45 *Id.* at 377-78.

46 *See id.* at 378.

47 *See generally* Kent Greenfield & Adam Winkler, *Without Kennedy, the Future of Gay Rights Is Fragile*, N. Y. TIMES (June 28, 2018), http/www.nytimes.com/2018/06/28/opinion/kennedy-gay-rights-same-sex-marriage.html.

48 *See* Lisa J. Banks & Hannah Alejandro, *Changing Definitions of Sex Under Title VII*, 32 A.B.A. J. LABOR & EMP'T L. 25, 28 (2016).

49 *See id*. at 25 n.2.

50 *See id.* (citing Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015); Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

51 *See Obergefell*, 135 S. Ct. 2584, 2598 (2015).

52 *Id.* at 2590.

it would "put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied" when enacted in law and policy.[53]

Since Justice Kennedy issued his opinion in *Obergefell*, opponents of marriage equality have attempted to limit the scope of the landmark 2015 decision.[54] Recent lawsuits seeking to curtail the rights of LGBTQ individuals include *Pidgeon v. Turner*, where the petitioners challenged the City of Houston's extension of benefits to same-sex spouses of city employees, and *Pavan v. Smith*, where the Supreme Court reversed the Arkansas Supreme Court decision that would have prevented same-sex couples from both being listed as parents on their child's birth certificate.[55]

During oral arguments in *Masterpiece Cakeshop,* where a Christian baker refused to sell a wedding cake to a same-sex couple, Justice Kennedy echoed his belief that "tolerance is essential in a free society," concluded that "tolerance is most meaningful when it's mutual," and emphasized the necessary balance between respecting religious beliefs and prohibiting discrimination against LBGTQ individuals.[56] Despite a growing consensus opposing discrimination against LGBTQ individuals, full legal equality has eluded LGBTQ advocates, largely due to the piecemeal nature of court decisions resulting in gaps in federal protection.[57]

II. THE CURRENT LEGAL CLIMATE OF TITLE VII AND SEXUAL ORIENTATION DISCRIMINATION

A. *Baldwin v. Foxx: The Precursor to the Seventh Circuit's Decision*

In 2015, the EEOC took a historic step forward for the federal government by resolving the inequality of discrimination law in *Baldwin v. Foxx*.[58] In *Baldwin*, the complainant filed a formal complaint

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[53] *Id.* at 2602.

[54] *See e.g.*, Pavan v. Smith, 137 S. Ct. 2075 (2017) (per curiam); Pidgeon v. Turner, 538 S.W.3d 73 (Tex. 2017).

[55] *Pavan*, 137 S. Ct. at 2076-77; *Pidgeon*, 538 S.W.3d at 75-76.

[56] Transcript of Oral Argument at 64, Masterpiece Cakeshop, Ltd. v. Col. Civ. Rights Comm'n, 138 S. Ct. 1719 (No. 16-111) (2017).

[57] *See* Banks et al., *supra* note 48, at 25.

[58] Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 at *6 (EEOC July 15, 2015).

with the EEOC alleging sexual orientation discrimination because the Department of Transportation failed to promote him to a fulltime air traffic controller position at the Miami International Airport, because of his sexual orientation.[59] The EEOC held that the complainant stated a valid claim of sex discrimination because the employer relied on unlawful sex-based considerations in its employment decision.[60]

The EEOC first established a basic syllogism that sexual orientation is "premised on sex-based preferences, assumptions, expectations, stereotypes, or norms," concluding that sexual orientation cannot conceptually be defined without referencing sex.[61] Accordingly, sexual orientation is a subset of sex discrimination because sexual orientation discrimination is "inescapability linked to sex."[62] The EEOC's second legal rationale was that sexual orientation discrimination is "associational discrimination on the basis of sex," following from the prohibitions against race discrimination recognized by the Supreme Court's decision in *Loving v. Virginia*.[63] The associational theory under *Loving* recognizes that discrimination based on the race of an employee's spouse or a person with whom the employee associates is a form of racial discrimination covered by Title VII.[64] Likewise, following *Obergefell*, the EEOC reasoned that an associational theory regarding sex discrimination was also applicable.[65] The EEOC applied this theory, concluding that discriminating based on the sex of an employee's spouse or partner constituted discrimination on the basis of sex under Title VII.[66] Finally, the EEOC held sexual orientation discrimination requires gender stereotyping, which falls within Title VII's purview under *Price Waterhouse.*[67] Therefore, any alleged sexual orientation discrimination would be incorporated into Title VII's protected categories.[68]

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59 *Id.* at *1.

60 *Id.* at *6.

61 *Id.* at *5.

62 *Id.* at *5.

63 *Id.* at *6.

64 Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 347 (7th Cir. 2017). *See also* Loving v. Virginia, 388 U.S. 1, 12 (1967).

65 Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 at *6-*7 (EEOC July 15, 2015).

66 *See id.* at *7.

67 *Id. See also* Price Waterhouse v. Hopkins, 490 U.S. 228, 232-58 (1989).

68 *Baldwin*, 2015 WL 4397641 at *6.

Baldwin provided three legal justifications for expanding LGBTQ protections in sex discrimination law; however, its "powers of persuasion" are limited because the EEOC lacked rulemaking authority in the matter.[69] The EEOC also discussed counterarguments concerning Congress' silence and failure to pass amendments expanding Title VII's coverage to LGBTQ individuals, concluding that Congressional inaction was not dispositive when determining the scope of sex discrimination.[70] The EEOC concluded that interpreting Title VII's prohibition of sex discrimination to exclude coverage of LGBTQ individuals "inserts a limitation into the text" that Congress did not intend to enact.[71] Although the EEOC's opinion is not binding, it has opened the door for several United States Courts of Appeals to expand Title VII coverage.[72]

B. *The Seventh Circuit: Hively v. Ivy Tech Community College*

Two years after the EEOC issued its opinion in *Baldwin*, the Seventh Circuit broke with the circuit courts' unanimous definition of sex discrimination under Title VII when it decided, *en banc*, *Hively v. Ivy Tech Community College*.[73] Kimberly Hively was employed by Ivy Tech Community College as an associate professor and continually denied promotion to full time faculty.[74] Hively filed suit against her former employer for discrimination by failing to promote her to a full time professor because she was a lesbian.[75] *Hively* certified its place as a landmark decision for LGBTQ rights as the first court of appeals decision to incorporate sexual orientation discrimination as an actionable form of sex discrimination under Title VII.[76] The case's four opinions "compet[e] for space in future casebooks" by submitting conflicting modes of statutory interpretative analysis.[77] The majority's rationale mirrors the three justifications provided in *Baldwin*, fol-

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69 Patti, *supra* note 31, at 137.

