

ARTICLES

JUDICIAL ECOLOGY: RECONCILING A NORMATIVE CRITIQUE OF *HIVELY V. IVY TECH COMMUNITY COLLEGE* WITH THE CURRENT SOCIOPOLITICAL CONTEXT

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Abstract

In April of 2017, the 7th Circuit held that discrimination based on “sexual orientation” is included in Title VII’s prohibition of discrimination in employment because of a person’s “sex”, creating a split with all other circuit courts that had reached the issue at that time. Critical gender theorists and legal scholars have raised concerns about the trajectory of gender rights litigation, highlighting shortfalls in judicial understanding of the complex social dynamics of gender discrimination and sexual orientation discrimination specifically. Brian Soucek’s article, “Hively’s Self-Induced Blindness”, criticizes the formalist rationale of the majority opinion in *Hively* for its lack of engagement with the work of critical gender theory on the underlying gender non-conformity animus in our culture. Soucek argues that this weakens the opinion’s potential for advancing LGBT rights or influencing future courts to come to a similar result, and asserts that future opinions should take an approach more aligned with the work of critical gender theorists and LGBT advocates. This article will respond by highlighting the sociopolitical context in which *Hively* arose and offer a counter interpretation to that of the Soucek article, examining the reasoning in *Hively* through recognized social, political, and institutional considerations that necessarily weigh in on judicial decision-making. It is clear that the court in *Hively* was cognizant of its decision’s implications as to the place of the judiciary in our constitutional system, yet believed it was compelled to recognize a formal right whose time had come. This article offers the argument that normative critiques like Soucek’s would do well to take a more holistic perspective of judicial decision-making in

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pursuit of forging an effective path to lived equality for underserved and underrepresented population.

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I. INTRODUCTION

Gender² equality and sexual orientation discrimination in particular are currently at the center of contentious political discourse in the U.S. and popular sentiment about numerous associated issues varies substantially across the country.³ Title VII of the Civil Rights act of 1964 became a central figure in this debate in April 2017 when the Seventh Circuit held that the statute’s prohibition of discrimination in employment based on “sex” included discrimination based on “sexual orientation.”⁴ This ruling drew on various strands of litigation that have tested and altered the bounds of Title VII’s reach over the years as well as other legal issues that address gender discrimination, all of which have left advocates, courts, and scholars with mixed certainty about where Title VII’s boundaries actually lie.⁵

Title VII has a storied history, clouded from the outset by debate over Congress’ original intent when they included the provision barring

2. See Douglas A. Gentile, *Just What are Sex and Gender, Anyway?: A Call for a New Terminological Standard*, 4 PSYCHOL. SCI. 120, 120 (1993) (The word gender generally connotes culturally constructed characteristics that a society attributes to different classifications of individuals, often tied to biological sex. The terms “sex” and “gender” are often used interchangeably—even in academia and judicial opinions—but the issue here concerns the interplay of the two words and for this reason, the author will use the two terms more purposefully.); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 4 (1995).

3. See *infra* Part IV.

4. Matthew Hagg & Niraj Chokshi, *Civil Rights Act Protects Gay Workers, Court Rules*, N.Y. TIMES, April 4, 2017, <https://www.nytimes.com/2017/04/04/us/civil-rights-act-gay-workers-appeals-court.html> [<https://perma.cc/HR29-DYCB>].

5. See generally KIMBERLY A. YURACKO, GENDER NONCONFORMITY AND THE LAW 6-7 (2016).

discrimination based on sex.⁶ Even legal scholars have regurgitated the rationale that the word “sex” was introduced into the bill by its opponents solely to defeat its passage, citing anecdotes about the amendment originally drawing laughter on the floor of Congress.⁷ These arguments even leaked into judicial opinions, influencing how courts interpret the scope of Title VII’s protections through reasoning that Congress did not intend the provision to have a broad reach.⁸ Concern about pervasive shortfalls in courts’ understanding of gender generally and the lack of comprehensive protections against gender-based discrimination, academics and normative⁹ legal scholars have undertaken extensive critical examination of judicial decisions in this sphere.¹⁰

However, some legal commentators caution that normative theory often fails to consider the broader context inherent in the role of the judiciary, observing that these oversights often impoverish the rationales and impacts of normative scholarship.¹¹ This article will examine the Seventh Circuit’s ruling on Title VII and one such normative critique to illuminate contextual factors that may be of value to observers and advocates in their pursuit of lived equality for LGBT¹² and other underrepresented populations. In times when political and social discourse are pervasively fraught with divisiveness and vitriol, it seems that advocates seeking to further causes via the court system should take caution in their assumptions about the role of the judiciary. Where, as here, critical normative theory agrees with the ends but not the means of judicial decision-making, this article seeks to illuminate how contextual factors, longstanding institutional norms, and positive theory about jurisprudence may clarify the disconnect.¹³

In Part II, this article will lay out the *Hively* rationale and highlight several of the contextual and institutional influences that informed the courts approach. Part III will review Soucek’s normative critique of the majority opinion and draw out assumptions that he makes, as well as the considerations that he ignores. Part IV will describe relevant contextual factors that may have

6. See Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 453-54 (1981).

7. *Id.*

8. *Id.* at 454.

9. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 257 (2005) (defining the term normative as referring to scholarly work that focuses on how judges *should* decide cases).

10. See *infra* Part III.

11. See generally Friedman, *supra* note 9, at 257-58.

12. See generally Michael Schulman, *Generation LGBTQIA*, N.Y. TIMES, Jan. 9, 2013, <https://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html> (describing the movement towards more inclusive acronyms, such as LBGTQIAAP which includes two-spirit, queer, questioning, intersex, asexual, allies, and pansexual; LGBT is currently the most common acronym used in news media and politics).

13. Friedman, *supra* note 9, at 258 (“Positive theorists ask what motivates judges to decide cases as they do and what forces are likely to influence judges’ decisions.”).

weighed in on the *Hively* court's approach including the current social and political climate, historical jurisprudential concerns raised by decisions such as this one, and practical considerations that would inform a more holistic critique of the opinion's reasoning. This article will conclude by arguing that critical observers of jurisprudence should employ such a holistic approach—with a reflective understanding of the greater ecology within which the judiciary functions—when critiquing decisions such as the Seventh Circuit's in *Hively*.

