

## STATUTORY ORIGINALISM AND LGBT RIGHTS

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*In the wake of marriage equality, LGBT claims to employment rights have taken center stage in the struggle for LGBT equality. Raising claims under federal sex discrimination law, advocates have argued that anti-LGBT discrimination is, necessarily, also sex discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”). Such claims have seen increasing success in the federal courts as biases against the LGBT community have receded, allowing courts to recognize the textual and doctrinal logic of such sex discrimination claims. As victories in the lower courts have accumulated, the LGBT employment discrimination issue has increasingly seemed poised to be the next major LGBT equality issue to reach the Supreme Court.*

*But a new argument has also arisen to dispute LGBT Title VII claims, sounding in “statutory originalism.” Arguing that the meaning of Title VII ought to be judged by reference to its “original public meaning”—and that the original public in 1964 would not have thought that anti-LGBT discrimination was proscribed—opponents of LGBT inclusion have contended that such sex discrimination claims cannot be allowed. In making these arguments, opponents have endeavored to sidestep well-established textualist case law that rejects virtually identical arguments when made under the rubric of congressional expectations or intent.*

*This Article contends that the “original public meaning” approach raised by opponents of LGBT inclusion is neither so distinctive, nor so uncontroversial, as its proponents have suggested. “Original public meaning” itself is a modality of statutory interpretation that has almost no pedigree in the federal statutory interpretation case law. And yet the arguments of its proponents do bear a striking resemblance to*

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*another well-established, but now discredited approach: looking to the expectations or intent of Congress to limit broad and unambiguous statutory text. Moreover, the specific approach to “original public meaning” taken by opponents of LGBT inclusion—looking to “original expected applications”—is one that should concern both civil rights advocates and originalists alike. Thus, courts ought to reject the novel “original public meaning” arguments that have been raised in opposing LGBT employment equality claims.*

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#### I. INTRODUCTION

In the wake of marriage equality, employment discrimination protections have become the new frontier of LGBT equality.<sup>1</sup> Long without explicit protections under federal employment discrimination law, LGBT litigants have argued that anti-LGBT discrimination is—under traditional textualist principles and doctrines of anti-discrimination law—also, necessarily, sex discrimination.<sup>2</sup> As biases against the LGBT community have retreated, courts have increasingly recognized the textual and doctrinal logic of such claims, finding anti-LGBT discrimination to be actionable as sex discrimination under Title VII.<sup>3</sup> As victories in the lower courts have accumulated, LGBT employment rights has increasingly seemed

1. See, e.g., Jennifer Calfas, *Employment Discrimination: The Next Frontier for LGBT Community*, USA TODAY (July 31, 2015, 7:13 PM), <https://www.usatoday.com/story/news/nation/2015/07/31/employment-discrimination-lgbt-community-next-frontier/29635379/>.

2. For an extended discussion of these issues, see generally Katie R. Eyer, *Lesbian, Gay, Bisexual and Transgender Employees*, in LEGAL ISSUES AFFECTING GAY, LESBIAN BISEXUAL TRANSGENDER CLIENTS (forthcoming); Katie R. Eyer, *Sex Discrimination and LGBT Equality*, AM. CONST. SOC’Y FOR L. & POL’Y (Aug. 2017), [https://www.acslaw.org/wp-content/uploads/2018/04/Sex\\_Discrimination\\_Law\\_and\\_LGBT\\_Equality.pdf](https://www.acslaw.org/wp-content/uploads/2018/04/Sex_Discrimination_Law_and_LGBT_Equality.pdf) (describing federal sex discrimination protections and analyzing how those protections might extend to sexual orientation and gender identity).

3. See sources cited *supra* note 2.

poised to become the next major LGBT rights issue to reach the Supreme Court.<sup>4</sup>

The rise in the success of LGBT employment claims has been accompanied by the rise of a new counterargument, couched in the language of “statutory originalism.”<sup>5</sup> Thus, some defendants have argued—and some concurring and dissenting judges have endorsed—the notion that the scope of statutory protections under federal anti-discrimination law should be limited to the “original public meaning” of such laws.<sup>6</sup> In the context of Title VII, such arguments are being deployed to contend that, because the general public in 1964

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4. For currently pending cases in which the parties have sought certiorari review, see Petition for Writ of Certiorari, *Bostock v. Clayton County*, No. 17-1618 (May 25, 2018); Petition for Writ of Certiorari, *Altitude Express, Inc. v. Zarda*, No. 17-1623 (May 29, 2018); Petition for Writ of Certiorari, *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 17A-1267 (July 20, 2018).

5. For an early discussion of statutory originalism in the LGBT context, see generally Josh Blackman, *Statutory Originalism*, JOSH BLACKMAN’S BLOG (Feb. 26, 2017), <http://joshblackman.com/blog/2017/02/26/statutory-originalism/>. Note that Blackman’s argument was made in the context of discussion of the *G.G. v. Gloucester County School Board* case—a case involving administrative deference under Title IX. See *G.G. v. Gloucester County School Board*, 822 F.3d 709, 717–23 (4th Cir. 2016), *judgment vacated* 137 S. Ct. 1239 (2017). Although many of the arguments that could be made for and against the statutory originalism argument in the Title IX context are similar to those that can be made under Title VII, there are a few important differences, especially in the context of disputes over gender identity appropriate access to sex-segregated facilities like restrooms (at issue in *G.G.*). See Blackman, *supra*. For this reason, Blackman’s account is not the focus of my critique herein.

6. See, e.g., Wittmer v. Phillips 66 Company, 915 F.3d 328, 334–36, n.1 (5th Cir. 2019) (Ho, J., concurring); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 137, 143–56 (2d Cir. 2018) (Lynch, J., dissenting); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 359–63 (7th Cir. 2017) (Sykes, J., dissenting); *Altitude Express Petition for Writ of Certiorari*, *supra* note 4, at 14–18; Reply Brief for Petitioners, *Altitude Express v. Zarda*, No. 17-1623, at \*8–9 (Sept. 4, 2018); Brief of Court-Appointed Amicus Curiae, *Wittmer v. Phillips 66 Co.*, No. 18-20251, at 10–15 (5th Cir. Dec. 26, 2018); Brief of the States of Arkansas, et al., as Amici Curiae in Support of Appellee, *Horton v. Midwest Geriatric Management, LLC*, No. 18-1104, at \*6–7 (8th Cir. June 13, 2018); En Banc Brief of Court-Appointed Amicus Curiae, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775), at 6–8; see also *Bostock v. Clayton County Georgia*, No. 17-1618, at 18–19 Aug. 10, 2018 (making a similar argument without relying on the term “original public meaning,” instead relying only on the “ordinary, contemporary, common meaning” canon discussed *infra* Part IV); *Harris Funeral Homes Petition for Writ of Certiorari*, *supra* note 4, at 25–27; Respondent’s Brief in Opposition to Petition for Writ of Certiorari, (same); *Horton v. Midwest Geriatric Management, LLC*, No. 18-1104, at \*23–31 (8th Cir. Jun. 5, 2018) (same); Responsive Brief of Appellee *R.G. & G.R. Harris Funeral Homes, Inc.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16–2424, at \*24–28 (6th Cir. May 17, 2017) (same); Brief for the States of Nebraska et al. as Amicus Curiae in Support of Petitioner, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, No. 18–107 (Aug. 23, 2018) (making a similar argument under the rubric of “original public understanding”).

would not have understood anti-LGBT discrimination to be covered by Title VII's proscription on discrimination "because of . . . sex," such claims must be rejected today.<sup>7</sup>

Ironically, the need for such arguments by opponents of LGBT inclusion under Title VII<sup>8</sup> has arisen precisely because of the success of the textualist statutory interpretation project of prominent originalists like Justice Scalia.<sup>9</sup> Arguing that statutory language must always be paramount, many prominent originalists/textualists have been leading critics of principles of statutory interpretation that might permit a deviation from broad statutory text based on subjective congressional expectations or intent.<sup>10</sup> The increasing influence of this truly textualist approach to statutory interpretation has succeeded in largely delegitimizing what was once seen as a legitimate "originalist" mode of statutory interpretation: disqualifying a particular application of the law (otherwise within its text), based on what a court thinks Congress would have anticipated

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7. See sources cited *supra* note 6.

8. I self-consciously use the term "opponents of LGBT inclusion under Title VII" rather than "opponents of LGBT equality" to describe those who have invoked "original public meaning," since many of the judges who have dissented in the recent LGBT rights cases have proclaimed their personal interest in seeing LGBT equality legally secured. See *Zarda*, 883 F.3d at 137 (Lynch, J., dissenting) ("Speaking solely as a citizen, I would be delighted to awake one morning and learn that Congress had just passed legislation adding sexual orientation to the list of grounds of employment discrimination prohibited . . ."). Having no reason to doubt the sincerity of those affirmations, I rely on the neutral term "inclusion" to connote their opposition to the inclusion of anti-LGBT discrimination under Title VII's protections. Hereafter, for linguistic ease, I use the shortened phrase "opponents of LGBT inclusion," with the understanding that the target of that language is opposition to inclusion under Title VII.

9. See *infra* notes 10–13 and accompanying text. As discussed *infra* notes 98–104, the rise of textualism has certainly not been complete, especially in its more radical ambitions. But textualism has significantly changed dominant approaches to federal statutory interpretation. *Id.* And among the most uncontroversial and widely agreed-upon of textualist principles are those that decline to permit Congress's subjective or imagined expected applications to trump broad and unambiguous text. See, e.g., *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) (unanimous opinion expressing this principle); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211–12 (1998) (same).

10. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 101–06 (2012); see also Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997, 997–99 (2011) (describing Justice Scalia's strong opposition to statutory interpretation elevating congressional purpose or intent over text).

or desired.<sup>11, 12</sup> In the context of the LGBT cases, this approach has dramatically undermined what was once a common basis for rejecting LGBT litigants' claims.<sup>13</sup>

As such, opponents of arguments for LGBT inclusion have had to turn to a new framing, made possible by the shift in leading theories of originalism from a focus on the intent of the Constitution's authors (the founders) to a focus on "original public meaning" as the metric of originalist interpretation.<sup>14</sup> Arguing that the "original public" would neither have expected, nor desired, Title VII's sex discrimination protections to reach the LGBT community, such opponents have contended that such an interpretation of the law must therefore be disallowed.<sup>15</sup> In so framing the issue, opponents attempt to sidestep decisions (many authored by Justice Scalia himself<sup>16</sup>), which reject virtually identical arguments about the relationship of text to expected application (albeit historically, congressional expectations) in the statutory interpretation context.<sup>17</sup>

Importantly, this argument—which is often treated by its proponents as a well-established modality of statutory interpretation<sup>18</sup>—is not nearly so established as its proponents' rhetoric would suggest. The Supreme Court has only once invoked "original public meaning" in the statutory interpretation context—and never in support of the "original expected applications" approach that opponents of LGBT inclusion put forth.<sup>19</sup> Outside of the Court,

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11. Most modern "originalists" would likely reject subjective congressional expectations or intent as the metric of originalism in the statutory interpretation context, but as others have observed, such an approach is certainly "originalist" in the ordinary meaning of the term. See, e.g., Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1078–79 (1992) (characterizing "originalism" in statutory interpretation as "asking how the enacting Congress would have decided the question" and contrasting that with the textualist methodology of judges like Justice Scalia).

12. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211–12 (1998); see also SCALIA & GARNER, *supra* note 10, at 101–05 (discussing *Oncale* and *Yeskey*).

13. See discussion *infra* Part III.

14. See generally Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 379–80 (2013) (describing the shift in originalism from a focus on the framers to an "original public meaning" approach).

15. See sources cited *supra* note 6.

16. See *Oncale*, 523 U.S. at 78; *Yeskey*, 524 U.S. at 209.

17. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 144 n.7 (2d Cir. 2018) (Lynch, J., dissenting) (deriding the majority and concurrence for citing to *Oncale* when the dissent is not arguing that congressional expectations must control, but rather those of the public); En Banc Brief of Court-Appointed Amicus Curiae, *supra* note 6, at 9 (distinguishing *Oncale* based on the "original public meaning of Title VII"); Petition for Writ of Certiorari, *Altitude Express, Inc. v. Zarda*, No. 17-1623 (May 29, 2018), at 18 (distinguishing *Oncale* from the original public meaning approach).

18. See sources cited *supra* note 6.

19. See discussion *infra* Part IV.

only a tiny number of judges have ever invoked “original public meaning” in any statutory interpretation context—and most of those judges have been dissenters in the recent LGBT discrimination cases.<sup>20</sup> Although the concept of “original public meaning” sounds familiar to many—as it has become the centerpiece of modern academic originalist theories<sup>21</sup>—it is a term of art that has virtually no pedigree in federal statutory interpretation.<sup>22</sup> And, although enactment-era history undoubtedly plays a significant role in federal statutory interpretation—allowing plausible claims that statutory interpretation is already at least partially “originalist” in nature—the “original public meaning” arguments deployed in the LGBT rights cases differ in key respects from the case law under which its proponents have suggested it is subsumed.<sup>23</sup> Thus, “original public meaning”—at least as applied in the LGBT rights cases—is not the established modality of statutory interpretation that its proponents have presented it as.