70 *Baldwin*, 2015 WL 4397641 at *9.

71 *Id.*

72 *See* Patti, *supra* note 31, at 139.

73 *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341, 343 (7th Cir. 2017).

74 *See id.*

75 *Id.*

76 *See id*.

77 Brian Soucek, *Hively's Self-Induced Blindness*, 127 YALE L.J. 115, 116 (2017).

lowed by Judge Posner's and Judge Flaum's separate concurrences and by Judge Sykes' originalist dissent.[78]

The majority posits a "fresh look" in light of recent Supreme Court developments, concluding that discrimination based on sexual orientation is an actionable form of sex discrimination under Title VII.[79] The Seventh Circuit clarified that the issue did not turn on whether the Court should amend Title VII to put forth an additional protected class, which is clearly beyond the powers of judicial interpretation.[80] Instead, the court sought to resolve the inconsistencies regarding the definition of sex discrimination and to determine whether adverse employment action taken on the basis of an employee's sexual orientation is a subset of unlawful sex discrimination.[81] Additionally, the Court observed that unanticipated applications of the law are nonetheless lawful because Congress may not have realized "the full scope of the words it chose" when the statute was enacted.[82] The majority concluded that *Hively's* specific inquiry was one of pure statutory interpretation and proceeded to echo the EEOC's triad interpretive approach.[83] Yet, the majority failed to address relevant policy concerns for LGBTQ individuals and prevailing scholarship on sexual orientation and gender identity.[84]

Judge Wood's opinion offers a "deceptively simple argument" that Hively was denied a full time faculty position because she was a lesbian, which indicates her employer took her sex into account when making its adverse employment decision.[85] This "tried-and-true" comparator rationale employed by the EEOC and the majority opinion in *Hively* highlights the significance of the employee's sex in the employer's decision, concluding that Hively represented "the ultimate case of failure to conform to the female stereotype" because she was not a heterosexual.[86] As Brian Soucek noted, Judge Wood's argument, put differently, is that Hively "alleged that Ivy Tech hires men,

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78 *See* Patti, *supra* note 31, at 139-40. *See also Hively*, 853 F.3d 339 (7th Cir. 2017).
79 *Hively*, 853 F.3d at 340-41.
80 *Id.* at 343.
81 *Id.*
82 *Id.* at 345.
83 *See id.*
84 *See* Soucek, *supra* note 77, at 116.
85 *Id.* at 117.
86 Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345, 346 (7th Cir. 2017).

but not women, who are attracted to women," and consequently, "[b]ut for Hively's sex, she would have a job."[87]

Additionally, the majority discussed the application of an associational theory by analyzing *Loving v. Virginia* as a viable remedy to Title VII's inconsistent application.[88] Following *Obergefell*, the majority followed the reasoning employed by the EEOC that an associational theory regarding sex discrimination was applicable.[89] The majority applied the associational theory and held discriminating based on the sex of an employee's spouse or partner constituted discrimination on the basis of sex under Title VII.[90]

Finally, the majority stated that *Hively* must be understood within the context of recent Supreme Court decisions.[91] Judge Wood noted "it would require considerable calisthenics to remove the 'sex' from 'sexual orientation'," concluding that no valid distinction exists between claims of sexual orientation discrimination and gender stereotyping already under Title VII.[92] Judge Wood discussed *Price Waterhouse v. Hopkins* and *Oncale v. Sundowner Offshore Servs., Inc*. to illustrate how the Supreme Court has expanded the scope of Title VII's sex discrimination to include gender stereotyping and discrimination when the harasser and victim are the same sex.[93] The majority utilized the traditional canons of statutory interpretation, including plain language, context, and legislative history.[94] The Court then expanded beyond the traditional interpretative tools, noting legislative history "is notoriously malleable" and refrained from "div[ing] the significance of unsuccessful legislative efforts to change the law" when assessing Congressional intent.[95]

Judge Posner declared in his provocative concurrence that "we are Blackstone's heirs," referencing William Blackstone's view that in light of "the effects and consequence, or the spirit and reason of the law . . . the rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the

87 Soucek, *supra* note 77, at 117.

88 *See Hively*, at 853 F.3d at 347-49.

89 *Id.* at 349.

90 *See id*. at 347-49.

91 *Id.* at 349.

92 *Id.* at 350.

93 *Id.* at 342.

94 *See* Halet, *supra* note 3, at 388.

95 Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 343 (7th Cir. 2017).

received sense of them."[96] Posner discusses three "flavors" of statutory interpretation, the "extraction of original meaning," the "interpretation by unexpressed intent," and—his preferred form of statutory interpretation—"judicial interpretative updating," which provides a "fresh meaning" to a statutory or constitutional provision.[97] Posner further clarified that his third interpretative method "presupposes a lengthy interval between enactment and (re)interpretation."[98] This approach takes into account the 53-year evolution of American social norms following the passage of the 1964 Civil Rights Act and recognizes a modern interpretation of sex discrimination.[99] Accordingly, judicial interpretative updating revises a concept found within the statute, which "infuses the statement with vitality and significance" in modern society.[100]

Judge Posner grounded his theory of judicial interpretative updating with previous examples where the Supreme Court or Congress adapted outmoded law to fit the needs of modern society. He deftly compared Title VII with the evolution of the 1890 Sherman Antitrust Act, which has adapted to modern economics by "making old law satisfy modern needs and understandings."[101] Additionally, Judge Posner pointed to Justice Scalia's decisive fifth vote, in holding that burning the American flag as a political protest is protected under the First Amendment, along with the Supreme Court's effective revision of the Fourth Amendment in *Johnson v. United States*.[102] These examples illustrate the frequency of judicial interpretations based on "present need and understanding" instead of strict adherence to the original meaning of the text.[103] The concurrence advocates the vital social and political interest in protecting LGBTQ individuals from discrimination, which justifies "an admittedly loose interpretation" of sex discrimination.[104] Judge Posner argued that failure to extend coverage of sexual orientation discrimination would render Title VII "anachronistic," especially in light of changing social attitudes toward LGBTQ

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96 *Id.* at 352, 354 (Posner, J., concurring).