II. HIVELY'S RATIONALE AND ACKNOWLEDGED LIMITATIONS

In *Hively*, the en banc Seventh Circuit examined whether Title VII's prohibition of discrimination in employment practices based on a person's sex includes discrimination based on sexual orientation.¹⁴ The Court noted that, although the all of the U.S. Circuit Courts excluded claims of sexual orientation discrimination from Title VII's protection against sex discrimination, the Supreme Court had not yet reached the issue.¹⁵ Taking into consideration developments in the Supreme Court's more recent decisions under Title VII, the Seventh Circuit concluded that the present state of the law regarded sexual orientation discrimination as a form of sex discrimination.¹⁶ In doing so, the Seventh Circuit incorporated a ban on sexual orientation discrimination into Title VII's prohibition of discrimination based on sex. This overturned prior circuit precedent and created a split with all other circuit courts to reach the issue, most of which had come to the contrary conclusion based on the notion that Congress intended Title VII's prohibitions to reflect a traditional notion of the term "sex."¹⁷

Acknowledging the importance of its decision—and its obvious inability to amend federal statutes—the court defined the narrow question before it as one of statutory interpretation.¹⁸ The court set aside Congress' historical lack of amendments to Title VII, and the presence of parallel amendments in other legislation addressing sex and sexual orientation separately, as inconclusive.¹⁹ The court additionally pointed out that the Equal Employment Opportunity Commission ("E.E.O.C.")—the agency tasked with initially assessing whether a violation of Title VII occurs—interpreted Title VII to include a prohibition on sexual orientation discrimination.²⁰ Following the Supreme Court's rationale in *Oncale v. Sundowner Offshore Servs., Inc.*, the Seventh Circuit observed that

14. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 340 (7th Cir. 2017) (en banc) (Sykes, J., dissenting).

15. *Id.* at 340.

16. *Id.* at 341.

17. *Id.* at 341-42 (noting the Seventh Circuit and all other Circuit Courts previously required Title VII sex discrimination claims to hinge on a traditional definition of "sex," not sexual orientation).

18. *Id.* at 343.

19. *Id.* at 343-44.

20. *Id.* at 344.

Title VII reaches many forms of discrimination not intuitively included in a traditional interpretation of the word “sex.”²¹ This being the case, the court concluded that under the Supreme Court’s developing understanding of Title VII, the meaning of the statute may be fairly read to incorporate types of discrimination well beyond the original or traditional meaning of its terms.²²

The court then considered whether, as Hively asserted, sexual orientation discrimination is by definition sex discrimination, honing in on Title VII’s term “sex” as the central factor for examination.²³ In its analysis, the court reasoned that discrimination based on sex is present if—holding everything else constant including the sex of her partner—Hively would not have been discriminated against if she were a man.²⁴ In light of the Supreme Court’s holdings that forms of gender non-conformity discrimination are cognizable under Title VII, the Seventh Circuit reasoned that sexual orientation discrimination is necessarily included as well.²⁵ This is so, the court noted, because no discernable difference exists between discrimination based on gender stereotypes about what is appropriate male or female behavior and stereotypes about what one’s partner’s sex should be because of their own sex.²⁶ Both focusing on what is or is not appropriate for a man or a woman to do, and thus the court concluded that both necessarily take sex into account.²⁷ Therefore, because discrimination in employment based on sexual orientation necessarily takes a person’s sex into account, the Court held that it is necessarily prohibited under Title VII.²⁸

The court then examined a second way in which sexual orientation discrimination runs afoul of Title VII’s prohibition of discrimination in employment based on a person’s sex. A line of equal protection cases flowing from the Supreme Court’s rationale in *Loving v. Virginia*, prohibit discriminatory actions that are based on the protected characteristic of someone with whom one associates.²⁹ In *Loving*, the Supreme Court struck down state antimiscegenation laws that prohibited interracial marriage, rejecting the argument that an equal effect on both black and white individuals freed the law’s prohibitions from an equal protection challenge.³⁰ Subsequent circuit court decisions extended this principle to Title VII’s prohibition of discrimination in employment by holding that employers could not discriminate

21. *Id.* at 345 (citing Supreme Court decisions incorporating sexual harassment claims, same-sex harassment claims, and claims of discrimination based on both nonconformity to traditional gender stereotypes as well as gender-based longevity assumptions into Title VII).

22. *See id.* at 345.

23. *Id.*

24. *Id.*

25. *Id.* at 346-47.

26. *Id.* at 347.

27. *Id.*

28. *Id.*

29. *Id.* at 347-49.

30. *Id.* at 347 (citing *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967)).

based on the race of people with whom their employees associated.³¹ The court in *Hively* reasoned that since Title VII prohibited discrimination based on the protected characteristic of someone with whom one associates under a theory of racial discrimination, it also reached such actions under a theory of sex discrimination.³² As the statute made no distinction between the reach of its parallel provisions for race and sex, the court held that sexual orientation claims are cognizable under Title VII because *Hively* would not have suffered discrimination but for her partner's sex.³³

In holding that Title VII prohibits discrimination in employment based on sexual orientation, the Seventh Circuit acknowledged that its decision arose in the context of expanding legal recognition of discrimination based on sexual orientation.³⁴ The court pointed out decisions of other circuit courts and administrative tribunals as well as public policies on the issue that broadly conflicted with each other, and were often even self-contradictory.³⁵ Nonetheless, the court believed that the state of the law and common sense dictated that it is "impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex"³⁶ Noting the litany of related issues not before them, the court stated its holding narrowly: "[A] person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes."³⁷

III. SOUCEK'S CRITIQUE AND ASSUMPTIONS

Although the court's holding formalized a long sought after goal of LGBT advocates, some observers balked at the form and substance of the opinion. Brian Soucek's article *Hively's Self-Induced Blindness* leads with unreserved disappointment in the opinion's lack of engagement with the substantive gender theory and legal scholarship on gender discrimination.³⁸ Soucek states that the opinion would have been more influential on other courts had it focused on the way sexual orientation discrimination polices gender norms and how this falls

31. *Id.* at 347-48 (citing *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986); *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008)).