Conversely, the version of statutory originalism articulated in the LGBT cases should also be recognized as less distinctive than it purports to be. The basic ideas that undergird the version of statutory originalism argued in the LGBT cases—that a particular application of the law can be excised from a law’s broad text based on the subjective expectations of those at the time of enactment—are ones that have been repeatedly repudiated by contemporary statutory interpretation caselaw.<sup>24</sup> While proponents of “statutory originalism” in the LGBT rights cases have shifted the focus from Congress’s expectations to those of the general public, they have offered no normative argument for why the result ought to differ based on the identity of the group whose subjective expectations are the focus of inquiry.<sup>25</sup> If Congress must be held to the broad language it employed

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20. See discussion *infra* Part IV.

21. See, e.g., Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY* 12, 8, 15–17 (Grant Huscroft & Bradley W. Miller eds., 2011) (describing the turn in originalist thought from “original intentions” to “original public meaning”).

22. See *supra* notes 19–20 and accompanying text. Note that even including references from the constitutional law context, academic usage of the term far dwarfs its representation in federal caselaw. See *infra* note 125 and accompanying text (demonstrating that as of February 14, 2019, only 43 federal opinions of any kind have ever used the term “original public meaning,” whereas the term had been used 1,139 times in the law review literature). However, the term is especially rarely used in the statutory interpretation context, where it has almost no presence. See *supra* notes 19–20.

23. See discussion *infra* Part IV.

24. See sources cited *supra* note 12.

25. See, e.g., sources cited *supra* note 6. While academic theories of originalism have certainly offered a general defense of originalist-focused approaches, including in the statutory interpretation context, I am aware of no

(regardless of whether we believe it would have subjectively anticipated a particular application), it is far from clear why the public ought not to also be so constrained.<sup>26</sup>

This Article argues that it is vital that scholars and judges attend to this development—and take seriously efforts to instantiate this brand of statutory originalism. While, as noted *supra*, history already plays an important role in federal statutory interpretation, the version of statutory originalism put forward in the LGBT rights cases is novel and problematic. If adopted, it would provide a deceptively neutral—but practically deeply pernicious—framework for understanding statutory law. Because politically unpopular applications of the law will rarely be within the original expectations of the public, writing such applications out of the law may narrow the law’s protections to only those groups and contexts that command the widest public support, divesting the marginalized of the law’s equal regard. So too, it is far from clear that the *form* of statutory originalism proposed in the LGBT rights cases—so-called “expected applications” originalism—is one that even most originalists would endorse. Moreover, as this points up, “original public meaning” is an academic term of art with diverse and contested meanings, and thus one that rule of law values should caution against importing uncritically into the statutory interpretation case law.

Three final preliminary observations are worth emphasizing before proceeding to the substance of the analysis. First, while this Article takes issue with the novel “original public meaning” approach argued in the LGBT Title VII cases, it does not dispute that history plays a variety of well-established roles in statutory interpretation. While there may be debates over how consistently history ought to

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work defending the “original expectations” approach taken in the LGBT rights cases, nor explaining why it is defensible in view of its close resemblance to discredited congressional expectations approaches. See discussion *infra* Parts II–IV (describing in greater detail the approach taken in the LGBT rights cases and its resemblance to now-discredited congressional expectations approaches); cf. Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 COLO. L. REV. 1, 3–4 (2004) (describing the democratic and rule of law values that proponents of originalism have put forward in support of both constitutional and statutory originalism, none of which speak to the “original expectations” approach of the LGBT rights cases). Proponents of “original public meaning” in the LGBT rights cases themselves certainly have offered no such defense, simply (erroneously) stating or implying that “original public meaning” is a well-established modality not requiring any *de novo* defense. See, e.g., sources cited *supra* note 6.

26. In the constitutional context, one rejoinder might be that the public understanding is what matters, because the public serves as “ratifiers.” See, e.g., Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 251–52 (2009) (describing originalists’ arguments). But in the context of statutory enactment, this argument makes little sense, because—at least in the federal system—the public plays no role in statutory enactment.

control contemporary statutory meaning (as, for example, where contemporary context or definitions might point to a different interpretation than enactment-era sources), this Article takes no position on those debates.<sup>27</sup> Rather, the contention of this Article is that the invocation of “original public meaning” in the recent LGBT rights cases is *not* subsumed within any of the established ways of considering history in statutory interpretation, even assuming those established ways of considering history should control here.<sup>28</sup>

Second, and relatedly, this Article takes as its starting point a posture that does not contest most of the core arguments of proponents of “original public meaning” in the LGBT Title VII cases. It does not contest (though it could be contested) that the appropriate time frame for determining the proper understanding of the statutory terms of Title VII is 1964.<sup>29</sup> It does not contest (though it could be contested) that case law and subsequent statutory amendments should—to the extent they depart from the historical meaning—play no role in how we understand those terms.<sup>30</sup> It does not contest (though it could be contested) that “sex” in 1964 meant a narrow version of “biological sex.”<sup>31</sup> Rather, this Article takes all of these contestable propositions as its starting point and argues that *even if they are true*, opponents’ “original public meaning” arguments still represent a novel—and illegitimate—attempt to privilege subjective expectations over text.<sup>32</sup>

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27. See, e.g., James J. Brudney, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 511–512 (2013); William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987); see also Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1342 (2018) (describing the perspective of a sample of contemporary lower court judges with respect to judicial “updating”).

28. See discussion *infra* Part IV.

29. See, e.g., William N. Eskridge, Jr., *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 340–42 (2017); see also *supra* note 27 and accompanying text.

30. See, e.g., Eskridge, *supra* note 29, at 341–92; see also sources cited *infra* note 33.

31. See, e.g., *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526–27 (D. Conn. 2016). Opponents of LGBT inclusion typically assume that “biological sex” itself is a stable and binary concept, an assumption that is substantially complicated by the scientific literature. See, e.g., Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 266–69 (1999); Audrey C. Stirnitzke, Note, *Transsexuality, Marriage, and the Myth of True Sex*, 53 ARIZ. L. REV. 285, 296 (2011). For the purposes of this Article, I take as my starting point the oversimplified construct adopted by opponents of LGBT inclusion, addressing their argument on its own terms.

32. See discussion *infra* Part II.



Finally, it should be noted that there are a whole host of interpretive and jurisprudential arguments that could be made in favor of LGBT inclusion that are not engaged with at all in this Article.<sup>33</sup> This Article focuses on textualist arguments alone because its object is to demonstrate that opponents' "original public meaning" approach violates core principles of textualism, in particular those that have rejected the use of "expected applications" to limit otherwise broad statutory text. There are a host of other arguments that could be made—for example, based on precedent, based on the evolution of the statute, based on scientific understandings of sex—that also support the contention that anti-LGBT discrimination is "because of . . . sex."<sup>34</sup> But as this Article demonstrates, the courts need go no further than a simple, straightforward textual analysis to conclude that anti-LGBT discrimination is "because of . . . sex"—and to reject opponents' "original public meaning" claims.<sup>35</sup>

This Article addresses the forgoing issues in four parts. Part II begins by defending the claim that "original public meaning," as deployed in the LGBT rights cases, seeks to excise a particular application of broad text based on presumed public expectations, a practice virtually identical to the discredited "congressional expectations" approach. Part III turns to the history of the LGBT rights cases and explains why the rise of textualism, coupled with other legal and social changes, has necessitated resort to this new "original public meaning" argument for those who disagree with arguments for LGBT inclusion under Title VII. Part IV demonstrates that "original public meaning" originalism—at least as deployed in the LGBT rights cases—is indeed a new modality of statutory interpretation and is not subsumed in the well-established statutory interpretation modalities that its proponents have claimed. Finally, Part V describes the reasons why diverse constituencies—from civil rights advocates to, potentially, originalists themselves—should be concerned about the "original public meaning" approach set forth in the LGBT rights cases.

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33. See, e.g., Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 115 MICH. L. REV. 809, 812–14 (2017); Eskridge, *supra* note 29, 331, 333; Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 395 (2001); Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1308 (2012); Brian Soucek, *Hively's Self-Induced Blindness*, 127 YALE L.J.F. 115, 116 (2017); Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964*, 18 TEMPLE POLIT. & CIVIL RIGHTS REV. 573 (2009). For my own prior work, see sources cited *supra* note 2.

34. See, e.g., sources cited *supra* note 33.

35. See discussion *infra* Parts II–IV.

## II. “ORIGINAL EXPECTATIONS” OR THE “ORIGINAL MEANING” OF TEXT?

Because proponents of “original public meaning” in the LGBT rights cases have described their arguments in a variety of ways, it is worth beginning by defending the claim that—like the discredited “congressional expectations” approach—opponents seek to rely on subjective (or imagined) expectations to limit broad and unambiguous text.<sup>36</sup> As set out above, congressional expectations about where a statute would apply might once have been seen as a legitimate basis for finding that a textually broad statute should not apply to a particular context.<sup>37</sup> But that approach has been largely discredited by modern textualist caselaw, which has held that even unanticipated (and perhaps undesired) applications of a textually broad law still fall within its reach.<sup>38</sup> Thus, one important critique of the “original public meaning” approach is that it seeks to reinstitute a discredited approach to statutory interpretation, albeit with a slightly shifted focus (the “original public”) for its inquiry.<sup>39</sup>

Making this claim requires disentangling the historical/textualist aspects of opponents’ arguments from the expectations-focused aspects of those arguments in order to understand the “work” that each of these portions of opponents’ arguments do. As set out below, opponents of LGBT inclusion have often elided these two issues, seeking to cast their “original public meaning” claims as resting on a historical understanding of the word “sex.”<sup>40</sup> But, in fact, the truly textualist aspects of their argument do no work, as even if they are accepted, they still lead to a pro-LGBT equality result.<sup>41</sup> Rather, it is only by adopting an approach that

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36. When I refer to the “congressional expectations” approach herein, I am referring specifically to historical interpretation approaches which permitted subjective (or imagined) congressional expectations about the scope of a statute to limit its otherwise broad and unambiguous text—approaches that are, as set out *infra* largely discredited today. See *infra* notes 100–02 and accompanying text. I am not referring to every possible consideration of congressional expectations in order to understand textual meaning—one form of what Victoria Nourse has referred to as “legislative evidence.” See generally VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY (2016) (defending resort to “legislative evidence” in statutory interpretation). Despite the efforts of the late Justice Scalia, such legislative evidence remains a common part of what most judges consider in statutory interpretation. See, e.g., Gluck & Posner, *supra* note 27, at 1324–26.

37. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 465 (1892).

38. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998); *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 211–12 (1998).

39. Cf. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997) (in the context of constitutional law, positing a theory of preservation-through-transformation of status regimes).

40. See *infra* notes 55–56 and accompanying text.

41. See *infra* notes 59–69 and accompanying text.

closely resembles discredited theories of congressional expectations that proponents of statutory originalism can make claims for LGBT exclusion.<sup>42</sup>

This can be seen most clearly by starting with a straightforward textual analysis of Title VII's language, which proscribes discrimination "because of . . . sex."<sup>43</sup> The Supreme Court has stated that the "ordinary meaning" of "because of" connotes but-for causation.<sup>44</sup> And, as an increasing number of adjudicators have recognized, anti-LGBT discrimination is always "but-for" sex.<sup>45</sup> Thus, a lesbian who is fired for marrying a woman would not have been fired had she engaged in identical conduct as a man. So too a transgender woman who is not hired because she wore a dress to her interview, would have been hired but for her perceived sex (male). Because sexual orientation and gender identity discrimination are inextricably bound up in expectations about how men and women

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42. See *infra* notes 70–76 and accompanying text.

43. 42 U.S.C. § 2000e-2(a)(1) (2012) (making it unlawful to "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.")

44. See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013) (reading "because of" to connote "but for" causation); *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176–77 (2009) (same); see also *Burrage v. United States*, 571 U.S. 204, 212–14 (2014) (making a similar observation in the criminal law context); *Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (invalidating an employment practice on the grounds that "[s]uch a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different'"); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (summarily reversing the Fifth Circuit Court of Appeals' determination that discrimination against mothers with young children was not "because of sex," because it did not discriminate against women as a class).

45. See, e.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575–77 (6th Cir. 2018) (embracing this reasoning in the gender identity context); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 116–19 (2d Cir. 2018) (embracing this reasoning in the sexual orientation context); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345–47 (7th Cir. 2017) (en banc) (embracing this reasoning as to both sexual orientation and gender identity discrimination); *Smith v. Salem*, 378 F.3d 556, 574 (6th Cir. 2004) (embracing this reasoning in the gender identity context); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (same); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1161 (C.D. Cal. 2015) (embracing this reasoning in the sexual orientation context); *Hall v. BNSF Ry. Co.*, 2014 WL 4719007, at \*5 (W.D. Wash. 2014) (embracing this reasoning in the sexual orientation context); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307–08 (D.D.C. 2008) (adopting a similar theory in the gender identity context); *Baldwin v. Foxx*, Appeal No. 0120133080, at \*5 (EEOC 2015) (embracing this reasoning in the sexual orientation context).

should behave, such discrimination is always—on a straightforward “but-for” approach—“because of” sex.<sup>46</sup>

It is important to note that this remains true even in circumstances where an employer discriminates against LGBT men and women alike. In each and every individual case, it remains true that the individual plaintiff would not have been subjected to discrimination had their sex been different (so, a lesbian woman would not have been subjected to discrimination by the employer were she a man attracted to women, and similarly, a gay man would not have been subjected to discrimination by the employer were he a woman attracted to men).<sup>47</sup> And while men and women as a class might suffer no differential harm in this scenario, as the Supreme Court has observed, the “plain language” of Title VII makes clear that this is irrelevant.<sup>48</sup> Rather, the language of Title VII tells us that the relevant question is whether there was an adverse employment action “because of *such individual’s . . . sex*”—*not* whether the employer’s action harms men or women as a group.<sup>49</sup>

Opponents of LGBT inclusion have attacked this straightforward reasoning—as well as other similarly well-founded textual and doctrinal arguments made by LGBT rights advocates—as unworkable on their own terms.<sup>50</sup> But recent cases have also seen the

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46. Judges, advocates and scholars have offered many other more sophisticated ways of demonstrating this, but one need not go further than this straightforward textualist analysis to conclude that anti-LGBT discrimination is “because of” sex. *See, e.g.*, sources cited *supra* note 33.