97 *See id.* at 352 (Posner, J., concurring).

98 *Id.* at 353 (Posner, J., concurring).

99 *See id.* (Posner, J., concurring).

100 *Id.* at 352 (Posner, J., concurring).

101 *See Hively*, 853 F.3d at 352 (Posner, J., concurring).

102 *Id.* at 353-54 (Posner, J., concurring). *See also* Johnson v. United States, 333 U.S. 10, 13-14 (1948).

103 *Id.* at 353 (Posner, J., concurring).

104 *Id.* at 355 (Posner, J., concurring) (internal quotation marks omitted).

individuals, the LGBTQ community's "intellectual and cultural attributions to society," and the social benefit of having LGBTQ couples adopt children in foster care.[105]

Judge Posner warns against focusing on the associational discrimination theory, because the Court's decision in *Loving* had little or nothing to do with the enactment of Title VII.[106] Judge Posner references Justice Holmes's views on statutory interpretation, stating "[w]e must consider what this country has become in deciding what that [statute] has reserved."[107] Based on this mode of interpretation, Judge Posner asserts, "[w]e understand the words of Title VII differently not because we're smarter than the statute's framers and ratifiers but because we live in a different era, a different culture."[108] Judge Posner's concurrence relies on the traditional canons of statutory interpretation, including the interpretative goal of avoiding an absurd result and the increased interpretative flexibility in the absence of clear legislative history or Congressional intent.[109] The fact that "sex" undoubtedly referred to gender and not sexual orientation in 1964 did not persuade Judge Posner to limit the scope of its meaning today.[110]

Judge Flaum issued a separate concurrence, focusing on the command of the statute's text.[111] Flaum set aside the majority and dissenting opinions' discussion of sexual orientation as a "freestanding concept," and concluded that any discrimination on the basis of an individual's homosexuality is by definition sex discrimination.[112] Judge Flaum supported this assertion with multiple dictionary definitions of "homosexual" to illustrate his point that "one cannot consider a person's homosexuality without also accounting for their sex."[113] Judge Flaum also echoed the interpretive strategies of the majority similar to utilizing *Loving* as "an apt illustration" to further an associ-

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105 *Id.* (Posner, J., concurring).

106 *Id.* at 356 (Posner, J., concurring).

107 Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 356-57 (7th Cir. 2017) (Posner, J., concurring).

108 *Id.* at 357 (Posner, J., concurring).

109 *See id*. (Posner, J., concurring).

110 *See id*.

111 *See id*. (Flaum, J., concurring).

112 *Id.* at 358 (Flaum, J., concurring).

113 *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 358(7th Cir. 2017) (Flaum, J., concurring).

ational theory aimed at increasing the privileges and constitutionally protected rights for LGBTQ individuals in the wake of *Obergefell*.[114]

Judge Sykes, joined by two other judges, delivered a dissent lamenting the majority's "judge-empowering" approach to interpretation of Title VII.[115] Judge Sykes argued that the majority and Judge Posner's concurrence failed to provide an interpretation faithful to the statute's text, resulting in a "statutory amendment courtesy of unelected judges."[116] Judge Sykes preferred a formalistic interpretation of the statute based on the framer's original definition of the term "sex."[117] The dissent argued that *Hively* is at odds with the Constitutional limits placed on the judiciary.[118]

Judge Sykes further attacked Judge Posner's concept of judicial statutory updating, concluding that it "cannot be reconciled with the constitutional design."[119] Judge Sykes highlights the importance of textualism in reaching the appropriate conclusion, observing, "[w]hen we assume the power to alter the original public meaning of a statute through the process of interpretation, we assume a power that is not ours."[120] By offering an opinion based on originalism that is blind to history, the dissent misconstrued Judge Posner's pragmatic legal reasoning.[121] The textualist dissent also focused on a limited analysis of statutory interpretation and failed to fully address the social realities that give Title VII's words its meaning.[122]

C. *The Eleventh Circuit: Evans v. Georgia Regional Hospital*

In *Evans v. Georgia Regional Hospital*, the Eleventh Circuit arrived at a conclusion similar to the *Hively* dissenters, and declined to widen Title VII's scope and to upend circuit precedent.[123] Jameka Evans argued that she had sufficiently stated a valid cause of action under Title VII when she claimed the discrimination in her workplace

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114 *See id.* at 359 (Flaum, J., concurring).

115 *Id.* at 359, 360 (Sykes, J., dissenting).

116 *Id.* at 360 (Sykes, J., dissenting).

117 *See id.* at 362-63 (Sykes, J., dissenting).

118 *Id.* at 372 (Sykes, J., dissenting).

119 Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 360 (7th Cir. 2017) (Sykes, J., dissenting).

120 *Id.* (Sykes, J., dissenting).

121 *See* Soucek, *supra* note 77, at 117.

122 *See id.* at 117-18.

123 *See* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255, 1256 (11th Cir. 2017).

was based on her sexual orientation.[124] The panel concluded she had not faced sex discrimination in her workplace due to the circuit's binding precedent that forecloses an actionable claim of sexual orientation discrimination.[125] The court stated that *Price Waterhouse* and *Oncale* failed to "squarely address whether sexual orientation discrimination is prohibited by Title VII."[126]

The concurrence in *Evans* concluded that "[p]lain and simple, when a woman alleges, as Evans has, that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be," echoing the sentiment of the *Hively* majority.[127] Furthermore, the dissenting judge stated that "it is utter fiction to suggest that she was not discriminated against for failing to comport with her employer's stereotyped view of women," concluding that this form of discrimination clearly violates Title VII based on *Price Waterhouse*.[128] After the Eleventh Circuit declined to revisit the case *en banc*, Evans filed a petition for a writ of certiorari with the Supreme Court, which the Supreme Court denied.[129] For LGBTQ advocates, the Supreme Court's denial of Evans' petition for writ of certiorari was neither a surprise nor an extreme disappointment due to procedural problems involved with the case.[130]

D. *The Second Circuit: Zarda v. Altitude Express, Inc.*

Similarly to *Hively* and *Evans*, the Second Circuit was asked to assess whether Donald Zarda's termination due to his sexual orientation constituted a valid Title VII claim.[131] During the district court's proceedings, the EEOC issued its legal rationales in *Baldwin*, establishing the agency's view that sexual orientation discrimination was

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124 *Id.* at 1255.