32. *Id.* at 349 (drawing the analogy that as it is prohibited to fire a white person for marrying someone who is black, it is equally prohibited to fire a woman because she is married to a woman because both decisions discriminate against the employee based on the protected characteristic of the employee's spouse).

33. *Id.*

34. *Id.* at 349-50.

35. *Id.*

36. *Id.* at 351.

37. *Id.* 351-52.

38. Brian Soucek, *Hively's Self-Induced Blindness*, 127 YALE L. J. FORUM 115, 115-16 (2017).

squarely within the antisubordination³⁹ principles that Title VII was meant to address.⁴⁰ The opinion's "gender-blind" anti-classification⁴¹ tilt and focus on statutory interpretation—Soucek argues—reflects rationales that have failed to gain traction in the past, diminishing the historic holding's value and effect.⁴²

According to Soucek, the majority opinion's approach to statutory interpretation does little to respond to the dissent's originalist approach and is not sufficient to establish a framework for assessing Title VII's application to sexual orientation claims on neutrality principles.⁴³ The concern being that the rationale's simplicity, comparing whether Hively's employer would hire men who are attracted to women but not women who are attracted to women, leaves it open to attack because it conflates sex discrimination and sexual orientation discrimination.⁴⁴ Soucek argues that the majority opinion's strategy of reaching sexual orientation discrimination under Title VII by applying *Oncale*'s expansion of the law (incorporating meanings that were not Congress' original intent) is a weak sidestep.⁴⁵ This strategy does not respond sufficiently to the challenges its simplistic argument may face according to Soucek and does little more than open the door to a contemporary interpretation of the statute's language.⁴⁶

Soucek argues that a more probing disentanglement of sex and sexual orientation discrimination is necessary to bolster the majority's arguments.⁴⁷ For this reason, his response to the majority's second assertion is the same: by invoking the Supreme Court's rationale in *Price Waterhouse*—that Title VII was meant to address disparate treatment of men and women from the entire range of sex stereotypes—⁴⁸it exposes the opinion to a strong symmetry objection.⁴⁹ If Title VII is meant to prevent disparate treatment, the assertion that heterosexuality is the ultimate sex stereotype highlights that it is a form of discrimination that applies equally to both men and women.⁵⁰ Soucek argues that the court's disparate treatment argument is self-defeating because it concedes that the stereotype effects both men and women the equally,⁵¹ and he

39. Antisubordination describes an approach to examining the purpose antidiscrimination laws. It focuses on the law's function of addressing inequality by aiming to dismantle social hierarchies which place people in a cast-like juxtaposition based on particular characteristics. See YURACKO, *supra* note 5, at 54-88.

40. Soucek, *supra* note 38, at 116.

41. Anticlassification describes reasoning in opinions that seeks to root out discrimination based on specific protected classifications. See YURACKO, *supra* note 5, at 44-52.

42. Soucek, *supra* note 38, at 116.

43. *Id.* at 118.

44. *Id.* at 117-18.

45. *Id.* at 118.

46. *Id.* at 118.

47. *Id.* at 122-23.

48. *Id.* at 118.

49. *Id.* at 123.

50. See *id.* at 118-19.

51. *Id.* at 119.

points out that gender theory flatly rejects this assertion.⁵² He urges that judicial opinions should incorporate accepted social science and legal scholarship on how gender stereotypes and sexual orientation discrimination serve to police social roles—particularly in the way they limit economic opportunities based on a person’s gender.⁵³ This, Soucek argues, is precisely the dynamic that Title VII was meant to abolish and incorporating these arguments offered by social science and gender theory would bolster the strength and influence of the opinion’s conclusions.⁵⁴

Lastly, Soucek cautions the analogy to *Loving* as a separate route to reach sexual orientation discrimination under Title VII.⁵⁵ The weakness of this associational argument is that it only works when examining the intended discriminatory impact on the person with whom one is associating.⁵⁶ *Loving* allowed for the associational argument because antimiscegenation laws were an attempt to preserve racial integrity and here the opinion’s stereotype (that people of both sexes are being discriminated against based on sexual orientation) muddles the comparison.⁵⁷ By simplifying the stereotype to one that is gender-neutral, Soucek argues that the opinion obscures the specific ways that homophobia serves to police gender norms and subordinate certain groups based on gender.⁵⁸ Soucek urges that greater engagement with the specific ways in which sexual orientation discrimination and homophobia are intended to constrain men and women is necessary to tie those dynamics to the principles of Title VII invoked in *Loving*.⁵⁹

The article acknowledges that the form of the opinion may have been strategic in that the court’s reasoning could have been shaped with future circuit court and Supreme Court reviews of the issue in mind.⁶⁰ Soucek assumes that the court *hoped* its opinion would have a persuasive effect in the future and points out that these types of formalist arguments in sexual orientation discrimination have met little success.⁶¹ However, some scholars observe that the means of judicial opinions reflect much more than imputed motivations that normative scholarship often focuses on. With that in mind, examining the relevant context in which the *Hively* opinion arose sheds important light on why the court may have examined the issue and formulated its opinion as it did.

52. *Id.* at 121-23.

53. *See id.* at 124-25.

54. *Id.* at 124-25.

55. *Id.* at 119.

56. *Id.* at 119.

57. *Id.* at 120-21.

58. *Id.* at 123.

59. *Id.* at 124-25.

60. *Id.* at 126.

61. *Id.* at 126 (citing Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087 (2014)).