47. *But cf.* Brief of Court-Appointed Amicus Curiae, *Wittmer*, *supra* note 6 at 1–2 (positing the hypothetical of “Ashley” whose resume includes the statement “Ashley is proudly transgender” and is not hired on this basis alone and suggesting that this shows that anti-transgender discrimination is not inherently “because of” sex). Note that in addition to being exceedingly unlikely to occur in reality, the hypothetical prospective employee proffered by the court-appointed amicus in *Wittmer* would still have experienced discrimination “because of such individual’s . . . sex,” since the entire premise for the hypothetical—that they are transgender, and thus in some way not in conformity with the gender norms of their sex assigned at birth—would not exist were their birth sex different, and thus congruent with their gender presentation. Indeed, “gender identity” and “sexual orientation” are fundamentally incoherent concepts without reference to sex. Thus, it is literally impossible for an employer to engage in sexual orientation or gender identity without engaging in discrimination that is “because of . . . sex.” *Cf.* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240–42 (1989) (admonishing that sex must be “irrelevant,” and that it is unlawful under Title VII for employers to take sex “into account.”).

48. *See, e.g.*, *Manhart*, 435 U.S. at 708–09.

49. *Id.*; *see also* 42 U.S.C. § 2000e-2(a)(1) (2012) (making it unlawful for an employer to engage in adverse employment actions “because of *such individual’s* race, color, religion, sex or national origin.”) (emphasis added).

50. *See, e.g.*, *Zarda*, 883 F.3d at 143 (Lynch, J., dissenting); *Hively*, 853 F.3d at 363 (Sykes, J., dissenting); *Zarda* Petition for Writ of Certiorari, *supra* note 4, at 23–30. One of the major objections that has been proffered by opponents of LGBT inclusion is that this straightforward reasoning would invalidate other

rise of new arguments that “original public meaning” must control.<sup>51</sup> Specifically, opponents of LGBT inclusion have argued that “any literate American” or any “fluent speaker of the English language” would have understood Title VII as prohibiting discrimination against “women because they are women and men because they are men”—and not as prohibiting discrimination against the LGBT community.<sup>52</sup> Thus, they contend that this “original public meaning” of Title VII’s “because of . . . sex” language must control.<sup>53</sup>

It is entirely possible that it is descriptively accurate to claim that the public in 1964 would not have expected Title VII to proscribe discrimination against the LGBT community—although the success of Phyllis Schlafly’s claims that the Equal Rights Amendment (“ERA”) would proscribe anti-gay discrimination shortly thereafter, at least complicates that claim.<sup>54</sup> But the important question in assessing whether this is a truly new argument—and one consistent

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facially sex-based employment practices, like sex-separated restrooms, and sex-specific grooming and appearance codes. *See, e.g.*, Brief of Court-Appointed Amicus Curiae, *Wittmer*, *supra* note 6, at 15; *Wittmer*, 915 F.3d at 335–39 (Ho, J., concurring). This of course, is a policy argument, not a textualist one. As I have written elsewhere, there *are* possible textualist arguments for defending sex-separated restrooms and dress codes, but they do not reside in the meaning of “because of . . . sex,” but instead in Title VII’s requirement that any actionable discrimination affect “terms, conditions or privileges of employment.” 42 U.S.C. § 2000e-2(a)(1); *see also* Eyer, *Lesbian, Gay, Bisexual and Transgender Employees*, *supra* note 2, at 15–16 (discussing this issue). Whatever else can be said about such policies, there can be no doubt that they are, literally, “because of . . . sex” (just as Jim Crow restrooms were literally “because of . . . race.”) Whether alternative arguments founded in Title VII’s “terms and conditions” ought to prevail in preserving such other sex-based workplace policies is an issue I do not address herein.

51. *See* sources cited *supra* note 6.

52. *See Zarda*, 883 F.3d at 143 (Lynch, J., dissenting); *Hively*, 853 F.3d at 363 (Sykes, J., dissenting). There are multiple problems with this reasoning, including that the Supreme Court has long since repudiated the idea that Title VII only prohibits discrimination against “men as men” or “women as women.” *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) (Title VII’s “because of . . . sex” provision does not impose talismanic rules on sexual harassment law, but rather prohibits any sexual harassment—including that between men—that is because of sex); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (gender stereotyping is prohibited under Title VII). This Article does not fully elaborate on those critiques, as it is aimed exclusively at elaborating on the reasons why—even on its own terms—the statutory originalism argument is problematic.

53. *Hively*, 853 F.3d at 363 (Sykes, J., dissenting).

54. *See, e.g.*, Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 584–85 (1973) (discussing leading constitutional scholar Paul Freund’s argument during the ERA debates that the ERA would prohibit bans on same-sex marriage and expressing a similar view under *Loving v. Virginia*); *see also* Eskridge, *supra* note 29, at 349–52; Gillian Frank, *Phyllis Schlafly’s Legacy of Anti-Gay Activism*, SLATE (Sept. 6, 2006, 5:52 PM), [http://www.slate.com/blogs/outward/2016/09/06/phyllis\\_schlafly\\_s\\_legacy\\_of\\_anti\\_gay\\_activism.html](http://www.slate.com/blogs/outward/2016/09/06/phyllis_schlafly_s_legacy_of_anti_gay_activism.html).

with contemporary textualist approaches—is not whether the public would have understood the law to apply to a particular application, but *why*. If the reason why the original public would not have understood “because of . . . sex” to encompass anti-LGBT discrimination is because the meaning of those words—separately or in combination—has somehow changed, or represented a term of art, then one might credit “original public meaning” arguments as a distinctive textualist or originalist argument. But if the claim is instead one that simply draws upon our gut intuitions that the LGBT community was a discrete and stigmatized community, and thus the “original public” would not have imagined that they would be covered—even though discrimination against them was literally “because of . . . sex”—then it is difficult to see how advocates’ new “statutory originalism” approach differs meaningfully from the now-discredited “congressional expectations” approach.

Thus far, proponents of “statutory originalism” arguments in the LGBT rights cases have all made at least some effort to cast their claims as the former (i.e., as an argument about the changed meaning of words).<sup>55</sup> Thus, the judges and advocates that have invoked “original public meaning” in the LGBT rights cases have uniformly tried to link their arguments to 1960s era dictionary definitions of “sex,” contending that—under such definitions—“the word ‘sex’ means biologically male or female; it does not also refer to sexual orientation [or gender identity].”<sup>56</sup> (It is unclear what work history does in this argument, as many proponents have also argued that this is the “ordinary meaning” of “sex” today).<sup>57</sup> As others have explored, even this argument is problematic—there were broader understandings of sex that existed even in the 1960s, and Supreme Court precedent has, in any event, clearly rejected the narrow “biological” understanding of what is meant by “sex.”<sup>58</sup> However, this

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55. See *Zarda*, 883 F.3d at 145 (Lynch, J., dissenting); *Hively*, 853 F.3d at 362–63 (Sykes, J., dissenting); *Zarda* Petition for Writ of Certiorari, *supra* note 4, at 16; cf. Blackman, *supra* note 5 (making this argument with respect to the definition of “sex” vis-à-vis gender identity discrimination under Title IX); see generally sources cited *supra* note 6 (all making some efforts to cast their arguments in these terms).

56. *Hively*, 853 F.3d at 362–63 (Sykes, J., dissenting); see also sources cited *supra* note 55. As noted, *supra* note 31, I take as my starting point for my analysis herein the overly simplified conception of “biological sex” that opponents of LGBT inclusion adopt, despite the fact that it is of questionable scientific validity.

57. See, e.g., *Hively*, 853 F.3d at 362–63 (Sykes, J., dissenting) (“To a fluent speaker of the English language—then and now—the ordinary meaning of the word ‘sex’ does not fairly include the concept of ‘sexual orientation.’”).

58. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989); Eskridge, *supra* note 29, at 337–39; Franklin, *supra* note 33, at 1320–26 (discussing in great depth the history of early disputes over the meaning of Title VII’s sex discrimination provision); see generally Vicki Schultz, *Taking Sex*

definitional argument—while questionable on other grounds—is clearly an argument residing in textual meaning, not expected applications (and thus is arguably distinguishable from discredited contra-textual theories of congressional expectations).

But opponents’ “sex” argument is also an irrelevant argument.<sup>59</sup> Even if one embraces the narrowest historical definition of sex—as a “biological”<sup>60</sup> man or woman—discrimination based on sexual orientation or gender identity is still, as set out above, “because of” sex.<sup>61</sup> Because, as scholars such as Brian Soucek have reminded us, sex discrimination is inextricably bound up with expectations about how men and women should think and behave, it is always the case that the outcome in an LGBT discrimination case would have been different “but for” that individual’s sex.<sup>62</sup> A gay man who is fired because his employer discovers he is gay (and thus attracted to other men) would not have been fired were he a biological woman attracted to men. A transgender man who is terminated because his appearance is male—but his birth sex was female—would not have been fired if his sex assigned at birth had been male. Thus, it is the statutory phrase “because of” that does the work to bring LGBT

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*Discrimination Seriously*, 91 DENV. L. REV. 995 (2015) (discussing the history of the meaning of sex discrimination). Note of course that another possible response to this argument is that what is included in the meaning of expansive terms *ought* to vary with new developments and new understandings. The Supreme Court is not consistent with respect to how it approaches this issue, even when applying a professedly originalist approach. *Cf.* *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (characterizing the argument that the Second Amendment’s protection of the right to bear “arms” should be limited to those arms in existence at the time the Bill of Rights was ratified as “bordering on frivolous,” in an originalist constitutional opinion).

59. There are some arguments that have been made by LGBT rights advocates that do rely on understandings of sex, such as the argument that anti-transgender discrimination is literally sex discrimination because gender identity is a component of sex. *See, e.g.*, *Schroer v. Billington*, 424 F. Supp. 2d 203, 211–12 (D.D.C. 2006); *see generally* Weiss, *supra* note 33 (extensively developing arguments for transgender inclusion premised on the meaning of the term “sex”). There, the critiques of “original public meaning” arguments would be different, focused mostly on the set of issues that I leave aside for the purposes of this Article. *See supra* notes 29–33 and accompanying text. Regardless, proponents of statutory originalism have attempted to situate it as a response to the entirety of advocates’ claims that LGBT discrimination is “because of . . . sex,” not limiting the argument to those specific arguments relating to the definition of sex. *See* sources cited *supra* note 6. But, as set out below, it is irrelevant as to many of LGBT rights advocates’ arguments, including the most straightforward textualist ones. *See infra* notes 60–69 and accompanying text.

60. As described, *supra*, I have adopted opponents’ usage of this term—and narrow understanding of it—for the sake of argument. *See supra* note 31.

61. *See, e.g.*, *supra* notes 43–49 and accompanying text.

62. *See supra* notes 43–49; *see also* Soucek, *supra* note 33, at 121–23.

individuals within Title VII's protections—regardless of which definition of “sex” is employed.<sup>63</sup>

But here, of course, there is simply no textualist or originalist argument to be made. “Because of” meant the same thing in 1964 that it means today: “by reason of, on account of.”<sup>64</sup> The Court has repeatedly and without controversy—from the 1970s to the present—recognized that this, in its ordinary meaning, connotes (at least) actions that would not have been taken “but for” protected class status.<sup>65</sup> Indeed, to the extent there have been disputes on the Court regarding what “because of” might mean, they have centered on whether it ought to be given more capacious understanding (as requiring only a motivating factor)—disputes that, in any event, Congress resolved in favor of proponents of broader coverage under

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63. See *supra* notes 43–49 and accompanying text. Note that one of the statutory originalism proponents, the *Zarda* dissent, attempts to link its interpretation to yet another term in the statute, “discriminate,” contending that this word connotes a negative valence attached to sex (as in “discriminate against”). See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 137, 149 (2d Cir. 2018) (Lynch, J., dissenting). This argument is inconsistent with governing Supreme Court precedent making clear that the absence of bad motives does not matter where disparate treatment is present. See, e.g., *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197–200 (1991). It is also textually incoherent as a response to a hiring or firing claim. See 42 U.S.C. § 2000e-2(a) (2012) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . .”) (emphasis added). Similarly, the *Zarda* dissent’s argument that Title VII only extends to actions that disadvantage men or women as a class founders in the face of both the text of the statute (which imports no such requirement) and contrary Supreme Court precedent. See, e.g., *Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 708–10 (1978) (explicitly rejecting the notion that an employment action must discriminate against women as a class and stating that “but for” discrimination is proscribed).

64. See, e.g., WEBSTER’S THIRD NEW INT’L DICTIONARY 194 (1966) (defining “because of” to mean “by reason of; on account of”). The legal definition was the same. *Because*, BALLENTINE’S LAW DICTIONARY (1969) (defining “because” as “for the reason or cause that; on account of”).