125 *Id.*

126 *Id.* at 1256.

127 *Id.* at 1261 (Rosenbaum, J., dissenting).

128 *Id.* (Rosenbaum, J., dissenting).

129 *See* Petition for Writ of Certiorari, Evans v. Ga. Reg'l Hosp., (No. 17-370) (11th Cir. Mar. 31, 2017).

130 Robert Barnes, *Supreme Court Turns Down Case that Raised Issue of LGBT Worker Protections*, THE WASHINGTON POST (Dec. 11, 2017) https://www.washingtonpost.com/politics/courts_law/supreme-court-turns-down-case-that-raised-issue-of-gay-worker-protections/2017/12/11/2789e740-dea0-11e7-89e8-edec16379010_story.html?utm_term=.015b36ac6440.

131 Zarda v. Altitude Express, 855 F.3d 76, 80 (2d Cir. 2017).

undoubtedly sex discrimination.[132] Based on *Baldwin*, Zarda moved for summary judgment in the district court, which was denied and led to the appeal before the Second Circuit.[133] Because the initial three-judge appellate panel lacked the authority to overturn the Second Circuit's precedent, the court declined "Zarda's invitation" to change existing law, and Zarda appealed.[134]

The Second Circuit heard *Zarda en banc* on September 26, 2017, to reconsider the question of sexual orientation discrimination.[135] The EEOC and Department of Justice (DOJ) filed separate, contradictory amicus curiae briefs on behalf of the federal government.[136] The EEOC's brief in support of the petitioner echoed its decision in *Baldwin*.[137] Conversely, the DOJ attempted to challenge the EEOC's and Seventh Circuit's legal reasoning by arguing that Congress' inaction and consistent failure to expand Title VII coverage illustrated Congressional intent to exclude LGBTQ protections.[138] The DOJ also argued that sex discrimination is solely confined to disparate treatment of men and women, rather than sexual orientation discrimination.[139]

Sitting *en banc*, the Second Circuit overruled *Simonton v. Runyon* and *Dawson v. Bumble*, concluding that "sexual orientation is motivated, at least in part, by sex and is thus a subset of sex discrimination."[140] In reference to the EEOC's expansion of LGBTQ legal protections in the workplace, the majority noted that "legal doctrine evolves" with changes in society, and Title VII should be construed broadly to further equality in employment opportunities and practices.[141] Perhaps angling to conservative legal spectators and Supreme Court Justices, the Second Circuit majority rooted their interpretation

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132 Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 at *5 (EEOC July 15, 2015).

133 *See Zarda*, 855 F.3d at 81.

134 *Id.* at 80.

135 *See* Zarda v. Altitude Express, 883 F.3d 100, 108 (2d Cir. 2018).

136 *See* Brief for The United States as Amicus Curiae, Zarda v. Altitude Express, Inc., (No. 15-3775) (2d. Cir. July 26, 2017); En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants and in Favor of Reversal, Zarda v. Altitude Express, Inc., (No. 15-3775) (2d. Cir. June 23, 2017).

137 *See* En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants and in Favor of Reversal, *supra* note 136, at 10.

138 *See* Brief for The United States as Amicus Curiae, *supra* note 136, at 15-22.

139 *Id*. at 15.

140 Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d. Cir. 2018).

141 *Id.* at 107, 111.

of sexual orientation discrimination in the statutory text by centering their analysis on the phrase "because of . . . sex."[142] The majority further noted that the court does not "write on a blank slate," viewing the statute in its entirety and within the context of relevant precedent.[143]

As in *Hively*, the critical inquiry before the Second Circuit in *Zarda* turned on whether sex was a motivating factor in Zarda's adverse employment decision.[144] Relying on *Oncale* as judicial precedent for expanding Title VII's purview, the majority observed that Title VII has never been interpreted by the Supreme Court to cover only "the principal evil[s] Congress was concerned with" in 1964, but also any "reasonably comparable evils" that rise to the level of regulatory requirements.[145] By incorporating the comparator, associational, and sex-stereotyping methods employed by the Seventh Circuit and EEOC, the Second Circuit's majority opinion held that sex was a motivating factor in sexual orientation discrimination and was within Title VII's reach.[146]

In support of the comparator mode of interpretation, the majority cited Judge Flaum's concurrence in *Hively*, concluding that "to operationalize [Black's Law Dictionary's] definition and identify the sexual orientation of a particular person, we need to know the sex of the person and that of the person to whom he or she is attracted" to hold that the individual's sex was the "but for" cause of sexual orientation discrimination.[147] The majority then followed a basic syllogism, like Judge Flaum, observing that logic necessitates that sexual orientation is an inherent function of sex, which is a protected Title VII class.[148]

The *Zarda* decision dismissed the DOJ's defense as a distracting "semantic sleight of hand" that attempts to manipulate the language Hively used to outline the comparator and associational theories.[149] Additionally, the evolution of Title VII's scope in expanding coverage

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142 *Id.* at 111-12 ("In deciding whether Title VII prohibits sexual orientation discrimination, we are guided as always, by the text, and in particular, by the phrase 'because of . . . sex.'").

143 *Id.* at 112.

144 *Id.*

145 *Id.* (quoting Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 79 (1998)).

146 Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d. Cir. 2018).

147 *Id.* at 113 (citing Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 358 (7th Cir. 2017)).