IV. SOCIAL, POLITICAL, AND LEGAL CONTEXT

Dissenting from the majority in *Hively*, Judge Sykes stressed the fact that substantial public debate was currently focused on the issue before the court.⁶² Similarly, Judge Posner's concurrence examined how courts have struggled with the meaning and bounds of gender based discrimination, coming to widely varying conclusions and results.⁶³ The majority opinion also acknowledged the spectrum of muddled cases addressing the overlap of gender stereotyping and sexual orientation claims under Title VII.⁶⁴ These observations on the narrow issue the court was faced with and related unresolved issues of gender equality swirling in other legal and political spheres speak to more than the Soucek article takes into account. Perhaps for this reason, critiques such as Soucek's—that particular judicial opinions are “formalistic” or “originalist”—have fallen under criticism for the rational shortcomings of using such descriptors in a somewhat pejorative sense.⁶⁵

A deeper understanding of the *Hively* opinion's form and purpose may be gained by a less dismissive approach, one that considers what positive scholarship and a broader view of the judiciary's role have to offer about judicial decision-making.⁶⁶ One of the pillars of the U.S. constitutional system is the purposeful distinction between the courts and the political branches, yet history has shown that political influences inevitably seep into the judiciary's approach to its role.⁶⁷ Indeed many considerations have substantial effects on judges' decision-making processes including pervasive public opinion, the judiciary's relationship to the coordinate branches, the impact of their decisions on other parts of the judicial system, and even judges' own personal values.⁶⁸ Critical examination of these influences not only lends insight into the means of judicial decision-making but benefits the ambition of normative scholars and other advocates by highlighting questions or options for future action that are otherwise easily overlooked.⁶⁹ With that in mind, an examination of the *Hively* opinion should consider relevant contextual factors that may have influenced the judges' analysis of the issue before them and in turn weighed on the opinion's form.

62. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 361 (7th Cir. 2017) (en banc).

63. *See id.* at 355-56.

64. *Id.* at 341-42.

65. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 160-61 (2009).

66. *See* Friedman, *supra* note 9, at 261.

67. *See id.* at 264-65; *see also* *Baker v. Carr*, 369 U.S. 186, 209-11 (1962).

68. *See generally* Friedman, *supra* note 9, at 258.

69. *See generally id.* at 259.

A. Hively's Issue in the Political Spotlight.

The *Hively* opinion was issued in the spring of 2017,⁷⁰ shortly after a highly contentious presidential election in which gender politics and the dynamics of gender discrimination played a central role.⁷¹ The Democratic Party's candidate, Hillary Clinton, was the first female presidential nominee from one of the country's major parties, and the divisive nature of the election exposed an expanse of gender biases broadly prevalent in American public opinion.⁷² Many of Clinton's supporters felt in her defeat a blow to the social progress of issues such as sexual harassment and sexual assault in large part because of the perceived character of her opponent, Donald Trump.⁷³ Many Clinton supporters were concerned about his past behavior—widely viewed as degrading toward women—and his treatment of Clinton during the campaign.⁷⁴ The election spurred broad public expression of serious concern about what his presidency would mean for gender equality in the U.S.⁷⁵ Yet at the same time, even female supporters of the new President rejected such concerns out of reliance on contrary anecdotal information or for other personal and political reasons.⁷⁶ This divide illuminates the expanse of personal views that Americans hold on gender issues and the relative importance of such issues to different segments of our population when it comes to political life.

The shift in executive administrations in the presidential election brought sweeping changes to the way the government approached gender discrimination. Numerous policies of the previous administration were rolled back or reversed entirely under arguments that federal antidiscrimination legislation was not intended to create expansive gender non-conformity protections.⁷⁷ Under executive orders the new President rescinded a policy of the prior administration under Title XI that instructed schools to allow transgender students access to bathrooms that reflected their gender identity.⁷⁸ Similarly, the Department of Defense was ordered to reverse course on both allowing transgender individuals to serve openly in the military and providing

70. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc).

71. Nina Burleigh, *The Presidential Election was a Referendum on Gender and Women Lost*, NEWSWEEK, Nov. 14, 2016, <http://www.newsweek.com/2016/11/18/hillary-clinton-presidential-election-voter-gender-gap-520579.html> [perma.cc/HMV6-TLZB].

72. Peter Beinart, *Fear of a Female President*, THE ATLANTIC, Oct. 2016, at 15, <https://www.theatlantic.com/magazine/archive/2016/10/fear-of-a-female-president/497564/> [https://perma.cc/KH2B-JLNW].

73. *See id.*

74. *See id.*

75. Helen Drynan, *What Does the Presidential Election Mean for Gender Equality?*, THE HUFFINGTON POST: THE BLOG, Nov. 22, 2016, <https://www.huffingtonpost.com/helen-drynan/what-does-the-presidential-election-mean-for-gender-equality/> [perma.cc/46M7-AD3W].

76. Burleigh, *supra* note 71.

77. Katy Steinmetz, *President Trump Just Rolled Back Guidelines That Protected Transgender Students*, TIME, Feb. 23, 2017, <http://time.com/4679063/donald-trump-transgender-bathroom/> [perma.cc/6ZMR-QGPT].

78. *Id.*

related medical care.⁷⁹ The new administration also rescinded requirements that businesses with more than one-hundred employees, and federal contractors with more than fifty, report detailed data about compensation based on gender and race.⁸⁰ Many of these changes followed popular campaign promises the new President made on his way to election, but at the same time the changes were met with wide disfavor and viewed as devastating blows to the LGBT community.⁸¹ National tension on these issues animated strong emotions across the political spectrum, but these changes were widely popular amongst social conservatives and reflected common conservative concerns over recent legal expansions of sexual orientation and gender equality.⁸²

In addition to these drastic administrative policy shifts, the federal agencies directly tasked with enforcement of Title VII's provisions split on the particular issue facing the court in *Hively*. The *Hively* opinion observed that a recent E.E.O.C. decision, though not binding on the Seventh Circuit, had held that Title VII's bar covered claims of sexual-orientation discrimination.⁸³ The E.E.O.C. assesses federal employment discrimination claims—including those under Title VII—against companies on behalf of employees who allege that their rights have been violated.⁸⁴ Typically the E.E.O.C. makes a determination as to whether the discrimination occurred, and if the dispute cannot be resolved by their conciliatory process the Department of Justice (“D.O.J.”) takes over

79. Zeke J. Miller, *President Trump Has Taken a Key Step to Implement his Transgender Military Ban*, TIME, Aug. 25, 2017, <http://time.com/4916871/donald-trump-transgender-military-ban/> [perma.cc/3XES-94UD] (citing Memorandum from President Trump to the Secretary of Defense and the Secretary of Homeland Security on Military Service by Transgender Individuals (Aug. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland> [https://perma.cc/S47V-DCUV]).