65. See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013) (holding that Title VII’s language proscribing retaliation, which uses the language “because of,” connoted and thus required but-for causation); *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176–78 (2009) (holding that “because of” connotes “but-for” causation); *Manhart*, 435 U.S. at 711 (holding that Title VII is violated where “the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different’”); see also *Burrage v. United States*, 571 U.S. 204, 212–14 (2014) (drawing on *Gross* and *Nassar* in the criminal context). *Gross* and *Nassar* were controversial, but only because some Justices and commentators believed that “but-for” causation was too *high* of a standard; no Justice disputed that but-for causation would *suffice* to satisfy the statutory standard of “because of.”



Title VII.<sup>66</sup> But regardless, even the narrowest understandings of “because of”—as satisfied only by “but for” causation—do the work of demonstrating that anti-LGBT discrimination is “because of . . . sex.”

Thus, although proponents have attempted to elide this point through a slight of rhetoric—simply ignoring the work that “because of” does in LGBT rights advocates’ arguments—a truly text-focused “original public meaning” approach does not lead to the result that proponents seek.<sup>67</sup> Even under the narrowest historical definition of sex, anti-LGBT discrimination is still literally “because of . . . sex.”<sup>68</sup> While this might not have been an application that was subjectively expected at the time, there can be little question that it falls within the broad text of the statute.<sup>69</sup> It is only by simply ignoring the actual arguments that LGBT rights proponents have made (most of which *do not* depend on which understanding of “sex” is correct) that

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66. See *supra* note 65; see also 42 U.S.C. § 2000e-2(m)(2012) (codifying the “motivating factor” standard for liability under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989) (plurality opinion, joined by concurrences) (reaching the conclusion that the language “because of” could be read to allow mixed motives burden-shifting, although retaining an ultimate “but for” standard for liability).

67. See sources cited *supra* note 6.

68. See *supra* notes 61–66 and accompanying text. This conclusion of course conflicts not only with proponents of “original public meaning” but also with the conclusion reached by Judge Posner in *Hively*, where he contends that “[a] broader understanding of the word ‘sex’ in Title VII than the original understanding is thus required in order to be able to classify the discrimination of which *Hively* complains as a form of sex discrimination.” See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 355 (7th Cir. 2017) (Posner, J., concurring). Judge Posner, however, makes the same error that opponents of LGBT inclusion do when he ignores the fact that the important work is done by the term “because of,” not the term “sex.”

69. One could argue, as some recent dissenting judges have, that even if the words, on their own, might be given this meaning, we ought to consider the historical context in which Title VII was enacted—which, they suggest, makes clear that Title VII’s purpose was to prohibit discrimination against women. See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 138–43 (2d Cir. 2018) (Lynch, J., dissenting); see also *Zarda* Petition for Writ of Certiorari, *supra* note 4, at 18. Even if this could be characterized as a textualist instead of a purposivist argument (a questionable assertion), such an argument proves too much, since, as Bill Eskridge has pointed out, Title VII prohibits “classifications” instead of “protecting classes.” Eskridge, *supra* note 29, at 342–43. Thus, although discrimination against women was surely the central expected application of Title VII’s sex discrimination provision, it is equally clearly not the only application included by its text. And, no less authority than Justice Scalia has written for the Court that it is the text—rather than the narrower constraints of expected applications—that controls. *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (“[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But 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.”).

opponents of LGBT inclusion can claim that their “original public meaning” argument is textual in nature.

What then, is the work that proponents seek to have “original public meaning” do, when they claim that no “literate American” would have understood “because of . . . sex” to include claims to LGBT equality?<sup>70</sup> As the *Zarda v. Altitude Express, Inc.*<sup>71</sup> dissent makes clear, this is really a dispute about social context and our intuitions about what the social context of Title VII must tell us.<sup>72</sup> As the *Zarda* dissent lays out, at the time that Title VII was enacted, this country had yet to take its first steps towards meaningful LGBT equality.<sup>73</sup> Gay people were presumptive criminals in most states, legalized discrimination against them was common, and even most civil rights and civil liberties organizations did not meaningfully advocate for LGBT equality.<sup>74</sup> The implication is clear: in view of this history, we can know that the public (and Congress) viewed the LGBT community as a distinct and heavily stigmatized constituency—and thus would not, regardless of the literal meaning of Title VII’s words, have expected protections for the LGBT community to fall within Title VII’s expansive terms.

This argument—that the application of Title VII’s broad language to the LGBT community would not have been expected or approved of in 1964—is not new.<sup>75</sup> If it were 1979 or even 1999, most judges and advocates would have simply expressed their resulting conclusions in terms of Congress’s expectations or intent.<sup>76</sup> But, as described above (and as discussed in the following Part), insofar as congressional expectations were once deemed an appropriate basis for limiting broad text, this approach has been substantially discredited by the rise of textualism in statutory interpretation. The following Part describes the evolution of responses to LGBT equality claims and explains how the discrediting of contra-textual congressional expectations arguments has led to the rise of new “original public meaning” arguments.

### III. THE ROAD FROM “CONGRESSIONAL EXPECTATIONS” TO “ORIGINAL PUBLIC MEANING”

As described above, there have long been strong textual and doctrinal arguments for why anti-LGBT discrimination must be deemed sex discrimination under federal anti-discrimination law. Most basically, discrimination on the basis of LGBT status will also

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70. See *Zarda*, 883 F.3d at 143 (Lynch, J., dissenting).

71. 883 F.3d 100 (2d Cir. 2018).

72. *Id.* at 142 (Lynch, J., dissenting).

73. *Id.* at 140–42.

74. *Id.*

75. See cases cited *infra* note 80.

76. See cases cited *infra* note 80.

always necessarily be but for the victim's sex, and thus "because of . . . sex."<sup>77</sup> As modern courts have recognized, anti-LGBT discrimination also runs afoul of doctrinal prohibitions on gender stereotyping and violates associational discrimination and status conversion discrimination prohibitions.<sup>78</sup> Thus, under a host of textualist and doctrinal approaches, it is clear that, as a formal matter, anti-LGBT discrimination is "because of . . . sex."

Nevertheless, until fairly recently, courts regularly rejected such claims. Many such judges, like contemporary proponents of statutory originalism, purported to do so on textualist grounds, focusing only on the statutory term "sex," and ignoring the work that "because of" does to bring LGBT employees within the law.<sup>79</sup> But judges also frequently opined that—because there was no indication that Congress intended for LGBT employees to be covered by Title VII's sex discrimination provisions—the statute could not be construed to provide such coverage.<sup>80</sup> Thus, judges—rather than engaging meaningfully with the textual and precedent-based arguments that LGBT plaintiffs made—historically simply sidestepped such arguments, often focusing on presumed congressional intent.<sup>81</sup> Until 1989, such rejection was virtually uniform, with courts regularly rejecting LGBT claims to statutory equality under federal sex discrimination law.<sup>82</sup>

The stranglehold of these historical cases began to weaken for transgender plaintiffs in the aftermath of *Price Waterhouse v. Hopkins*;<sup>83</sup> the Supreme Court case that in 1989 recognized "gender stereotyping" as a form of sex discrimination.<sup>84</sup> Recognizing that

77. See *supra* notes 43–49 and accompanying text.

78. See sources cited *supra* note 2.

79. See cases cited *infra* note 80; see also *supra* notes 59–69 and accompanying text (making clear that it is "because of," not "sex," that does the work of LGBT inclusion). Notably, even where even the narrowest definitions of "sex" clearly would not obviate the claim—such as a disparate impact argument—courts fell back on subjective congressional intent. See, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 330–31 (9th Cir. 1979). For more recent cases adopting similar reasoning, see *infra* notes 87–88. For a law review article extensively critiquing this reasoning on its own terms, see Franklin, *supra* note 33.

80. See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084–85 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749–50 (8th Cir. 1982); *DeSantis*, 608 F.2d at 329–32; *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326–27 (5th Cir. 1978); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).

81. See cases cited *supra* note 80.

82. See cases cited *supra* note 80.

83. 490 U.S. 228 (1989).

84. See *Hopkins*, 490 U.S. at 250–51 (plurality); *id.* at 272 (O'Connor, J., concurring) (describing the evidence of gender stereotyping in *Hopkins*' case as evidence that her sex played a role in the decision, and characterizing that as actionable); see also Eskridge, *supra* note 29, at 369, 369 n.180 (noting that a

*Price Waterhouse* “eviscerated” the reasoning of many prior anti-LGBT precedents, individual courts began to recognize that if Ann Hopkins was protected against gender stereotyping, so too transgender plaintiffs must be so protected.<sup>85</sup> Because, as one court observed, “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes,” many courts saw no meaningful basis for refusing to apply gender stereotyping case law to anti-transgender discrimination.<sup>86</sup> Nevertheless, in the sexual orientation context, courts continued to draw a sharp distinction between sexual orientation discrimination (not prohibited) and (prohibited) gender

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majority of the Supreme Court in *Hopkins* “held that an employer decision grounded in prescriptive stereotypes about women . . . constituted discrimination because of sex,” and that the “six Justice *Hopkins* majority splintered on issues of proof”).

85. See, e.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572 (6th Cir. 2018); *Barnes v. Cincinnati*, 401 F.3d 729, 735–37 (6th Cir. 2005); *Smith v. Salem*, 378 F.3d 566, 573–75 (6th Cir. 2004); *Mickens v. Gen. Elec. Co.*, No. 3:16CV-00603-JHM, 2016 WL 7015665, at \*3 (W.D. Ky. Nov. 28, 2016); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1011–14 (D. Nev. 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 521–27 (D. Conn. 2016); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 787–88 (D. Md. 2014), *dismissed on other grounds*, 640 Fed. Appx. 245 (4th Cir. 2016); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307–08 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 658–61 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173, at \*2 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03–CV–0375E(SC), 2003 WL 22757935, at \*4 (W.D.N.Y. Sept. 26, 2003); *Macy v. Holder*, Appeal No. 0120120821, at \*6–7 (EEOC 2012), <https://www.eeoc.gov/decisions/0120120821.txt>; see also *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047–50 (7th Cir. 2017) (similar reasoning under Title IX); *Dodds v. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (similar reasoning under Title IX); *Glenn v. Brumby*, 663 F.3d 1312, 1316–20 (11th Cir. 2011) (similar reasoning under the equal protection clause); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (similar reasoning under the Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (similar reasoning under the Gender Motivated Violence Act); cf. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345–47 (7th Cir. 2017) (embracing this reasoning as to both sexual orientation and gender identity discrimination in a sexual orientation case).

86. *Glenn*, 663 F.3d at 1316. Although *Glenn* is a constitutional employment case, it drew extensively on Title VII precedents and its reasoning has been relied on in subsequent Title VII cases. See *id.*; see also, e.g., *Macy*, Appeal No. 0120120821, at \*6–7 (drawing extensively on *Glenn*).

stereotyping.<sup>87</sup> And even in the transgender context, some courts continued to attempt to divine a line between the two.<sup>88</sup>

Three decades have passed since *Price Waterhouse*, and in that time, three trends have converged to fatally undermine the traditional judicial response to LGBT sex discrimination claims: (1) a rise in the social and legal acceptance of the LGBT community, which has rendered claims to LGBT equality normatively plausible; (2) a rise in textualism as a leading modality of federal statutory interpretation; and (3) increasingly meaningful engagement by judges with the textualist and precedent-based arguments of LGBT rights advocates. As set out below, taken together, these three trends have eviscerated the traditional arguments for excluding LGBT employees from Title VII's sex discrimination coverage.

In relation to the first trend, it is unsurprising, as Professor Bill Eskridge has argued, that—in an era when the LGBT community was perceived as immoral presumptive criminals—courts found claims to statutory equality unintelligible.<sup>89</sup> Because LGBT status was widely understood as a normatively valid basis for “discrimination”—in the sense of differentiation or distinction—courts naturally found claims of entitlement to anti-discrimination protections normatively implausible.<sup>90</sup> This normative backdrop served as a serious obstacle to formal arguments for equality under statutory law, as they appeared to render such claims substantively unjustified, and even normatively absurd.<sup>91</sup>

But as the social and legal backdrop has shifted—towards full acceptance and inclusion for the LGBT community—this normative baggage has largely dropped away.<sup>92</sup> Gays and lesbians are no longer

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87. See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at \*4 (6th Cir. Jan. 15, 1992). Courts during this era also increasingly relied on a different type of congressional intent argument—that we know from subsequent failed attempts to enact ENDA, or other legislation explicitly protecting the gay community, that Congress did not intend for sexual orientation discrimination to be prohibited by Title VII. See, e.g., *Bibby*, 260 F.3d at 261 (noting that although there is relatively little legislative history of Title VII's sex discrimination provision itself “Congress has [since] repeatedly rejected legislation that would have extended Title VII to cover sexual orientation”). This argument is a distinctive congressional intent argument from the one addressed herein, which must be addressed on its own terms. For some responses, see Eskridge, *supra* note 29, at 389–90; sources cited *supra* note 2.

88. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–25 (10th Cir. 2007).

89. See Eskridge, *supra* note 29, at 335–36, 352.

90. *Id.*; see also cases cited *supra* note 80.