148 *Id.*

149 *Id*. at 113, 114.

to sexual discrimination claims directly challenges Judge Sykes's dissent.[150] Judge Sykes challenged the *Hively* majority and EEOC, arguing that the majority's "but for" comparison changed "two variables-the plaintiff's sex and sexual orientation;" however, "in the comparison, changing Hively's sex changed her sexual orientation. Case in point."[151] Unlike Judge Sykes and the DOJ, the Second Circuit concluded that "the law is clear: To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently 'but for' his or her sex."[152]

In addition to the comparator theory, the majority employed the *Price Waterhouse* sex-stereotype theory to hold that sexual orientation discrimination is "almost invariably rooted" in stereotypes concerning male and female gender norms.[153] And like the Seventh Circuit and EEOC, the majority reinforced the associational discrimination theory's central thesis, finding that the employer's adverse decision was based on the "opposition to romantic association between particular sexes," and was within Title VII coverage.[154]

The opinion challenged the view that an associational discrimination theory can "be based only on acts," and not on "status," by referencing the Supreme Court's rejection of arguments that treated acts as separate from status regarding sexual orientation.[155] Additionally, the majority dismissed the opposition's reliance on the 1991 Amendments to the Civil Rights Act of 1964 that did not address the inclusion of sexual orientation discrimination when expanding the rights of employees suing their employers.[156] The majority concluded "this theory of ratification by silence is in direct tension with the Supreme Court's admonition that 'subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress,' particularly when 'it concerns, as it does here, a proposal that does not become law.'"[157] Finally, the majority argued that, when drafting separate statutes or

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150 *See id.* at 114.

151 *Id.* at 116 (citing Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 366 (7th Cir. 2017)).

152 Zarda v. Altitude Express, Inc., 883 F.3d 100, 119 (2d. Cir. 2018).

153 *See id.* at 119-20.

154 *Id.* at 124.

155 *Id.* at 127, 128 (citing Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring)).

156 *Id.* at 128-29.

157 *Id*. at 130 (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)).

amendments, Congress is unlikely to use terms consistently, noting the separate uses of "race" and "ethnicity" in certain statutes and the singular use of "race" to include both race and ethnicity in Title VII.[158]

Like Judge Posner and Judge Flaum in *Hively*, Judges Jacobs, Cabranes, and Sack took issue with the three part analysis employed by the *Zarda* majority and with the potential consequences of expansive, if not redundant, legal theories.[159] Judge Jacobs chided the majority that "good craft counsels that we go no further," concluding that much of the majority's analysis "amounts to woke dicta" that could thwart the efforts of LGBTQ advocates.[160] For Judge Jacobs, the associational theory was the most persuasive mode of statutory analysis, while the comparator test was "an evidentiary technique, not a tool for textual interpretation."[161] He argued that the majority opinion "merges in a fuzzy way with definitional analysis" that could pose substantial, albeit unintended, ramifications in applying the statute.[162] Additionally, Judge Jacobs was not persuaded by the sex-stereotyping method as employed in *Price Waterhouse*, observing that "[h]eterosexuality and homosexuality are both traits that are innate and true, not stereotypes of anything else."[163]

Judge Cabranes offered a separate concurrence, taking aim at the cacophony of justifications in the majority opinion.[164] In his brief opinion, Judge Cabranes asserted his preference for straightforward statutory construction, where the basic logical syllogism of the comparator theory echoed by Judge Flaum in *Hively* and in the *Zarda* majority is the necessary end of the interpretative analysis because sexual orientation discrimination inherently involves sex-based considerations and is therefore prohibited by Title VII.[165] Judge Cabranes took issue with the potential for unintended consequences in enforcement and interpretation, concluding that "[i]t will take the courts years to sort out how each of these theories presented by the majority applies to other Title VII protected classes."[166] Similar to the

158 Zarda v. Altitude Express, Inc., 883 F.3d 100, 130, 131 (2d. Cir. 2018).

159 *See id.* at 132-37.

160 *Id.* at 134 (Jacobs, J., concurring).

161 *Id.* (Jacobs, J., concurring).

162 *Id.* (Jacobs, J., concurring).

163 *Id.* at 134 (Jacobs, J., concurring).

164 Zarda v. Altitude Express, Inc., 883 F.3d 100, 130, 135 (2d. Cir. 2018) (Cabranes, J., concurring).

165 *See id.* (Cabranes, J., concurring).

166 *Id.* (Cabranes, J., concurring).

concurring judges in *Hively* and *Zarda*, Judge Cabranes warned against employing an unnecessary myriad of interpretative rationales.[167]

Finally, Judge Sack provided an additional concurrence urging the majority to "tread carefully" when analyzing the "highly charged issues" presented before the court, and to say no more than necessary.[168] Like the other concurring judges, Judge Sack sought to avoid the potential consequences "of being mistaken in one unnecessary aspect or another," and believed the associational theory was the best analytical framework.[169]

In Judge Lynch's dissent, she offered her condolences for the "sorry history of opposition to equality for African Americans, women, and gay women and men"; however, she refused to support a legal solution to remedy the current injustice endemic in the American legal system and in society at large facing LGBTQ employees.[170] Much of the dissent follows Judge Sykes's legal reasoning in *Hively*, arguing for the court to adhere to the "original *public* meaning" of sex discrimination, in which a sound legal interpretation of the statute would not include sexual orientation discrimination.[171] Judge Lynch sets forth an interpretative approach inconsistent with Judge Posner's concurrence by arguing that stereotyping "rests more on verbal facility than on social reality."[172] Judge Lynch also reasoned that the court had not been asked to interpret the Constitution, which allows for greater interpretive flexibility, but was instead bound by the strict constructionist maxims to interpret an act of Congress.[173]

IV. ANALYSIS

LGBTQ advocates have increased momentum in achieving federal protections under Title VII following *Baldwin*, *Hively*, and *Zarda*, which could ultimately make its way before the Supreme Court.[174] Due to prevailing scholarship on sexuality and gender, *Price*

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167 *See id.* (Cabranes, J., concurring).

168 *Id*. (Sack, J., concurring).

169 *Id.* at 135 (Sack, J., concurring).

170 Zarda v. Altitude Express, Inc., 883 F.3d 100, 130, 143 (2d. Cir. 2018) (Cabranes, J., concurring).

171 *Id.* (Cabranes, J., concurring).