80. Danielle Paquette, *Trump Administration Halts Obama-Era Rule to Shrink the Gender Wage Gap*, CHICAGO TRIBUNE, Aug. 30, 2017, <http://www.chicagotribune.com/news/nationworld/politics/ct-trump-wage-gap-20170830-story.html> [https://perma.cc/JZB8-YJ2T] (citing Memorandum from Neomi Rao, Administrator, Office of Information and Regulatory Affairs, to Victoria Lipnic, Acting Chair, Equal Employment Opportunity Commission on EEO-1 Form; Review and Stay (Aug. 29, 2017), https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf [perma.cc/R3LH-XYDD]).

81. Char Adams, *Everything Donald Trump Has Said About the LGBTQ Community as President Announces Trans Military Ban*, PEOPLE: POLITICS, July 26, 2018, <http://people.com/politics/donald-trump-lgbtq-trans-military-ban/> [perma.cc/5NPG-KHMD].

82. See, e.g., Steinmetz, *supra* note 77 (“By the time he left office, Barack Obama had taken several steps to support transgender people, moves that ‘thrilled’ advocates and outraged social conservatives still stinging from a same-sex-marriage loss before the Supreme Court.”).

83. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 344 (7th Cir. 2017) (en banc) (citing *Baldwin v. Foxx*, E.E.O.C. Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015)).

84. *Employees & Job Applicants*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/> [https://perma.cc/G2EV-VP4U] (last visited April 20, 2018).

and may pursue a civil lawsuit against the employer.⁸⁵ At the same time *Hively* was being decided, the identical issue was before the Second Circuit Court of Appeals and the D.O.J. filed an amicus brief refuting the exact arguments adopted by the *Hively* majority.⁸⁶ Particularly, the D.O.J. noted that Congress' subsequent amendments to and ratifications of Title VII declined to incorporate sexual orientation into the statute, despite the creation of similar protections—differentiating between sex and sexual orientation—into other statutory schemes.⁸⁷ This type of discord within the political branches of the federal government mirrors that swirling in popular opinion, and the Seventh Circuit's awareness of these conflicting policies would no doubt inform the court's approach.

Perhaps the most stark contextual factor is that the laws of the states themselves differ widely in terms of the extent to which they provide protections against different forms of gender discrimination.⁸⁸ Additionally—as with many federal statutes—state statutes commonly distinguish between discrimination based on sex, and discrimination based on sexual orientation.⁸⁹ California, for example, prohibits discrimination in employment because of a person's “sex, gender, gender identity, gender expression, [or] sexual orientation[.]”⁹⁰ By contrast, twenty-eight states have no laws prohibiting discrimination in employment based on sexual orientation at all.⁹¹ Several states that have no gender discrimination protections even have legislation prohibiting local municipalities from passing or enforcing nondiscrimination laws encompassing protected categories beyond those provided for in state law.⁹² These state policies reflect both the states' vastly different positions on gender discrimination in employment, as well as broad public opinion that the terms sex, gender, and sexual orientation are generally understood as distinct.

Given the current breadth of public opinion, and by extension public policy on gender equality issues—as well as the prevalence and divisiveness of political debate thereupon—it is hard to argue that judges deciding federal policy would not take note. This would be particularly true when considering an interpretation of federal law explicitly rejected by other branches of the government, and many other courts. The holding in *Hively* creates a federal

85. Press Release, E.E.O.C., Justice Department and Equal Employment Opportunity Commission Sign Memorandum of Understanding to Further the Goals of Title VII of the Civil Rights Act of 1964 in Prohibiting Employment Discrimination in State and Local Governments, (Mar. 3, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/3-3-15.cfm> [<https://perma.cc/SP97-N7AQ>].

86. Brief for the U.S. as Amicus Curiae at § III, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2017) (No. 15-3775).

87. *Id.* at § II (B); see also *Hively*, 853 F.3d at 363-65 (Sykes, J., dissenting).

88. *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws [<https://perma.cc/KC6Y-NSZD>] (last visited Apr. 23, 2018).

89. *Hively*, 853 F.3d at 364.

90. CAL. GOV'T CODE § 12940 (West 2018).

91. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 88.

92. See e.g. TENN. CODE ANN. § 7-51-1802 (2011).

remedy without vetting by the political, and legislative processes that normally hold governmental actors accountable for federal policy. It seems only natural that these considerations would weigh in on how the *Hively* opinion developed. Federal appeals judges are not blind to the substantial impact their rulings have—both legally and in a broader social reality—and this truth has long been a part of positive legal theory, as well as constitutional jurisprudence.

B. Historical Jurisprudential Concerns Raised by Similar Issues.

From the outset, *Hively's* rationale acknowledges the particular role that courts are designed to play in our constitutional system, and the due respect thus owed to the coordinate branches.⁹³ The court realized its decision and rationale would draw the oft-touted criticism that it was performing “judicial legislation”, and explicitly stated that amending federal legislation was beyond the power of the judiciary—this was why the court chose to define its issue narrowly.⁹⁴ Dissenting in *Hively*, Judge Sykes highlights these concerns, arguing that the majority opinion steps well beyond the role of unelected judges and of the courts by straying into the purview of the legislative branch.⁹⁵ This debate and the implicit concerns that come with it have long been a mainstay of legal thought in our constitutional system,⁹⁶ and federal judges are thus duty bound to tread lightly when faced with contentious social issues. The historical concerns about the role of the courts, and the structure of our governmental system were highly focused on the issue of gender equality at the time *Hively* was decided. Only two years earlier, in *Obergefell v. Hodges*, the Supreme Court ruled that state laws denying same-sex couples the right to marry were unconstitutional.⁹⁷ While the result was widely celebrated by LGBT advocates,⁹⁸ public officials from several states and influential public interest groups adamantly rebuked the result.⁹⁹

93. *Hively*, 853 F.3d at 343.

94. *Id.*

95. *Id.* at 360.

96. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing numerous justiciability doctrines that courts must consider when assessing whether a question presented is even cognizable because of the essential horizontal balance of powers in the U.S.'s constitutional system).

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

98. Robert Barns, *Supreme Court Rules Gay Couples Nationwide Have a Right to Marry*, THE WASHINGTON POST, Jun. 26, 2015, https://www.washingtonpost.com/politics/gay-marriage-and-other-major-rulings-at-the-supreme-court/2015/06/25/ef75a120-1b6d-11e5-bd7f-4611a60dd8e5_story.html?hpid=z1&utm_term=.f62d9f96e9a8. [https://perma.cc/YP6L-7QXJ].