91. See cases cited *supra* note 80.

92. This is of course not universally true. There remains resistance to LGBT equality. See, e.g., Kyle Velte, *All Fall Down: A Comprehensive Approach to*

presumptive criminals, legally assumed to be unfit for raising even their own children.<sup>93</sup> Transgender individuals—while still stigmatized by some—are much more widely understood in sympathetic and non-pathologized terms.<sup>94</sup> Thus, to many today, it is the normative claims of LGBT litigants to equality—rather than the normative claims against the LGBT community—that appear compelling.<sup>95</sup>

A second trend has been as critical as the first to the increasing success of LGBT sex discrimination claims: the rise of textualist modalities of statutory interpretation. There can be little doubt—as courts once often observed—that Congress in 1964 did not expect that its actions would afford protections to the LGBT community via sex discrimination law and that it would probably not have wanted to do so had it been asked.<sup>96</sup> Under the modalities of statutory interpretation dominant in the 1970s and 1980s—under which subjective congressional expectations or intent were viewed as a proper basis for excluding applications of a textually broad statute—this arguably could (and often did) prove fatal to the claims of LGBT employees.<sup>97</sup>

But, as noted previously, the past several decades have seen a significant shift away from such methodologies.<sup>98</sup> Led by textualists

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*Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 4–5 (2016). But, as described *infra*, the center of gravity has shifted away from views of discrimination against the LGBT community as normatively justified. See *infra* notes 93–95 and accompanying text.

93. See, e.g., *Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015); *Lawrence v. Texas*, 539 U.S. 558, 567, 578–79 (2003).

94. Although there has not yet been a constitutional revolution in the transgender context of the scope that we have seen in the sexual orientation context, there too, views have shifted considerably in recent decades. For a recent global survey, see *Global Attitudes Toward Transgender People*, IPSOS (Jan. 29, 2018), <https://www.ipsos.com/en-us/news-polls/global-attitudes-toward-transgender-people>.

95. *Id.*; see also *Gay and Lesbian Rights: Gallup Historical Trends*, GALLUP, <http://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Jan. 5, 2019).

96. Eskridge, *supra* note 29, at 326, 335–36.

97. See cases cited *supra* note 80.

98. The turn towards textualism has no doubt not been complete, nor has textualism succeeded in its most radical ambitions (for example, to eliminate resort to legislative materials). See, e.g., Gluck & Posner, *supra* note 27, at 1301–02; Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 415–19, 421 (2015); see also Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 6–7 (2018) (observing that although textualism has had an impact on all levels of the federal judiciary, it has had the largest impact on the Supreme Court, and the lower courts often rely more on other tools of statutory interpretation, such as precedent). But as to the critical question of whether *Holy Trinity* style statutory interpretation is permissible—in which a

like Justice Scalia, the textualism revolution has been so successful as to lead even prominent progressives to proclaim that “we’re all textualists now.”<sup>99</sup> Unlike during the initial era of LGBT rights cases, few judges or advocates would argue today that congressional purpose or expectations can trump broad and unambiguous statutory text.<sup>100</sup> Moreover, textualist precedents have specifically acknowledged that unanticipated—and perhaps even undesired—applications of a textually broad statute may result from such an approach, but they have nevertheless held that such applications may not be excluded.<sup>101</sup> Thus, while textualism has not succeeded in all of its most radical ambitions, it has dramatically undermined approaches that privilege subjective (or imagined) congressional expectations over text.<sup>102</sup>

This turn towards textualism—and towards limiting the permissible relevance of subjective congressional expectations or intent—has had important implications for LGBT equality claims under Title VII. As noted above, the statutory language of Title VII—“because of . . . sex”—literally includes anti-LGBT discrimination.<sup>103</sup> It is only by ignoring the words of the statute—in favor of what judges have imagined Congress would have expected or anticipated—that such discrimination has been treated as outside the statute’s scope.<sup>104</sup> Thus, developments in statutory methodology have also severely undermined the formal justifications that courts have traditionally offered for rejecting LGBT sex discrimination claims.

Finally, it has also been important that courts have begun in recent years to engage much more meaningfully with LGBT rights advocates’ textualist and precedent-based claims. Historically, courts often engaged relatively little with LGBT rights advocates’ arguments, often summarily relying on their understanding of the term “sex” and the presumed intent of Congress to reject such

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court to reach contra-textual outcomes and ignores otherwise clear broad text because of congressional expectations or intent—textualism has generally been highly successful in shifting the terms of the debate. *See, e.g.*, Gluck & Posner, *supra* note 27, at 1327; Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM L. REV. 1, 29–35 (2006). Few judges (or savvy advocates) today would argue that congressional purposes or expectations are a permissible basis for declining to follow broad and unambiguous statutory text. *See* sources cited *supra*; *see also* Anton Metlitsky, *The Roberts Court and the New Textualism*, 38 CARDOZO L. REV. 671, 688–89 (2016).

99. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793, 793 n.10 (2018) (quoting Justice Kagan).

100. *See* sources cited *supra* note 98.

101. *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998); *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 211–12 (1998). *Oncale* and *Yeskey* were both unanimous opinions.

102. *See* sources cited *supra* notes 98, 101.

103. *See supra* notes 43–49 and accompanying text.

104. *See* sources cited *supra* note 80.

claims.<sup>105</sup> But as biases against the LGBT community have receded, courts have increasingly engaged on the merits with the variety of text and precedent-based arguments that can be made in favor of LGBT inclusion.<sup>106</sup> As they have done so, the formal logic of such claims has become apparent, attracting the support of even leading formalist/textualist judges such as Frank Easterbrook.<sup>107</sup>

Together, these three trends have allowed a remarkable string of successes for LGBT sex discrimination plaintiffs in recent years.<sup>108</sup> Already gaining ground in the 1990s, arguments that anti-transgender discrimination violates Title VII's sex discrimination protections continue to see a string of remarkable victories, now representing the inarguably dominant approach.<sup>109</sup> And even anti-gay discrimination—once the hard center of resistance to sex discrimination claims on behalf of the LGBT community—has seen the beginning of a striking reversal.<sup>110</sup> In the last two years alone, two circuits have held *en banc* hearings to repudiate their prior precedent (prohibiting sexual orientation claims) and have affirmatively held that anti-gay discrimination is indeed sex discrimination under Title VII.<sup>111</sup>

Faced with the decline of traditional arguments, opponents of LGBT claims for Title VII inclusion have had to turn to new

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105. See *supra* notes 79–82 and accompanying text.

106. See, e.g., sources cited *supra* note 85, *infra* notes 110–11.

107. See Eskridge, *supra* note 29, at 338 (making a similar observation).

108. See sources cited *infra* notes 109–10. Significant credit is also due to the EEOC, which, by taking LGBT advocates' textualist and precedential arguments seriously at an early stage, helped to persuade the courts to do the same. See *Macy v. Holder*, Appeal No. 0120120821, at \*6–7 (EEOC 2012), <https://www.eeoc.gov/decisions/0120120821.txt>; *Baldwin v. Foxx*, Appeal No. 0120133080, at \*15 (EEOC 2015).

109. See sources cited *supra* note 85. *But cf.* *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019) (recent case suggesting in dicta that old circuit precedent holding sexual orientation not covered was binding and should also extend to the gender identity context).

110. In addition to the two major *en banc* decisions cited *infra* note 111, see also *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 267–68 (D. Conn. 2016); *EEOC v. Scott Med. Health Ctr.*, 217 F. Supp. 3d 834, 840–42 (W.D. Pa. 2016); *Winstead v. Lafayette Bd. of Cty. Comm'rs*, 197 F. Supp. 3d 1334, 1344–47 (N.D. Fla. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1161 (C.D. Cal. 2015); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015); *Hall v. BNSF Ry. Co.*, No. C13–2160 RSM, 2014 WL 4719007, at \*3–5 (W.D. Wash. Sept. 22, 2014); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037–38 (N.D. Ohio 2012); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *Baldwin*, Appeal No. 0120133080, at \*1, \*15.

111. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107–08 (2d Cir. 2018) (*en banc*); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 340–41 (7th Cir. 2017) (*en banc*).



arguments. One of these has been “original public meaning.”<sup>112</sup> Thus, under the rubric of “original public meaning,” judges and advocates have attempted to argue that the presumed expectations of the public—that anti-LGBT discrimination would not be covered—should control.<sup>113</sup> Like the congressional expectations arguments that preceded them, such arguments seek to privilege expectations over broad and unambiguous text. And yet opponents have argued that they should be permitted to sidestep the textualist case law that disallows virtually identical arguments when framed in terms of Congress.<sup>114</sup>

In presenting these arguments, both litigants—and the judges who have adopted their arguments—have treated “original public meaning” as if it were a well-established, currently accepted, modality of statutory interpretation.<sup>115</sup> But as I turn to in the next Part, it is not. Although history is used in a variety of well-established ways in statutory interpretation, “original public meaning” itself has essentially no pedigree in the statutory interpretation case law.<sup>116</sup> Moreover—at least as argued in the LGBT rights cases—it is not simply subsumed in other currently accepted statutory interpretation methods.<sup>117</sup> Rather, to the extent it resembles any modality of statutory interpretation, it is the discredited “congressional expectations” approach.

#### IV. “ORIGINAL PUBLIC MEANING” STATUTORY ORIGINALISM AS A NOVEL METHOD OF STATUTORY INTERPRETATION

There is no doubt that “original public meaning” as a term of art, has very little pedigree in the federal statutory interpretation case law.<sup>118</sup> Until 2018, when the Supreme Court used the term in passing in a statutory interpretation case, no Justice on the Court had ever used the term in a statutory interpretation opinion.<sup>119</sup> Still today,

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112. See sources cited *supra* note 6.

113. See sources cited *supra* note 6.

114. See sources cited *supra* note 6; see also *supra* note 17 and accompanying text.

115. See sources cited *supra* note 6.

116. See *infra* Part IV.

117. See *infra* Part IV.

118. See *infra* notes 119–20 and accompanying text.

119. *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074–75 (2018). “Original meaning” appears somewhat more commonly in the federal statutory interpretation case law but also does not establish the expected applications approach to statutory interpretation that proponents of “original public meaning” argue in the LGBT rights cases. At the Supreme Court level, the term “original meaning” has been used seven times in a majority statutory interpretation opinion in the last 50 years. Historically, it was used most often in the literal sense of the term, and not as a modality of statutory interpretation (for example, to note that a revision of a Code was not intended to change the original meaning, but rather to make the language clearer and better organized). See, e.g., *Muniz*

only a handful of judges at any level have ever used the term in the statutory interpretation context—and a majority of those are dissenters (or, in one case, a concurrence) in the LGBT rights cases.<sup>120</sup> Thus, although the term is familiar to many academics—and may have a ring of familiarity even to those outside of academia—it is almost completely new to the federal statutory interpretation case law.<sup>121</sup>

Of course, it could be that those embracing the “original public meaning” rubric in the LGBT rights cases are simply using new words for old concepts, and indeed, some have so argued.<sup>122</sup> History always has played a variety of roles in statutory interpretation—roles that are arguably expanding in the current statutory interpretation

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v. Hoffman, 422 U.S. 454, 470 n.10 (1975); *Wingo v. Wedding*, 418 U.S. 461, 469 n.9 (1974); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 154 n.8 (1972). The most recent uses of the term have appeared in the context of opinions looking to historical dictionary definitions as well as other historical etymological context to ascertain the meaning of a statutory term. See *New Prime v. Oliveira*, 139 S. Ct. 532, 539 (2019); *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074–75 (2018). As described *infra*, this is a well-established role for history to play in statutory interpretation, but it does not aid opponents of LGBT inclusion, as even under the narrowest historical definitions, all anti-LGBT discrimination is still “because of . . . sex.” See *infra* notes 130–39, 146–55 and accompanying text; see also Benjamin Sachs & Adrienne Spiegel, *Is New Prime a Poison Pill for Title VII?*, ON LABOR (Jan. 22, 2019), <https://onlabor.org/is-new-prime-a-poison-pill-for-title-vii/> (recognizing that “a principled application of *New Prime*’s reasoning to the Title VII cases” would still lead to a pro-LGBT equality result).

120. With the exception of *Wisconsin Central* and the recent LGBT rights cases, the term “original public meaning” had been used only twice, at any level of the federal judiciary, in the statutory interpretation case law. See *Herrera v. Santa Fe Pub. Sch.*, 41 F. Supp. 3d 1188, 1275 n.86 (D.N.M. 2014) (using the term once in a footnote in a one-hundred-page opinion); *Swallows Holding Ltd. v. Comm’r*, 126 T.C. 96, 165 (2006) (Holmes, J., dissenting) (using the term once in passing in dissent). For uses by dissenters and concurring judges in the recent LGBT rights cases see sources cited *supra* note 6.

121. See sources cited *supra* note 120. The overwhelming majority of uses of the term “original public meaning” appear in the academic literature, rather than in federal case law. Although the term has been used somewhat more often in the constitutional case law (as compared to the statutory interpretation case law where it is almost entirely absent), even in constitutional cases, its deployment is rare. Indeed, as of February 14, 2019, only 43 federal opinions of any kind—at any level—had ever used the term “original public meaning,” whereas the term had been used 1,139 times in the law review literature. Search for “original public meaning” conducted in Westlaw, Secondary Sources Database and Federal Cases Database on February 14, 2019. Search results for “original public meaning,” WESTLAW, <https://1.next.westlaw.com/> (search for “original public meaning” in search bar, narrowed to “secondary sources” and “all Federal” respectively).