172 *Id.* at 156. (Cabranes, J., concurring).

173 *See id*. (Cabranes, J., concurring).

174 *See id.*; Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341, 360 (7th Cir. 2017).

Waterhouse's prohibition of sex-stereotyping "now appears relatively crude."[175] If and when the Supreme Court revisits the discussion of LGBTQ protections under Title VII, the Justices will have the myriad approaches offered by *Baldwin*, *Hively*, *Zarda*, and LGBTQ scholarship to help inform their decision. Given the evolution of society's views on sexuality and gender, the Supreme Court should heed Judge Posner's straightforward concurrence and the "deceptively simple" comparator theory. Judge Posner's mode of judicial interpretative updating provides an invitation for the Justices to interpret an outdated law and an exclusionary definition of sex to serve the needs of modern society, which is further supported by the logical syllogism of the comparator theory that sexual orientation discrimination inherently involves sex-based considerations and is therefore sex discrimination under Title VII. This combined interpretative approach will effectively resolve the untenable paradox facing LGBTQ employees and their families.

A. *The Problems with The* Price Waterhouse *Approach*

Despite the expanded protections that *Price Waterhouse* and *Oncale* provided to LGBTQ individuals, courts have only allowed discrimination claims by LGBTQ individuals if the discrimination was "based on plaintiffs' 'gay' appearance or affect and not on the employer's knowledge of their sexual orientation," which significantly *limits* discrimination protections for many LGBTQ individuals through its narrow prohibition of sex-stereotyping.[176] This "doctrinal result is untenable" because an LGBTQ employee is only protected if they appear "gay," leaving LGBTQ individuals that might superficially conform to an employer's particular expectation of gender norms unprotected against discriminatory action.[177] At the time of the Civil Rights Act's enactment in 1964, "legal and popular culture did not yet have a conception of 'sex' that clearly distinguished between biological and social factors"; however, the terms "sex" and "gender" are no longer "used interchangeably to categorize people as simply men or women."[178]

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175 Banks et al., *supra* note 48, at 30.

176 Soucek, *supra* note 77, at 124.

177 *Id.*

178 Banks et al., *supra* note 48, at 29.

As Brian Soucek noted, "the obvious solution is to take *Price Waterhouse* to its logical conclusion—to protect known, not just seen or heard, violations of gender norms related to sexual orientation."[179] Revisiting the rationale behind sex-stereotyping "would highlight what is at stake in this debate: gender policing," arguably a target of Title VII from the time of enactment.[180] Limiting Title VII to gender stereotyping claims would adversely affect the LGBTQ community and perpetuate antiquated views of sexuality and gender.[181] If the Supreme Court (or Congress) does not supplement *Price Waterhouse*, then absurd and inconsistent results will continue to plague the judicial system, adversely affecting the citizens that the federal government is entrusted to protect.[182]

B. Hively, Zarda, *And* Baldwin*'s Three Approaches to Statutory Interpretation*

The comparator method's formalism, associational theory, and sex-stereotyping theory proffered by the *Hively* and *Zarda* majorities and the EEOC in *Baldwin* provided three rationales that "articulate separate, but related (and perhaps occasionally overlapping), bases for the legal conclusion cast within existing Title VII doctrines."[183] First, the circuit courts and EEOC contend there is an "inescapable link" between discrimination on the basis of sex and sexual orientation because sexual orientation discrimination necessarily involves taking into account the employee's sex.[184] The decisions also utilize current dictionary definitions of sex and sexual orientation to reach their conclusion.[185]

The second rationale used an associational theory previously applied to racial discrimination cases, arguing that, like *Loving,* the ruling in *Obergefell* would prevent an employer for discriminating based on the sex of an employee's spouse or significant other.[186] The

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179 Soucek, *supra* note 77, at 124.

180 *See id.* at 116.

181 *See id.* at 124-25.

182 *See* Patti, *supra* note 31, at 140-41.

183 Banks et al., *supra* note 48, at 39.

184 *See* Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, *5 (EEOC July 15, 2015).

185 *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 362-63 (7th Cir. 2017) (Sykes, J., dissenting).

186 *See Baldwin*, 2015 WL 4397641 at *6.

reach of *Obergefell* has been contested by scholars with various perspectives and in recent litigation.[187] However, an associational theory is applicable to *Obergefell* because of its normative statement on the value and respect LGBTQ individuals deserve under the Fourteenth Amendment.[188] Matthew W. Green, Jr. observes that *Obergefell's* "explicit identification of same-sex sexual intimacy as a fundamental right and recognition that sexual orientation is both immutable and a 'normal expression of human sexuality' has the potential" to serve as a basis for extending the scope of Title VII, as *Loving* did for racial discrimination.[189] Finally, based on the *Price Waterhouse* precedent concerning sex-stereotyping, the courts and agency contend that sexual orientation discrimination is sex discrimination because sexual orientation discrimination involves adverse treatment based on the employer's perceived gender stereotypes.[190] But, the conflation of sexual orientation and gender expression in *Price Waterhouse* serves, at best, as a backdoor entrance to partial equality for LGBTQ employees.[191]

Some scholars take issue with this mosaic approach of legal reasoning, observing that the judicial actors are especially "blind to the substance" of the matter at stake when they focus solely on questions of statutory interpretation without referencing "a single antidiscrimination or gender theorist, legal historian, or gay rights advocate" in their assessment of LGBTQ law and policy.[192] Furthermore, according to Brian Soucek, the associational theory is only applicable when the law protects "some groups but not others, and the partner, but not the employee, belongs to the protected group," which could lead to inconsistent results in the long term.[193] Support of the associational theory is largely based on *Obergefell's* explicit declaration that "same-sex sexual intimacy" is a fundamental right that bears a legiti-

187 *See* Matthew W. Green, Jr., *Same-Sex Sex and Immutable Traits: Why Obergefell v. Hodges Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination Under Title VII*, 20 J. GENDER RACE & JUST. 1, 3-4 (2017). *See generally* Masterpiece Cakeshop, Ltd. v. Co. Civ. Rights Commission, 138 S. Ct. 1719 (2018); Pidgeon v. Turner, 538 S.W.3d 73 (Tex. 2017), *cert. denied*, 138 S. Ct. 505 (2018).