99. Emma Green, *How will the U.S. Supreme Court's Same-Sex-Marriage Decision Affect Religious Liberty?*, THE ATLANTIC, Jun. 26, 2015, <https://www.theatlantic.com/politics/archive/2015/06/how-will-the-us-supreme-courts-same-sex-marriage-decision-affect-religious-liberty/396986/> [https://perma.cc/58UZ-FENL].

Prohibition of sexual orientation discrimination under Title VII in particular drew the attention of groups that advocate for strong protections of religious liberty embodied in the Constitution.¹⁰⁰ In a case paralleling *Hively*, the Christian Legal Society raised concerns that an extension of the interpretation of Title VII to cover discrimination based on sexual orientation would effectively alter the law's provisions that protect the free exercise rights of private businesses.¹⁰¹ Specific religious exemptions are a common part of many federal statutory schemes including Title VII, and the Christian Legal Society's arguments represent the position of a not insignificant number of citizens as well as their elected representatives.¹⁰² Balancing the evolving societal conceptions of delicate social issues such as sex and gender with the centrality of religious liberty in our legal system has traditionally been left to the careful consideration of the legislators,¹⁰³ who are directly accountable to the people through the democratic process. The Christian Legal Society therefore cautioned the judiciary not to upset this balance; particularly, they urged the court to tailor its opinion narrowly to avoid wider implied changes in Title VII's application.¹⁰⁴ This concern highlights an important factor in judicial decision-making. Given the weight of authority that a judicial opinion carries—and the complexity of statutory schemes like Title VII—the relative precision of an opinion may have far reaching public policy consequences, and it follows that courts would necessarily tailor their reasoning to prevent those that are unintended.

This call for restraint on the part of the courts reflects a common thread in legal thought on contentious social issues, and stems from a well-founded concern for both the structure and the efficacy of our constitutional democracy. Cases such as *Obergefell v. Hodges*, have drawn sharp criticism for their potential to upset the balance of power between coordinate branches of government, and impede the functioning of the democratic process. Particularly, this type of decision is regarded by some as courts arguing for what they think the law *should be*, rather than determining and following what the law is.^{105,106} This is a particular concern when the states differ widely in their policies as to the issue in question, and thus a court's decision may have

100. En Banc Brief of Christian Legal Society and National Association of Evangelicals as Amici Curaie, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2017) (No. 15-3775).

101. *Id.* at 23-24.

102. *Id.* at 21-22.

103. *Id.*

104. *Id.* at 24.

105. Ryan Anderson, *Judicial Activism on Marriage Causes Harm: What Does the Future Hold?*, SCOTUSBLOG: SYMPOSIUM, Jun. 26, 2015, <http://www.scotusblog.com/2015/06/symposium-ryan-anderson/> [<https://perma.cc/AGH4-FZMF>].

106. Indeed, the delicacy in central maxims of American jurisprudence display how thin this line can be. For example, it is the “province . . . of the judicial department to say what the law is [and judges] who apply the rule in a particular case, must of necessity expound and interpret that rule.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

the effect of neutralizing a polarized debate about the way the issue should be addressed.¹⁰⁷ The problem being that this could further entrench opposing sides which otherwise may have been able to sway each other's opinions or develop a wider consensus through the marketplace of ideas and public discourse.¹⁰⁸ Thus a ruling that creates formal legal change—handed down from the judiciary—could stifle actual social change that might otherwise have been achieved.

The corollary concern, which may be more obvious to courts, is the effect that judicial engagement in an unsettled area of the law has on both the ability of the court to function and how the court system is perceived. Critics of opinions like *Hively*, that touch on subjects of substantial public debate, argue that such an intervention politicizes the judicial branch, thus shifting the public's perception of the courts and by extension the courts' ability to serve its proper function.¹⁰⁹ A major concern being that if a contentious social issue is taken out of public debate and the democratic process by the judiciary, this creates the perception that courts are substituting their own value judgments for those of the people.¹¹⁰ Additionally, it implies that the judiciary is a political arm of the government, and the public's confidence in the neutrality of judicial decision-making is thus undermined.¹¹¹ Justice Scalia raised these concerns in *Planned Parenthood of S.E. Penn. v. Casey*, observing that contemporary Supreme Court nominees are now subject to public scrutiny about their personal opinions on divisive social issues and how those might sway their vote in future decisions.¹¹² This politicization of the judiciary took center stage when Merrick Garland's Supreme Court nomination was held up for a record setting 293 days until it expired on January 31, 2017,¹¹³ less than two months before the decision in *Hively* was published. Congress' decision to hold up the nomination was openly political.¹¹⁴

Given the severely divisive tenor of current public discourse, objective analysis of the intended purposes and potential effects of judicial decision-making is as critical as ever. As the dynamic functionality of judicial decisions and their far-reaching consequences are not lost on observers and academics, judges surely are cognizant of them as well. As an illustration, ongoing concerns about public engagement in the political process—especially low

107. See generally Anderson, *supra* note 105.

108. *Id.*

109. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883, 999-1000 (1992) (Scalia, J., dissenting).

110. *Id.* at 1000-01.

111. *Id.* at 1001.

112. *Id.* at 995-96.

113. Jess Bravin, *President Obama's Supreme Court Nomination of Merrick Garland Expires*, THE WALL ST. J., Jan. 3, 2017, <https://www.wsj.com/articles/president-obamas-supreme-court-nomination-of-merrick-garland-expires-1483463952>.

114. *Id.*

voter turnout—remain largely without concrete explanation.¹¹⁵ One could argue that public perception of courts as an alternative avenue for resolution of political issues, instead of democratic engagement, would tilt the scales in the wrong direction. Unsurprisingly, public opinion runs largely in favor of judges ensuring that their personal opinions do not influence their decisions.¹¹⁶ Politicization of the courts' role inherently conflicts with that sentiment.

Alternatively, critical observers point out that judicial restraint on divisive social issues may force those issues to the forefront of the debate amongst the political branches of government.¹¹⁷ In other words, judicial restraint is arguably a powerful force for encouraging robust public engagement and forcing the public to resolve divisive issues in the crucible of democracy. Given that these arguments about judicial decision-making are a mainstay in legal thought, concerns about the public and institutional identities of the courts cannot be far from judges' minds when confronting an issue such as that in *Hively*. A critique that does not consider these types of contextual factors—that weigh heavily on the role of the judiciary—will inherently misinterpret the intentions and effects that such an opinion may have.