122. See, e.g., En Banc Brief of Court-Appointed Amicus Curiae, *supra* note 6, at 8 (asserting that “the Supreme Court has said it is the contemporaneous (*original*), common (*public*), meaning (*meaning*) that is to be used in statutory interpretation” cases).

milieu.<sup>123</sup> But, it is clear that the primary case law that judges and litigants have relied on to claim that their “original public meaning” approach is an established form of interpretation does not support their claims.<sup>124</sup> Nor do any of the other potentially analogous ways of looking to history in statutory interpretation—except the discredited approach of relying on congressional expectations—appear to closely resemble opponents’ proposed “original public meaning” approach.<sup>125</sup>

Beginning with the actual term that most opponents of LGBT inclusion have used—“original public meaning”—it is far from the established modality of statutory interpretation that its proponents have cast it as.<sup>126</sup> With the exception of the LGBT rights cases, the term “original public meaning” has been used only three times by federal courts at any level in the context of statutory interpretation.<sup>127</sup> Two of those usages (in a district court footnote and in a dissenting opinion of the tax court) were not authoritative in any sense and thus are not worth discussing in substance.<sup>128</sup> But the one recent use of the term by the Supreme Court—in the 2018 case of *Wisconsin Central Ltd. v. United States*<sup>129</sup>—requires examination.

What such an examination reveals is that *Wisconsin Central* does not support the “expected application” approach of opponents of LGBT inclusion, and indeed arguably undercuts it.<sup>130</sup> In *Wisconsin Central*, the Court used the term “original public meaning” to describe the practice of ascertaining the meaning of words at the time of their enactment—a well-established statutory interpretation approach.<sup>131</sup> Thus, in *Wisconsin Central*, the majority looked to the meaning of “money” at the time of enactment (aided by the use of historical

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123. See, e.g., Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. \_\_ (forthcoming) (describing the increased use of “originalist” methodologies in statutory interpretation this Term).

124. See *infra* notes 140–59 and accompanying text (discussing Supreme Court cases that have used the “ordinary, contemporary, common meaning” canon and how this canon differs from the “original public meaning” approach deployed in the LGBT rights cases).

125. See *infra* notes 140–69 and accompanying text (discussing the historically focused modalities of statutory interpretation that proponents of “original public meaning” purport to rely on—and the lack of work they do in their argument, except insofar as they resemble the discredited “congressional expectations” approach).

126. See *infra* notes 127–29 and accompanying text. See also *supra* note 119 (discussing the term “original meaning”).

127. See *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074–75 (2018); *Herrera v. Santa Fe Pub. Sch.*, 41 F. Supp. 3d 1188, 1275 n.86 (D.N.M. 2014); *Swallows Holding Ltd. v. Comm’r*, 126 T.C. 96, 165 (2006) (Holmes, J., dissenting).

128. See *Herrera*, 41 F.Supp.3d at 1275 n.86; *Swallows Holding Ltd.*, 126 T.C. at 165 (Holmes, J., dissenting).

129. 138 S.Ct. 2067, 2074–75 (2018).

130. See *infra* notes 131–39 and accompanying text.

131. See *Wisconsin Central*, 128 S. Ct. at 2070–72, 2074–75.

dictionary definitions and other historical etymological context) in construing the term “money remuneration.”<sup>132</sup> This facially resembles some of the rhetoric of opponents of LGBT inclusion, who have pointed to historical dictionary definitions of the word “sex” in seeking to argue that anti-LGBT discrimination cannot be comprised within Title VII’s terms.<sup>133</sup> But, as discussed at length in Part II, this aspect of opponents’ argument does no work, as even under the narrowest historical definitions of “sex,” anti-LGBT discrimination is still literally “because of . . . sex.”<sup>134</sup> Because it is “because of” that does the work to bring anti-LGBT discrimination within Title VII—and the meaning of “because of” has not changed—cases like *Wisconsin Central* do not support opponents’ “expected applications” approach.<sup>135</sup>

Indeed, the *Wisconsin Central* majority’s invocation of “original public meaning” appears, if anything to cut *against* opponents’ “expected application” arguments. The full passage in which the term arises reads as follows:

This hardly leave us, as the dissent worries, “trapped in a monetary time warp, forever limited to those forms of money commonly used in the 1930’s.” While every statute’s *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world. So “money,” as used in this statute, must always mean a “medium of exchange.” But what *qualifies* as a “medium of exchange” may depend on the facts of the day. Take electronic transfers of paychecks. Maybe they weren’t common in 1937, but we do not doubt that they would qualify today as “money remuneration” under the statute’s original public meaning. The problem with the government’s and the dissent’s position today is not that stock and stock options weren’t common in 1937, but that they were not then—and are not now—recognized as mediums of exchange.<sup>136</sup>

In recognizing that applications can—and do—evolve, the Court implicitly recognizes that the statute’s scope is not limited to those applications that the public would have anticipated at the time of enactment. Rather, it is the meaning of the words that is fixed, rather than their particular application.<sup>137</sup> But of course opponents’ arguments in the LGBT Title VII cases depend precisely on the opposite notion—that only those applications that the imagined historical public would have thought included are actionable—

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132. *Id.* at 2070–72.

133. *See supra* notes 55–56.

134. *See supra* Part II.

135. *See supra* notes 59–69 and accompanying text.

136. *Wisconsin Central*, 138 S. Ct. at 2074–75.

137. *Id.*

regardless of the meaning of the words “because of . . . sex.”<sup>138</sup> This is the opposite of what *Wisconsin Central*—the only direct authority for invoking “original public meaning” in a statutory interpretation case—invokes the term for.<sup>139</sup>

Nor does the other line of cases that opponents of LGBT inclusion have invoked support their arguments. The primary statutory interpretation case law that advocates and judges have relied on in making the statutory originalism argument is a set of cases in which the Supreme Court has stated that “[i]t is a ‘fundamental canon of statutory construction’ that, ‘unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.’”<sup>140</sup> As the Court-appointed Amicus in *Zarda* (arguing in support of the Defendant) pointed out, at first blush this language would seem to include the concept of original (“contemporary”), public (“common”), meaning (“meaning”).<sup>141</sup> Thus, the argument goes, opponents’ “original public meaning” arguments are not new at all, but indeed are premised on a “fundamental canon of statutory construction,” simply expressed with new words.<sup>142</sup>

But in fact, a review of the Supreme Court cases invoking the “ordinary, contemporary, common meaning” canon makes clear that this claim is unsupportable. The Supreme Court has not been consistent in where it invokes “ordinary, contemporary, common meaning”—but none of the ways it has deployed the canon resemble LGBT inclusion opponents’ proposed “original public meaning” approach.<sup>143</sup> Moreover, like the Court’s lone invocation of “original public meaning” itself, the ways the “ordinary, contemporary, common meaning” canon has been used by the Court simply would not do the work that opponents of LGBT inclusion need it to—but rather would lead still to a pro-LGBT equality result.<sup>144</sup> Thus, the set of cases that proponents of “original public meaning” have identified as supporting their approach do not do so in reality.

There are sixteen cases—including *Wisconsin Central*—in which the Supreme Court has invoked the “ordinary, contemporary, common meaning” canon in a majority opinion, ranging from 1979 to 2018.<sup>145</sup> In many (but not all) of them, the term is invoked in the

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138. See *supra* notes 70–76 and accompanying text.

139. See *Wisconsin Central*, 138 S. Ct. at 2074–75.

140. See, e.g., *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); see also sources cited *supra* note 6 (making the “original public meaning” argument and citing case law articulating the “ordinary, contemporary, common meaning” standard).

141. See En Banc Brief of Court-Appointed Amicus Curiae, *supra* note 6, at 8.

142. See *id.* at 1.

143. See *infra* notes 145–59 and accompanying text.

144. See *infra* notes 145–59 and accompanying text.

145. See *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2070–72, 2074–75 (2018); *Artis v. District of Columbia*, 138 S. Ct. 594, 603 n.8 (2018); *Star*

context of looking to enactment-era dictionary definitions or other historical etymological context to understand a statutory term—something that is rhetorically similar to how opponents of LGBT inclusion have characterized their “original public meaning” arguments.<sup>146</sup> But—as in the case of *Wisconsin Central*—the analytical approach that these cases support (looking to enactment-era understandings of a particular statutory term) does not lead to the outcome that opponents of LGBT inclusion seek.<sup>147</sup>

To demonstrate this, it is worth examining the case that comes closest to opponents’ of LGBT inclusion’s rhetorical claims: *Amoco Production Co. v. Southern Ute Tribe*.<sup>148</sup> In *Amoco*, unlike many of the other cases in which the “ordinary, contemporary, common meaning” canon has been invoked, there was a clear difference in the historical and contemporary definitions of a particular statutory term.<sup>149</sup> The Court held that the definition of “coal” prevailing at the time of the enactment of the Coal Lands Act of 1909 and 1910 was controlling and thus that coalbed methane gas (today scientifically thought of as part of coal, but not so considered then) was not part of minerals reserved in the granting of land patents under the Acts.<sup>150</sup> This of course bears significant resemblance to proponents’ arguments that—whatever the modern understanding of “sex”

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*Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014); *Sandifer*, 571 U.S. at 227; *Wall v. Kholi*, 562 U.S. 545, 551 (2011); *Bilski v. Kappos*, 561 U.S. 593, 603, 607 (2010); *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 n.5 (2002); *Williams v. Taylor*, 529 U.S. 420, 431 (2000); *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 873–74 (1999); *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 207 (1997); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship.*, 507 U.S. 380, 388 (1993); *Summit Valley Indus., Inc. v. Carpenters*, 456 U.S. 717, 722 (1982); *Diamond v. Diehr*, 450 U.S. 175, 181–82 (1981); *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980); *Perrin v. United States*, 444 U.S. 37, 42 (1979). There are of course many more cases in which the Court has invoked “ordinary meaning,” standing alone, but proponents have not claimed that their “original public meaning” approach is subsumed within the “ordinary meaning” standard. Moreover, such a standard would not do the work that proponents need it to do, as even the ordinary meaning of “because of” and “sex” lead to the conclusion that anti-LGBT discrimination must also be considered sex discrimination. See *supra* notes 43–49 and accompanying text.

146. See, e.g., *Wisconsin Central*, 128 S. Ct. at 2070–72, 2074–75; *Octane Fitness*, 134 S.Ct. at 1756; *Sandifer*, 571 U.S. at 876–77; *Wall*, 562 U.S. at 551–52; *Bilski*, 561 U.S. at 602–03; *Williams*, 529 U.S. at 431–32; *Amoco*, 526 U.S. at 873–74; *Walters*, 519 U.S. at 207–08.

147. See *infra* notes 148–59 and accompanying text.

148. 526 U.S. 865 (1999).

149. See *id.* at 872–75. See cases cited *supra* note 146 (often citing historical definitions, but in many cases in circumstances where there was no obvious difference between the “ordinary meaning” of the term historically and today).

150. See *Amoco*, 526 U.S. at 873–75.

today—definitions from the enactment era of Title VII must be controlling.<sup>151</sup>

But as described in detail in Part II and reiterated above, this argument does no work for opponents of LGBT inclusion, since it still leads to the same conclusion—anti-LGBT discrimination is “because of . . . sex.”<sup>152</sup> Even under the most narrow historical definition of sex (which may or may not be the most appropriate one), it is clear that anti-LGBT discrimination would not have occurred “but for” the victim’s sex.<sup>153</sup> Because it is always the case that sex plays a but-for role in the outcome, historical definitions do no work in “original public meaning” proponents’ arguments.<sup>154</sup> Rather, such definitions serve simply as rhetorical cover for the true argument: the public would not—regardless of the literal meaning of the statute’s words—have expected it to be applied in this way.<sup>155</sup>

Nor does any of the other Supreme Court case law invoking the “ordinary, contemporary, common meaning” canon support what those arguing against LGBT inclusion seek to do by invoking “original public meaning.”<sup>156</sup> Most notably, every single usage of the canon looks to “ordinary contemporary common meaning” (however variously defined) to understand the meaning of a particular statutory term, rather than to make arguments about where, generally, the public would have expected the statute to apply.<sup>157</sup> In

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151. *See supra* notes 55–56 and accompanying text. There are some indications in *Amoco* that the Court’s approach arose from the unique concerns implicated by statutory mineral reservations. *See Amoco*, 526 U.S. at 873. But, of course, there are numerous other places as well where the Court has resorted to historical dictionary definitions, and this Article does not dispute that resort to such definitions is sometimes an appropriate approach to statutory interpretation. *But see supra* note 58 and accompanying text (describing the reasons why such an approach may not be appropriate in the context of understanding the meaning of “sex” in Title VII).

152. *See supra* notes 59–69 and accompanying text.

153. *See supra* notes 59–69 and accompanying text.

154. *See supra* notes 59–69 and accompanying text.

155. *See supra* notes 70–76 and accompanying text.

156. *See infra* notes 157–59 and accompanying text.