188 *See* Green, *supra* note 187, at 3-4.

189 *Id.*

190 *See Hively*, 853 F.3d at 359; *Baldwin*, 2015 WL 4397641 at *7.

191 *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

192 Soucek, *supra* note 77, at 115.

193 *Id.* at 119.

mate influence on Title VII interpretation.[194] The dissent in *Hively* offers legal fiction based on both originalism and textualism when it adheres to a "traditional concept" of sex.[195] Instead, the drafter's of Title VII viewed sex discrimination "as a means of enforcing conventional sex and family roles," rather than referring solely to discrimination because of an employee's biological sex.[196]

C. *Judicial Interpretative Updating and the Need to Expand Title VII's Scope*

Judge Posner's judicial interpretative updating approach to statutory interpretation is controversial in its perceived expansion of judicial authority over statutory interpretation, but offers insight that could gain favor with the Supreme Court.[197] Judge Posner's concept of statutory interpretation is not as controversial as it may appear to supporters of originalism and textualism because of Title VII's lack of legislative history concerning the scope of sex discrimination.[198] Instead, Judge Posner's rationale fits comfortably within the heralded canons of traditional statutory interpretation.[199] Judge Posner focused on questions of statutory construction and underscored the gravity of sexual orientation discrimination affecting millions of Americans due to major gaps in sex discrimination law.[200] In doing so, Judge Posner cleared the path for the Supreme Court to use its supervisory authority and to provide clarity on a pertinent civil rights issue.[201]

Perhaps Judge Posner's most interesting legal reasoning is a series of analogies he discussed briefly in favor of a clear-cut interpretation of Title VII to conform with modern sentiment regarding the LGBTQ community.[202] Judge Posner analogized the evolution of the Sherman Antitrust Act, Justice Scalia's support for First Amendment protections for flag burning, and the adaptation of the Fourth Amendment

194 Green, *supra* note 187, at 9.

195 Soucek, *supra* note 77, at 125 (quoting Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination,* 125 HARV. L. REV. 1307 (2012)).

196 *Id.*

197 *See id.* at 127.

198 *See id*. at 125-6.

199 *See id.* at 128.

200 *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 357 (7th Cir. 2017) (Posner, J., concurring).

201 *See* Soucek, *supra* note 77, at 128.

202 *See Hively*, 853 F.3d at 352-54 (Posner, J., concurring).

in *Johnson* to the possibility of the Supreme Court extending Title VII coverage to LGBTQ individuals.[203] Judge Posner's rationale focused on Supreme Court precedent where an outdated law or narrowly construed constitutional amendment was interpreted to best serve the individuals or institutions they are designed to protect, which is firmly within the reach of the judiciary.[204] In essence, Judge Posner took the comparator theory that sexual orientation discrimination inherently involves impermissible sex-based considerations and added the legal and social justifications for the Supreme Court to interpret Title VII inclusively.[205]

If the Supreme Court were to apply Judge Posner's analogies of judicial interpretative updating, interpretations of sex discrimination under Title VII would finally break free from the confines of originalist and strict textualist schools of thought.[206] Title VII protections should be extended not simply for the ideal formalism of the *Hively* majority's definition interpretations, but because of the "paradoxical legal landscape" that currently exists.[207] *Stare decisis* is not an unbreakable wall, as the Court illustrated in *Obergefell*.[208] The Supreme Court has used its authority to remedy untenable injustices in the recent past, and it should continue to expand LGBTQ protections in light of the changing social and legal attitudes toward sexual orientation, gender expression, and sex discrimination.[209]

As thoroughly explained in the majority and EEOC opinions previously discussed, there are a number of anti-discrimination doctrines that support the assertion that sexual orientation discrimination is form of sex discrimination.[210] Yet, the "well-established principle" of the comparator theory —"that if a victim of discrimination would have been treated differently 'but for' their protected class status,

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203 *See id.* at 354 (Posner, J., concurring).

204 *See id.* at 354-55 (Posner, J., concurring).

205 *See id.* at 352-57.

206 *See* Soucek, *supra* note 77, at 128.

207 Patti, *supra* note 31, at 142 (quoting *Hively*, 853 F.3d at 714).

208 *See* Kenneth A. Pilgrim, *Two Wrongs Don't Make It Right: Title VII, Sexual Orientation and the Misuses of Stare Decisis*, 52 Ga. L. Rev. 685, 686, 715 (2018). *See also* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

209 *See* Patti, *supra* note 31, at 144.

210 *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 130 (2d. Cir. 2018); Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345, 346 (7th Cir. 2017); Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015).

actionable discrimination has occurred"—offers a strikingly simple and concrete justification for expanding Title VII coverage to a marginalized group of the American workforce.[211] Judge Posner, along with the other concurring judges in both *Zarda* and *Hively*, challenged the prevailing notion that a multitude of justifications is necessary to prevail with Supreme Court Justices.[212] These concurring opinions also combat the dissenting minorities by referencing *Oncale*, and notable precedent, arguing "the fact that Congress did not anticipat—and might even have oppose—a particular application of broad statutory language is not a basis for refusing to apply the statute as written."[213] The dissenters made the claim that men and women do not receive disparate treatment in sexual orientation discrimination claims, and, therefore, sexual orientation is not covered under Title VII.[214] This "equal application" theory should not be upheld as an adequate defense to "but for" consideration of race, sex, or other protected classes under Title VII.

Instead, the Supreme Court should consider that one of the key functions of anti-discrimination laws, like Title VII, is to deter discrimination in the workplace and elsewhere.[215] Additionally, anti-discrimination law is "severely constrained" if it must rely on case by case determinations for the Title VII enforcement, due to the inconsistent interpretations across circuit and state lines.[216] In light of this foundational motivation for Title VII, and absent a Congressional amendment, the Supreme Court should serve the interests of all Americans, including the LGBTQ community, and should provide the judicial interpretative updating Title VII requires to protect marginalized employees who continually receive disparate treatment because of their sexual orientation.[217]

Opponents of LGBTQ equality fear the "moral messaging" that would accompany an expansion of Title VII protections; however,

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211 Katie R. Eyer, *Sex Discrimination and LGBT Equality*, 11 ADVANCE 77, 79 (2017).