C. Formal Versus Lived Equality, A Cautionary Tale.

The Soucek critique of *Hively's* majority opinion closes with several assumptions about the strategic nature of its gender-neutral, formalist approach. The article acknowledges that the form of the opinion may have been a purposeful choice by the court, given the apparent appeal of this type of reasoning to members of the Supreme Court.¹¹⁸ Soucek cautions that the Seventh Circuit should not be optimistic about how influential its decision will be, citing observations about the lack of traction these forms of argument have found in LGBT rights litigation.¹¹⁹ However, these conclusions impute ends-based motivations to the members of the court and assume an intent contrary to the fundamental principles of neutrality in judicial decision-making. In so doing, Soucek assumes that the court ignored its essential function and was primarily motivated by some intention to further a political or social agenda

115. Michael D. Regan, *Why is Voter Turnout So Low in the U.S.?*, PBS NEWS HOUR: POLITICS, Nov. 6, 2016, <https://www.pbs.org/newshour/politics/voter-turnout-united-states> [<https://perma.cc/GXG9-YZ37>].

116. Christine Lagorio, *Poll: Americans 'Undecided' on Alito*, CBS NEWS, Jan. 9, 2006, <http://www.cbsnews.com/stories/2006/01/09/opinion/polls/main1192317.shtml> [<https://perma.cc/TE2U-YBVN>].

117. See Jeffrey Rosen, *The Day After Roe*, THE ATLANTIC, June 2006, <https://www.theatlantic.com/magazine/archive/2006/06/the-day-after-roe/304882/> [<https://perma.cc/Q22N-MFDH>] (discussing how the state legislatures and Congress would be forced to address the details of legislation by their relative constituencies should the Supreme Court overturn *Roe v. Wade*).

118. Soucek, *supra* note 38, 126-27.

119. *Id.* at 126.

associated with the result it reached. Given the numerous contextual factors that weigh on a court's decision discussed above—and the vast array of others not addressed here—the article's approach brushes aside valuable considerations found in positive scholarship and other more holistic approaches.

Certain scholars, for example, observe that alternative forms of legal argument do find ranging success in sexual orientation discrimination, but acknowledge that these arguments exist in a broader ecology.¹²⁰ Particular arguments may find less success in litigation because they challenge widely accepted gender norms, yet they still have much to offer in the way of effecting social change by other means.¹²¹ By its formal address of discrimination based on gender norms, a result like *Hively* shines a light on the underlying and troublesome dynamics that normative scholars like Soucek are particularly concerned about.¹²² Additionally, aggrieved parties getting their day in court through formal challenges to sexual orientation discrimination serves an expressive function with other socially and legally significant benefits.¹²³ Alternatively, however, an opinion like *Hively* may invigorate opposing viewpoints or even hostility between people on either side of an issue, thus relevant contextual and strategic concerns are important to acknowledge in any formative critique.¹²⁴ Given the complex interactions of political, institutional, and social constructs in gender discrimination litigation, no concrete predictions about the possible success or efficacy of one strategy or another can truly be drawn.¹²⁵ Thus, it seems conclusions such as Soucek's which are based on assumptions about a court's intent and biases about the result's future ability to effect social change inherently ignore the broader realities of judicial decision-making.

The issue of gender discrimination in employment presents a substantial challenge for our courts—as non-political institutions—in part because litigation has pushed the boundaries of Title VII to a point where decisions are based more and more on complex social constructs, rather than legal substance. Absent clear definitions of intent in the statute, courts have struggled to examine gender non-conformity claims under increasingly narrow legal theories rather than the broader policies embodied in the legislation.¹²⁶ Courts have thus acknowledged outright that the lines between discrimination based on sex versus sexual orientation necessarily overlap in complicated cases, but that the blurred lines should not be used as a means to effect a statutory

120. Suzanne B. Goldberg, *Risky Arguments in Social Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2149-53 (2014).

121. *Id.* at 2151.

122. *Id.* at 2149.

123. *Id.* at 2150-51.

124. *Id.* at 2152.

125. *Id.*

126. Camille Patti, *Hively v. Ivy Tech Community College: Losing the Battle But Winning the War for Title VII Sexual Orientation Discrimination Claims*, 26 TUL. J.L. & SEXUALITY 133, 144 (2017).

amendment.¹²⁷ *Jespersion v. Harrah's Operating Co.* is a perfect illustration of why courts have struggled with the grey areas that exist in gender related Title VII litigation. In *Jespersion*, the Ninth Circuit found itself conflicted when examining a particular employer's differing grooming standards for men and women.¹²⁸ The court observed that allowing a claim of discrimination under Title VII based on sex specific grooming standards "would come perilously close to holding that every . . . appearance requirement that an individual finds personally offensive [would] create a triable issue of sex discrimination."¹²⁹ This illustrates a deeper concern that courts undoubtedly have about wading into delicate points of gender equality without legislative guidance: the fear that doing so will make the court system a forum for policing social norms, and by extension making the judiciary a cultural authority on such matters.

Advocates for social change should also not lose sight of the fact that impact litigation is inherently limited, as a multitude of factors play into judicial decision-making and that there are infinite channels through which an opinion may be influential. Additionally, engaging the broader spectrum of means to achieve lived equality—and acknowledging the court system's place in that picture—is essential, considering the historical impact of formal equality as it stands on its own.¹³⁰ The achievement of a formal right in and of itself does not ensure tangible change in the lives of those for whom that right is won without substantive change in the structures that bring the lived realities of that right to bare.¹³¹ A formal right to sue for sexual orientation discrimination, for example, does little to overcome socioeconomic or geographical barriers to vindicating that right.¹³² Similarly, judicial opinions likely have limited direct effect on the opinions of members of the public who disagree with the result, especially rulings issued in the face of entrenched social division on the particular issue.¹³³ In addition to the fact that formal equality does not automatically produce lived equality, some legal theorists point out that in certain ways it frustrates efforts to ferret out inequality in the lives of those the formal right is intended to benefit.¹³⁴ This hard truth suggests that the efforts and resources focused on addressing challenges of gender discrimination might have a greater impact on those who face it if they were expended on direct services to vulnerable individuals and populations.¹³⁵

The disparities between as well as the interplay of formal rights and lived equality should give pause to those seeking to advance a particular cause that is

127. Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005).