157. *See* *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2070–2072 (2018); *Artis v. District of Columbia*, 138 S. Ct. 594, 601–03, 614 n.8 (2018); *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014); *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227–28 (2014); *Wall v. Kholi*, 562 U.S. 545, 551–53 (2011); *Bilski v. Kappos*, 561 U.S. 593, 603–04, 607 (2010); *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 n.5, 110 (2002); *Williams v. Taylor*, 529 U.S. 420, 431–32 (2000); *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 873–75 (1999); *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 207–08 (1997); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship.*, 507 U.S. 380, 388 (1993); *Summit Valley Indus., Inc. v. Carpenters*, 456 U.S. 717, 722–23 (1982); *Diamond v. Diehr*, 450 U.S. 175, 182–84 (1981); *Diamond v. Chakrabarty*, 447 U.S. 303, 308–10, 315–16 (1980); *Perrin v. United States*, 444 U.S. 37, 42–45 (1979).

addition, very few invocations of the canon actually implicate any inconsistency between historical and current meaning (although, as discussed earlier, it is not clear that the LGBT rights cases do either).<sup>158</sup> Moreover, the overwhelming majority of the applications of the canon seem, if anything, to cut against the arguments of opponents of LGBT inclusion, as it tends to be invoked to endorse broad, textually inclusive readings of the law.<sup>159</sup>

Importantly, other historically focused modalities of statutory interpretation—except the now mostly discredited search for Congressional expected applications—also do not subsume what proponents of “original public meaning” are attempting to do through their use of the term. As noted above, proponents *do* attempt to cast their approach in terms of the Court’s practice of looking to historical dictionary definitions (a practice sometimes, but not always, linked to the “ordinary contemporary common meaning” canon).<sup>160</sup> But, as described above, this approach does not actually achieve what they wish to accomplish, since even under the narrowest historical definitions, anti-LGBT discrimination is still “because of” sex.<sup>161</sup>

The *Zarda* dissenters also look to history to make the purposivist argument that Title VII was intended to “secure the rights of *women* to equal protection in employment” (and thus cannot be understood to secure the rights of the LGBT community via sex discrimination law).<sup>162</sup> Although cast in *Zarda* in terms of the public’s understanding, rather than Congress’s, this purposivist argument is

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158. Only a handful of the cases involved circumstances where the meaning of a term appeared to have evolved over time, making the historical reference point potentially dispositive in ascertain meaning. See *Wisconsin Central*, 138 S. Ct. at 2074–2075; *Amoco*, 526 U.S. at 873–75; *Perrin*, 444 U.S. at 42–45.

159. See, e.g., *Octane Fitness*, 134 S. Ct. at 1756; *Sandifer*, 571 U.S. at 227–28; *Wall*, 562 U.S. at 551–53; *Bilski*, 561 U.S. at 603–04, 607; *Chakrabarty*, 447 U.S. at 308–10, 315–16; *Perrin*, 444 U.S. at 42–45.

160. See *supra* notes 55–56 and accompanying text.

161. See *supra* notes 59–69 and accompanying text.

162. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 145 (2d Cir. 2018) (Lynch, J., dissenting) (emphasis added); cf. *Zarda* Petition for Writ of Certiorari, *supra* note 4, at 18 (making a similar argument). This argument, of course, also has problems on its own terms, since textually and as a matter of long-standing application, Title VII does not limit its protections to women. See 42 U.S.C. § 2000e-2 (2012). The *Zarda* dissent recognizes this, attempting to rescue its argument through a complicated interpretation under which practices that differentially disadvantage not only women specifically but “men vis-à-vis women or women vis-à-vis men” is what is prohibited. *Zarda*, 883 F.3d at 156 (Lynch, J., dissenting). But this argument itself is inconsistent with a long line of Supreme Court precedent making clear that Title VII protects *individuals* against sex-based disparate treatment (regardless of whether there are discriminatory effects on their group), see, e.g., *Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978), and also prohibits “equal application” discrimination, where groups are treated equally badly. See sources cited *supra* note 2.



virtually identical to that made by the defendants in *Oncale v. Sundowner Offshore Services*,<sup>163</sup> in contending that male-on-male same-sex harassment should not be recognized as sex discrimination (since to do so would “conflat[e] sex discrimination with sexual orientation discrimination”).<sup>164</sup> Of course this argument, as we know, was repudiated by the *Oncale* majority, which held that—regardless of whether Congress expected Title VII to encompass male-on-male sexual harassment—“it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>165</sup> Thus, although the *Zarda* dissent attempts to sidestep *Oncale* by recasting their inquiry as public-focused, it is hard, as concurring Judge Lohier notes, to characterize their argument as anything other than “a roundabout search” for Congressional expectations—an approach which is (at least where used to cabin otherwise broad and unambiguous text) “no longer an interpretive option of first resort.”<sup>166</sup>

And indeed, all of the deployments of “original public meaning” in the LGBT rights cases ultimately suffer from this same defect. Rather than an argument about the meaning of text, they are, as described earlier, ultimately an argument about the social meaning of the LGBT community—and what that social meaning would lead the public to conclude about the statute’s protections for that distinctive group, regardless of text.<sup>167</sup> But this of course resembles nothing more than the discredited Congressional expectations approach, under which Congressional expectations were used to limit the scope of otherwise broad and unambiguous text.<sup>168</sup> And proponents offer no explanation for why their variant on that discredited approach should be deemed more legitimate.<sup>169</sup>

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163. 523 U.S. 75 (1998).

164. *Compare Zarda*, 883 F.3d at 143–56 (Lynch, J., dissenting), with Brief for the Respondents at \*5–15, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). Indeed, even many of the specific nuances of the *Oncale* Respondents’ brief sound remarkably similar to the *Zarda* dissent. See, e.g., *Zarda*, 883 F.3d at 145–47 (Lynch, J., dissenting); Brief for the Respondents, *supra* note 6, at \*10–12.

165. See *Oncale*, 523 U.S. at 79–80 (noting that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII” but also that “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”).

166. *Zarda*, 883 F.3d at 137 (Lohier, J., concurring).

167. See *supra* notes 70–76 and accompanying text.

168. See *supra* notes 70–76 and accompanying text; see also *supra* notes 96–102 (describing the decline of theories that permitted subjective congressional expectations or intent to trump broad text as textualism has gained ground in federal statutory interpretation).

169. See sources cited *supra* note 6 (other than by ipse dixit—claiming that the methodologies are not the same—not explaining why opponents’ “original

Ultimately, while history plays a variety of well-established roles in statutory interpretation, that does not mean that all possible roles it *could* play are well established or correct. While opponents of LGBT inclusion have attempted to cast their arguments as falling within one such well-established approach—resort to historical definitions of a statutory term—this approach does not do any actual work in their argument and thus cannot be regarded as the true nature of their claims that “original public meaning” should control.<sup>170</sup> Rather, the true argument they seek to make is one that resides in the “original public’s” expectations—and efforts to leverage such presumed expectations to supersede broad and unambiguous text.<sup>171</sup> But this type of approach—privileging expected applications over text—has long since been repudiated.<sup>172</sup>

For this reason alone, we should call upon proponents of the “original public meaning” approach to offer a meaningful justification for why—having rejected methodologies that privilege expected applications over text—we ought to import the same construct via a different actor. If modern consensus principles of textualism reject subjective or imagined expectations as a principled basis for overriding broad and unambiguous text, that alone should counsel strongly against proponents’ “original public meaning” approach.<sup>173</sup> The following section turns to additional considerations that counsel against adopting proponents’ “original public meaning” approach to statutory interpretation.

#### V. THE PATHOLOGIES OF THE LGBT RIGHTS CASES’ “ORIGINAL PUBLIC MEANING” APPROACH

The prior Part made the case that the “original public meaning” methodology—as it has been argued in the LGBT rights cases—is indeed a new modality of statutory interpretation, which resembles, if anything, the discredited “Congressional expectations” approach. This Part argues that adoption of the LGBT rights cases’ “original public meaning” approach raises (at least) three additional concerns. First, as deployed in the context of rights laws, this version of statutory originalism suffers from an inevitable tendency to exclude politically unpopular constituencies from the protections of the law, a phenomenon which ought to be especially concerning to civil rights proponents. Second, even many self-proclaimed originalists may

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public meaning” arguments should be deemed any more legitimate than the discredited “congressional expectations” approach).

170. *See supra* Part II.

171. *See supra* Part II.

172. *See supra* notes 96–104 and accompanying text.

173. *See supra* notes 96–104 and accompanying text (noting that although not all aspects of the textualist project have succeeded in achieving widespread adherence, the proposition that the fact that Congress did not anticipate a particular application should not be a basis for overriding broad and unambiguous text is noncontroversial).

have reasons to worry about the ways that “original public meaning” has been deployed in the LGBT rights cases—and thus to oppose its adoption under the moniker of “original public meaning”—given its ultimate devolution into “original expectations” originalism. And finally, rule of law values counsel against adopting any modality of statutory interpretation under the contested and ever-evolving mantle of “original public meaning”—independent of the specific doctrinal content it is given.

The most obvious pathology created by the version of the “original public meaning” argument that has been argued in the LGBT rights cases is its inevitable tendency—in the context of rights laws interpretation—to exclude unpopular groups or applications from the reach of a law’s protections.<sup>174</sup> This is of course the very purpose of its interjection into the LGBT rights cases: to defeat what would otherwise be compelling textualist arguments by drawing on judicial intuitions that the 1960s era public—assumed to be unfriendly to LGBT equality—would have been surprised and perhaps upset to find that LGBT individuals were protected by the literal language of the law.<sup>175</sup> Indeed, the very essence of the “statutory originalism” argument in the LGBT rights cases resides in persuading judges that the LGBT community was, even then, an intelligible and distinct minority group, as to whom the “original public” would not have perceived coverage (even where the text might counsel otherwise).<sup>176</sup>

But of course, the same could be said for many politically unpopular applications of the law, and yet that is nevertheless an important part of the work of statutory law—indeed arguably among rights laws’ most important work. Thus, for example, the public in 1990 might well have been surprised (and perhaps displeased) to find that Title II of the Americans with Disabilities Act (“ADA”) applied to prisoners, not contemplating prisoners as possible beneficiaries of public “services, programs, or activities.”<sup>177</sup> Indeed, some (perhaps even a majority) might even have viewed the perils of experiencing prison as an unaccommodated disabled inmate as an appropriate component of punishment for disabled inmates’ crimes.<sup>178</sup> Certainly,

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174. See *infra* notes 175–91 and accompanying text.

175. See *supra* Part II.

176. See *supra* Part II.

177. See *infra* notes 178–79 and accompanying text. Indeed, given the stereotype of inmates as litigious, it seems highly unlikely that the public would have endorsed a view of the statute that would afford them substantial new legal rights. Cf. Jennifer A. Ptoplava, *Peanut Butter and Politics: An Evaluation of the Separation-of-Powers Issues in Section 802 of the Prison Litigation Reform Act*, 73 IND. L.J. 329, 329–31 (1997) (describing the perception of prisoners as inclined to frivolous lawsuits that led to the enactment of draconian limitations on federal court access in the Prison Litigation Reform Act).

178. See generally Kevin H. Wozniak, *American Public Opinion About Prisons*, 39 CRIM. JUST. REV. 305, 317, 320 (2014) (noting that 46.6% of those

it seems unlikely that prisoners—who but a few years later would be the subject of the draconian Anti-Terrorism and Effective Death Penalty Act and Prison Litigation Reform Act—were a part of what the public *expected* to be protected by the ADA's terms.<sup>179</sup>

And yet Justice Scalia properly held—when confronted with similar arguments regarding Congressional intent—that such beliefs are not an appropriate basis for exclusion from a law.<sup>180</sup> Rather, applying textualist principles, he held in the case of *Yeskey v. Pennsylvania Department of Correction*<sup>181</sup> that the ADA's broad text must be extended to prisoners—even if Congress might not have anticipated or desired its application to that context.<sup>182</sup> So too in *Oncale* he held that male-on-male harassment that was “because of” sex could not be excluded from Title VII's broad text, even where it was “assuredly not the principle evil Congress was concerned with when it enacted Title VII.”<sup>183</sup>

While Justice Scalia founded his decisions in *Yeskey* and *Oncale* on dry textualist reasoning, they also seem plainly correct from a normative perspective. Even conceding (as not all textualists do) that subjective Congressional intent ought to sometimes be given weight, it seems an obviously problematic approach to permit exclusion from a linguistically broad rights law simply because the identity of the rights bearers is unanticipated or disfavored. Indeed, there are strong arguments that Congress should be required, if such textual applications are disfavored, to do the work that it did, for example, in amending the Rehabilitation Act to explicitly exclude transgender individuals, thus making apparent its biases and providing a target

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surveyed felt that conditions in prison were “not harsh enough,” even though many also perceived life in prison as already unpleasant); *Should Prisoners Have Rights?*, DEBATE.ORG, <http://www.debate.org/opinions/should-prisoners-have-rights/> (last visited Jan. 6, 2019) (summarizing that 51% of respondents say prisoners should not have rights); Jamelle Bouie, *Dick Cheney's America: Of Course Americans Are OK with Torture. Look at How We Treat Our Prisoners*, SLATE (Dec. 16, 2014, 5:36 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/12/why\\_americans\\_support\\_torture\\_we\\_accept\\_the\\_abuse\\_and\\_cruel\\_punishment\\_of.html](http://www.slate.com/articles/news_and_politics/politics/2014/12/why_americans_support_torture_we_accept_the_abuse_and_cruel_punishment_of.html) (arguing that Americans are aware of, and believe prisoners deserve, the abusive conditions in prisons).

179. See 42 U.S.C. § 12132 (2012) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”); see also Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 801–810, 110 Stat. 1321 (1996) (codified as amended at 18 U.S.C. § 3601); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

180. See *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (holding that even if Congress did not expect the ADA to apply to prisoners, that would not create ambiguity in the otherwise unambiguous law).

181. 524 U.S. 206 (1998).

182. *Id.* at 212–13.

183. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998).

for constitutional challenge.<sup>184</sup> And indeed, few seem to genuinely disagree with the reasoning of cases like *Oncale* and *Yeskey*—which were, after all, unanimous decisions—that Congressional expectations should not be used to carve out disfavored rights holders from the scope of civil rights laws.<sup>185</sup>

But if this is true in the case of Congress, it seems equally obvious that it should be true in the case of the public. Uniform text provides at least some guarantees of neutrality and fairness.<sup>186</sup> But if we let the imagined biases of the public control the outcome, that neutrality and fairness disappears.<sup>187</sup> First, judges may simply imagine those biases to be whatever they themselves possess.<sup>188</sup> But even acting as

184. Judges originally construed the Rehabilitation Act of 1973 to include protections for transgender individuals. *See, e.g.*, *Blackwell v. Dep't of Treasury*, 639 F. Supp. 289, 290 (D.D.C. 1986); *Doe v. U.S. Postal Serv.*, No. 84-3296, 1985 WL 9446, at \*2 (D.D.C. June 12, 1985). Congress, in response, enacted an explicit exclusion for “transvestism, transsexualism, . . . [and] gender identity disorders not resulting from physical impairments.” 29 U.S.C. § 705(20)(F) (2012); *see also* 42 U.S.C. § 12211(b)(1) (2012) (identical exclusionary language in the ADA). While I am by no means a proponent of the discriminatory (and probably unconstitutional) exclusion that was added to the Rehabilitation Act (as well as the ADA), arguably, judicial exclusion resting on intuitions about disfavored applications is worse, as it divests the affected group of the transparency that a more explicit exclusion affords. *Compare* *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at \*2–4 (E.D. Pa. May 18, 2017) (applying the canon of constitutional avoidance to construe the ADA's exclusion extremely narrowly and as not applying to the transgender plaintiff before the Court), *with* *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (finding that an Equal Protection challenge to the exclusion of transgender workers from Title VII was “clearly not appropriate” since, in the Court's view, transgender workers were not excluded from the Act at all). In addition, it may be that such an explicit exclusion could not survive the rigors of legislative process, whereas the judicial interpretive approach to exclusion offers a much easier path. *Cf.* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 103–04 (2006) (observing that the vagaries of legislative procedure mean that there are many opportunities to make it difficult for even majorities to enact legislation that precisely comports with their will, including the exclusion of minorities).

185. Indeed, even proponents of the “original public meaning” approach in the LGBT rights cases do not dispute the general principles set out in *Oncale*. *See* sources cited *supra* note 17.

186. *Cf.* *Ry. Express Agency v. People of New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”).

187. *See infra* notes 188–89 and accompanying text.

188. *See* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1324–26 (2012)

honest brokers, and even if judges are capable of discerning the expectations of the public, because politically unpopular applications will rarely be what the public imagines—and may even, in the case of rights laws, be applications that the public has a strong disinclination to include—an original expectations approach may lead to deeply pernicious results.<sup>189</sup>

We should not easily accept a theory whose natural consequence is to harness the biases of the public to argue for the exclusion of a group from the law's protections. Indeed, as Bill Eskridge has argued, such an approach may even raise constitutional concerns.<sup>190</sup> But regardless of whether one agrees with this constitutional critique, such a move to embrace subjective biases should be resisted as a matter of statutory interpretation. Indeed, arguably the strongest critiques of such an approach should come from those least ideologically inclined to accept the inclusion of LGBT rights within the rubric of Title VII: conservative originalists and textualists, who have long argued for greater restraints on judicial subjectivity.<sup>191</sup>

Some originalists may also have additional reasons for opposing the adoption of the approach deployed in the LGBT rights cases under the moniker of “original public meaning.” While many originalists would no doubt be happy to see “original public meaning” play a more explicit role in statutory interpretation, the version of “original public meaning” that the LGBT rights cases deploy is not a universally agreed upon approach.<sup>192</sup> Indeed, the approach deployed in the LGBT cases resembles, if anything, “original expectations” originalism—the approach of treating as dispositive whether a particular application would have been expected by the then-contemporary framers or general public.<sup>193</sup>

But “original expectations” is not universally embraced by originalists today—far from it.<sup>194</sup> Although some originalists still see

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(describing research showing that there are strong reasons to believe that judges are subject to the same influences of biases and background beliefs as the average citizen).

189. See, e.g., *supra* notes 174–83 and accompanying text.

190. See Eskridge, *supra* note 29, at 335–36.

191. See, e.g., *id.* at 397 (noting that “many conservatives and most textualists believe in the rule-of-law values of predictability, objectivity, and consistency in statutory interpretation”); Colby & Smith, *supra* note 26, at 288–89 (describing the argument made by many originalists that originalism is a superior methodology because it “is uniquely capable of constraining judges’ ability to impose their views under the guise of constitutional interpretation”).

192. See *infra* note 193 and accompanying text.

193. See Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY* 12, 18–19 (Grant Huscroft & Bradley W. Miller eds., 2011) (describing “original expected applications” originalism).

194. See, e.g., Colby & Smith, *supra* note 26, at 252–54, 254 n.64, 295–97; Richard H. Fallon, *The Meaning of Legal “Meaning” and Its Implications for*

a role for “original expectations” originalism, many modern originalists embrace it only partially, if at all.<sup>195</sup> Indeed, many modern leading originalists have explicitly rejected the strong version of “original expectations” originalism that the LGBT rights cases deploy.<sup>196</sup> Thus, the adoption of “original expectations” originalism in the statutory interpretation case law under the moniker “original public meaning” might not be a development that even all self-proclaimed originalists would welcome.

Finally, regardless of its specific substantive content, rule of law values caution against adopting *any* modality of statutory interpretation under the moniker “original public meaning.” As the foregoing discussion suggests, “original public meaning” is—at any level more granular than its broadest definition—a contested, evolving, and widely debated academic concept.<sup>197</sup> In contrast to the paucity of federal case law deploying the term, there are over one thousand law review articles deploying the term “original public meaning”—and those law review articles do not all articulate the same theory.<sup>198</sup> There is no stable agreement among academics on the proper approach to “original public meaning,” and views on how “original public meaning” ought to be discerned and applied continue to regularly evolve.<sup>199</sup>

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*Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1291 (2015); Solum, *supra* note 193, at 18–19; Whittington, *supra* note 14, at 382–86. *But see* Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 155–56 (2016) (noting that Justice Scalia was inconsistent in his approach and sometimes relied on original expected applications); John O. McGinnis & Michael Rappaport, 24 CONST. COMMENT. 371, 378–79 (2007) (arguing for the role of original expected applications in originalist interpretation).

195. *See* sources cited *supra* note 194.

196. *See* sources cited *supra* note 194.

197. *See supra* notes 192–96 and accompanying text. *See also infra* notes 198–99 and accompanying text.

198. *See supra* note 22 (describing results of Westlaw search for “original public meaning,” which appears only 43 times in federal case law of any kind—including constitutional interpretation opinions—but 1,139 times in the law review literature).

199. *See, e.g.*, Fallon, *supra* note 194, at 1290 (noting that it is difficult to critique theories of “original public meaning” because of “the diversity of positions that self-described originalists have adopted and the reasons that they have given for adopting them”); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 295 (2017) (in the context of discussing “public meaning originalism,” noting that “originalist theory and practice continues to evolve at a rapid pace”). To name just a few areas of continued dispute and evolution, “original public meaning” originalists continue to disagree about how much indeterminacy, or space for constitutional “construction,” exists within an “original public meaning” modality, sometimes very substantially. *See, e.g.*, Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. REV. 1621, 1628–29 (2017); *see also* Colby & Smith, *supra* note 26, at 256 (describing internal debates among leading originalists about the level of generality at which liberty rights are protected

Under the circumstances, importing this academic term of art into the statutory interpretation case law would be problematic. The basic premises of rule of law—the existence of fixed rules, consistency, predictability, limitation of discretion, and stability—require the type of defined and clear content for interpretive rules that “original public meaning” simply does not provide.<sup>200</sup> Armed with the rubric of “original public meaning,” there are a wide variety of approaches and results that a judge could plausibly defend—if the judge could first familiarize him or herself with the many thousands of pages of originalist scholarship.<sup>201</sup> Although it is always the case that the eclectic nature of statutory interpretation allows judges flexibility in interpretation, we ought not to import a concept that by its very nature is contested, evolving, and primarily defined by actors who reside outside of the domain of legitimate of legal authority.<sup>202</sup>

Importantly, this does not mean that there is no role for enactment-era historical inquiry in statutory interpretation—indeed, such inquiry is already an established part of the modalities that judges apply to the interpretation of federal statutes.<sup>203</sup> But saddling

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under the constitution). For an example of the continuing evolution in the “original public meaning” theory, see for example, the rise of tech-driven “corpus linguistics” as a methodology central to leading originalists’ theories of how to discern “original public meaning.” See, e.g., Solum, *supra* note 193, at 1621, 1644 (offering a theory of “public meaning originalism” in which “corpus linguistics” figures centrally and recognizing the recent genesis of “corpus linguistics” as a means of interpreting legal texts).

200. See generally Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 655 (2008) (describing the minimum “consensus” components of the rule of law, on which most commentators agree).

201. See generally Colby & Smith, *supra* note 26, at 288–305 (generally critiquing originalism on these grounds).

202. Although academics certainly have legal knowledge, they lack legitimate legal authority, in the sense of authority to define what the law is. Some prominent academic originalists are of course also judges and thus have the authority to define what the law is within their role as judges. But as the paucity of majority opinions (or indeed opinions of any kind in the federal case law) using the term “original public meaning” demonstrates, most of the work of defining the content and methodology of “original public meaning” has gone on (and continues to go on) outside of the “law” itself. See *supra* note 22. Cf. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017) (discussing interpretive rules as a form of law); with Abbe R. Gluck, 120 YALE L. J. 1898, 1909–10 (2011) (noting that the Supreme Court does not treat its statutory interpretation methodology as binding law).

203. See, e.g., Michael Ramsey, *Statutory Originalism in King v. Burwell*, THE ORIGINALISM BLOG (June 26, 2015), <http://originalismblog.typepad.com/the-originalism-blog/2015/06/statutory-originalism-in-king-v-burwellmichael-ramsey.html> (describing historical/originalist reasoning in *King v. Burwell*—but questioning whether it is “persuasive originalism”); Michael Ramsey, *The Supreme Court’s Statutory Originalism*, THE ORIGINALISM BLOG (Jan. 28, 2014), <http://originalismblog.typepad.com/the-originalism-blog/2014/01/the-supreme-courts-statutory-originalismmichael-ramsey.html> (describing historical/originalist methodologies in *Air Wisconsin Airlines Corp. v. Hooper*).



such established statutory interpretation methods with a term whose “theory and practice” is “continu[ing] to evolve at a rapid pace,”—based largely on academic debates extraneous to the law itself—is unwise.<sup>204</sup> In practice, introducing such a contested and evolving academic term of art would serve none of the democratic or rule of law values that we all—originalists and non-originalists alike—aspire to have statutory interpretation serve.<sup>205</sup>

## VI. CONCLUSIONS

There are compelling textualist and doctrinal arguments for why anti-LGBT discrimination is, always, “because of . . . sex” and thus protected under Title VII. Historically such arguments have foundered in the face of judicial assumptions regarding Congressional intent. Reasoning that Congress did not have sexual orientation or gender identity in mind, courts have long rejected the claims of LGBT equality advocates.

With the rise of textualism in federal statutory interpretation, such arguments regarding Congressional expectations now face substantial obstacles. There is clear Supreme Court case law stating that broad and unambiguous statutory text cannot be limited simply by the expectations of Congress. Thus, those opposing arguments for LGBT inclusion within Title VII have adopted a new argument: “original public meaning.”

Proponents of the “original public meaning” approach have argued that because the original public would not have understood anti-LGBT discrimination to be covered under Title VII, such an understanding should be dispositive. In so arguing, they have suggested that “original public meaning” is a well-established modality of statutory interpretation, but one distinct from discredited arguments regarding Congressional expectations.

This Article has suggested that both of these claims are untrue: “original public meaning”—at least as it has been deployed in the LGBT rights cases—is not an established modality of statutory interpretation, nor is it subsumed within the established modalities of statutory interpretation its proponents have claimed. Rather, to the extent it resembles any established approach to statutory interpretation, it is the now discredited approach of privileging subjective Congressional expectations over broad text.

There are other reasons too to be concerned regarding the “original public meaning” approach proposed by opponents of LGBT inclusion. Such an approach—by focusing on the expectations of the

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204. See Solum, *supra* note 199, at 295 (noting that “public meaning originalism” as continues to evolve, in both theory and practice, at a “rapid pace”).

205. See generally Stack, *supra* note 25, at 4 (noting that both Justice Scalia and Professor Bill Eskridge—leading proponents of opposing theories of interpretation—“invoke democratic and rule-of-law values to justify their positions”).

public—has an inevitable tendency to exclude disfavored groups from rights protections, since such groups will rarely be within the public’s expected applications of the law. Moreover, an unexpectedly diverse group of constituencies may have other reasons to oppose the adoption of the LGBT rights cases’ “original public meaning” approach—founded in commitment to rule-of-law values or alternative conceptions of “original public meaning.”

Regardless of whether one agrees with these critiques, there are strong reasons to believe that “original public meaning” ought not to creep into the federal statutory interpretation case law without reasoned consideration. Such a move could have implications far beyond the context of the LGBT rights cases—implications unknowable by advocates of any stripe. History already plays a significant role in statutory interpretation, in well-established ways. We ought to think carefully about whether “original public meaning”—with its evolving and contested boundaries—is likely to enrich our consideration of statutory meaning or diminish it.