212 *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 130 (2d. Cir. 2018); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017).

213 Eyer, *supra* note 211, at 83-84. *See also* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

214 *See Hively*, 853 F.3d at 365 (Sykes, J., dissenting).

215 Eyer, *supra* note 211, at 89.

216 *Id.*

217 *See id.* at 85.

Katie R. Eyer argues that "when such categories are added, it signals a national moral consensus that such discrimination runs counter to our national ethos," which, regardless of a person's religious or political faction, should hold weight to the majority of Americans sympathetic to unjust discrimination.[218] Similarly, Kenneth A. Pilgrim has advocated for "taking into account intervening development in the law," including *Obergefell*, for interpreting the merits of sexual orientation discrimination as a subset of sex discrimination anew, and for avoiding reliance on *stare decisis* to resolve the issue.[219]

Sexual orientation claims argued before the Eleventh, Second, and Seventh Circuits "not only tee up important substantive issues of job discrimination but also methodological issues regarding the proper approach to statutory interpretation in general, and dynamic statutory interpretation in particular".[220] However, these issues have proved to be especially difficult to tease out and adjudicate with precision.[221] The Roberts Court "has shown itself willing to interpret Title VII stingily"; however, "ironically, the formalism of Chief Judge Wood's and Judge Flaum's approach would be attractive to the Supreme Court Justices . . . least inclined" to expand the reach of Title VII.[222]

The unabridged 1961 printing of *Webster's Dictionary* is the most cited dictionary in Supreme Court opinions, and it defines "sex" three different ways: sex in relation to biology, sex in relation to gender, and sex in relation to sexuality.[223] The 1991 amendments to Title VII expanded coverage to situations where an employer's discrimination was of "mixed-motive," as long as one motivating factor was the employee's sex.[224] Additionally, history justifies the comparator theory that the court "cannot linguistically or conceptually separate biology, gender, and sexuality when talking about 'sex.'"[225] The Equal Rights Amendment's legislative history and chief opposition from conservatives illustrate a view that the terms "because of sex" possessed the potential to extend to same-sex marriage, adoption, and other LGBTQ protections.[226]

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218 Eyer, *supra* note 211 at 90.
219 Pilgrim, *supra* note 208, at 686, 715.
220 Eskridge, Jr., *supra* note 29, at 330.
221 *See id.* at 371-72.
222 *Id.* at 329, 395.
223 *Id*. at 338.
224 *Id.* at 340.
225 *Id.* at 343.
226 *See* Eskridge, Jr., *supra* note 29, at 350-53.

Judge Posner believed Judge Wood's opinion was not "dynamic enough" when interpreting Title VII's original meaning, which has been "rendered obsolete by changed social and workplace norms."[227] Title VII poses an "open-textured" prohibition of sex discrimination that by its undefined nature allows judges to apply the statute to effectuate its broad statutory purpose, "namely, a Weberian workplace where merit-based performance and not status-based characteristics (race, sex, religion) are determinative."[228] Regardless of the technicalities associated with statutory interpretation, a law that allowed employers to discriminate against LGBTQ employees based on traditional stereotypes would conflict with *Romer v. Evans*, in which the Supreme Court ruled that laws excluding LGBTQ individuals from "general legal protections without plausible justification (or because of antigay animus) [would] violate the Equal Protections Clause."[229]

CONCLUSION

Despite the overwhelming majority of United States Courts of Appeal maintaining that Title VII does not cover sexual orientation discrimination, the *en banc Hively* and *Zarda* decisions, which spurred the circuit split, have increased the likelihood that the Supreme Court will review this issue.[230] LGBTQ individuals, and the general public, will reap social and economic benefits from an inclusive workplace free from discrimination.[231] A Supreme Court decision recognizing sexual orientation discrimination will remedy the "state-by-state and job-based antidiscrimination legal patchwork" that is currently available to LGBTQ employees.[232] When it does, the Court should extend protections not just for the reasons stated in *Baldwin*, *Hively*, and *Zarda*, but also because the Court has created a "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act" due to gaps in LGBTQ legal equality.[233] Furthermore, once courts and the federal government agree on

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227 *Id.* at 327, 330.

228 *Id.* at 403.

229 *Id.* at 335-36. *See also* Romer v. Evans, 517 U.S. 620 (1996).

230 *See* Soucek, *supra* note 77, at 128.

231 *See* Halet, *supra* note 3, at 389.

232 *Id.* at 390.

233 Patti, *supra* note 31, at 142 (quoting Hively v. Ivy Tech Cmty. Coll. of Ind., 830 F.3d 698, 714 (7th Cir. 2016)).

the issue of sexual orientation discrimination under Title VII, Congress might move closer to passing the Equality Act or an updated version of the Employment Non-Discrimination Act.[234]

By analyzing the most recent United States Courts of Appeal and EEOC decisions concerning Title VII and sexual orientation discrimination, it is clear there are myriad approaches to resolve this critical problem affecting the LGBTQ community.[235] In a post-*Obergefell* society, LGBTQ individuals should be afforded the same protections as their heterosexual peers, including federal protection from unlawful discrimination under Title VII. In its 53-year existence, Title VII of the Civil Rights Act of 1964 has evolved to incorporate additional protections not devised or foreseen by the statute's drafters.[236] The latest string of cases before the United States Courts of Appeal and the EEOC have provided the Supreme Court with an opportunity to intervene on this important issue of statutory interpretation and preservation of civil rights for a considerable minority of affected Americans.[237] Based on society's evolution and modern trends in statutory interpretation, the Supreme Court Justices should assume their position as "Blackstone's heirs" and formally affirm sexual orientation as an actionable form of sex discrimination under Title VII by relying on Judge Posner's method of judicial interpretative updating and the simple yet sound reasoning of the comparator theory.[238]

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234 *See* Halet, *supra* note 3, at 390.

235 *See* Soucek, *supra* note 77, at 115-116.

236 *See* Patti, *supra* note 31, at 142, 143.

237 *See id.*

238 *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 352 (7th Cir. 2017) (Posner, J., concurring).