128. See *Jespersion v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006).

129. *Id.* at 1112.

130. Leonore F. Carpenter, *The Next Phase: Positioning the Post-Obergefell LGBT Rights Movement to Bridge the Gap Between Formal and Lived Equality*, 13 STAN J. C.R. & C.L. 255, 258 (2017).

131. *Id.* at 270.

132. See *id.* at 274-78.

133. See *supra* Section IV (A).

134. Carpenter, *supra* note 130, at 281-86.

135. *Id.* at 288-92.

in need of both through strategies like impact litigation. That is not to say that legal recognition of formal rights for underrepresented or underserved populations is an undesirable result. However, proponents of those rights should at a minimum take care to be reasonably objective about the way progress develops, the efficacy of the attitudinal approach they adopt, and the personal and professional realities of those whom they seek to influence.

V. CONCLUSION

As the concerns of LGBT populations—and gender discrimination in particular—stand at the forefront of substantial social discourse and legal debate, it would benefit advocates to reflect holistically on past successes to inform their future strategies. The en banc Second Circuit Court of Appeals heard oral arguments in *Zarda v. Altitude Express* on the issue of sexual orientation discrimination claims under Title VII on September 26th, 2017.¹³⁶ While that opinion was pending, a petition for certiorari to the Supreme Court on the same issue was denied in a parallel case despite drawing motions for leave to file amicus briefs from numerous businesses and organizations, LGBT advocacy groups, anti-discrimination scholars, and several states.¹³⁷ After the Supreme Court declined to hear the issue, the Second Circuit issued its opinion in *Zarda*, holding that sexual orientation claims are cognizable as a subset of sex discrimination under Title VII.¹³⁸

It is a challenge to be sure—in the ambition of legal commentary—not to lose sight of the complex personal and cultural realities of those whose work we examine and critique. The abstract nature of legal theory naturally lends itself to such a result. However, judges and the individuals whose cases they decide share one critical similarity: both are undeniably human. Judges occupy a unique position in our culture and our governmental system. Often their role in each is misunderstood or misinterpreted in many ways for a multitude of reasons. Ordinary citizens as well as legal professionals, scholars, members of other governmental branches, and private organizations each carry assumptions about the judiciary that are colored by their own experiences and beliefs. Common to all of these parties is that they each have a vested interest in how judges perform their job. In addition to the centuries of jurisprudential philosophy on which our system is founded, the dynamic social and political ecology within which courts operate are surely not lost on judges when facing contentious decisions. That being the case, critical commentators should be

136. *Zarda v. Altitude Express Oral Argument*, C-SPAN, Sept. 26, 2017, <https://www.c-span.org/video/?433984-1/zarda-v-altitude-express-oral-argument/> [<https://perma.cc/Z6EH-HUF2>].

137. *Evans v. Georgia Regional Hospital*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/evans-v-georgia-regional-hospital/> [<https://perma.cc/YZ6G-MNW4>] (last visited Apr. 23, 2018).

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

wary of shortfalls in reasoning that come from conflating one's own judgment for that of another who occupies a substantially different reality.

Socially constructed biases and internalized norms carry with them considerable weight in every culture and for each person within that culture. The delicacy and vulnerability required for even a single individual to shed his or her own should inform compassion amongst those advocating for others to do so. The tragically divisive nature of contemporary politics all too often poisons the ability of public discourse to effectively examine vast numbers of social issues that substantially impact peoples' daily lives. Thus, it would seem to be a duty of those in the privileged position of influencing sociopolitical theory to temper rationales explicitly undercutting the wisdom of an institution such as the judiciary. The social and legal landscape of sexual orientation discrimination likely informed restraint by way of formalism in the *Hively* opinion. Similarly, smoldering social animus on a given issue—in an already severely contentious culture—should dissuade staunch indignation about the role of the courts, and the pace at which they incorporate progressive critiques of cultural norms. This is especially so when encouraging the courts to take a position that wide swaths of the population and other branches of the government have yet to adopt or even explicitly reject.

The holdings in *Hively* and *Zarda* are, as Soucek observed, historic. As the Supreme Court has declined to review the issue, arguments on both sides will no doubt continue to be the focus of substantial political attention.¹³⁹ This issue and others like it will continue to come before the courts, and advocates will continue to ask judges to come down on one of two socially charged sides. It seems, therefore, that we owe it to the judiciary and to ourselves to examine how our own approach to advocacy can prevent driving members of our society further and further apart. In light of the weight that we as a culture—and our legal institutions by design—place on the shoulders of the judiciary, it behooves those of us seeking the courts involvement in decisions that are substantially politicized to be cognizant of the judiciary's reality. The often-perilous duty of the courts—to say what the law is—should inform reflective critique that takes into account the relevant contextual realities the judiciary cannot lightly shed. A holistic view of the role of our courts, and the ecology within which the judiciary functions, should disabuse observers of hazardous assumptions and expectations that may be read into critiques of how they perform their role. A position of unreserved criticism is self-defeating as it blinds the critic to the subtle value and substance of that which is criticized, and may close off consideration of valuable rationales that would otherwise have been apparent.

The tribal trajectory our public discourse is on should impel those working toward universal equality to embrace parallel progress in realms other than their own, and should inform compassion for—rather than judgment of—the

139. Mark Joseph Stern, *Appeals Court Rules Anti-Gay Employment Discrimination is Already Illegal Under Federal Law*, SLATE, Feb. 26, 2018, <https://slate.com/news-and-politics/2018/02/second-circuit-rules-title-vii-bars-anti-gay-discrimination-in-zarda.html/> [<https://perma.cc/DJB7-LKJP>].

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means by which others find their way. Judgment, by definition, creates distance between those who exercise it and those upon whom it is placed. It would seem that distance is the last thing that we need between advocates in different spheres of our legal system, each attempting to ensure justice is done to the best of their own ability and within their own reality.