# Introduction

## *Fragmented Citizens*

We're adults, we're contributing to the welfare of society and yet, here's this one thing that just reaches up every year and kind of slaps us in the face.
—Brian Wilpert, on the challenges of filing joint tax returns for same-sex couples[1]

Angie's List is open to all and discriminates against none and we are hugely disappointed in what this bill represents.
—Bill Oesterle, chief executive officer of Angie's List, on his opposition to the Indiana Religious Freedom Restoration Act[2]

Today, hundreds of thousands of children are being raised in same-sex households. . . . Those hundreds of thousands of children don't get the stabilizing structure and the many benefits of marriage.
—Donald Verrilli, solicitor general of the United States, arguing before the Supreme Court, *Obergefell v. Hodges*[3]

The spring of 2015 was, in myriad ways, a disorienting season for gays and lesbians in the United States. Various events reminded us that, even as significant strides toward equal rights for sexual minorities had been achieved and public support for same-sex marriage had hit a record high, our status as equal citizens was hardly consistently recognized.[4] We were (and continue to be) seen differently and unequally depending on who was doing the looking.

This fragmented recognition was brought into stark relief by the springtime ritual of filing taxes. This requirement was "an accounting nightmare for thousands of gay and lesbian couples" because their status

as married has been so contingent.[5] Financial services firms, such as Wells Fargo, acknowledge this instability in their marketing to gay and lesbian couples: "You may have taken steps to formalize your domestic partnership where you are, but what if you relocate? The laws that affect your relationship vary from state to state. And, even if you stay where you are, laws constantly change." The advertisement stipulates, "Our future doesn't have to depend on which state we are in."[6] Yet, ironically, Tax Day 2015 indicated the opposite. The material security that same-sex couples can expect depends very much on where they live.

In 2013, when the Supreme Court held in *United States v. Windsor* that the section of the federal Defense of Marriage Act (DOMA) that defined marriage solely as between one man and one woman was unconstitutional, it required the federal government to recognize same-sex marriages where state governments had already done so.[7] In the months after *Windsor* the Internal Revenue Service established that, for federal tax purposes, it would recognize same-sex couples as married if they had first celebrated their marriage in a state where such unions were recognized, i.e., a "place of celebration" standard.[8] However, in the spring of 2015, at least thirteen states did not recognize same-sex marriages; consequently, those states rendered gay or lesbian married couples legal strangers.[9]

These state governments committed a violence of misrecognition and nonrecognition: "there's the insult of filing a legal document that says you're single when you're not."[10] Lesbian, gay, bisexual, and transgender (LGBT) individuals are hardly strangers to the "painful experience of nonrecognition . . . in a heteronormative society."[11] This experience of "social annihilation," as the sociologist Deborah Gould names it, can manifest as feelings of anger, frustration, or sadness, or it may fuel attempts at social change.[12] Either way, it is exposed in the structural variations of governmental recognition and reinforced by a marketplace where financial firms can assist in constructing private architecture that secures against the vagaries of public regulatory acknowledgment. Even after *Windsor*, Wells Fargo responded with an advertisement in the October/November 2013 issue of the LGBT news magazine the *Advocate*. Under the title "Changing Laws Can Change Your Life: Wells Fargo Is Here to Help," the text read,

> Even with the Court's decision [in *Windsor*], a majority of states still have either limited or no recognition of same-sex marriages. This leads to a

> "patchwork" approach to equality where each state can determine the rights of LGBT couples under that state's laws. It also raises more questions and requires guidance. Wells Fargo believes it's paramount for ALL LGBT couples to have a team of professionals in place to help them sort through the laws as they currently are, as well as what they will look like in the future. . . . These are people with specific experience who are well-versed in the current set of challenges, along with planning techniques available to help tackle some complexities of existing laws.

By playing on concerns about the instability of recognition, the advertisement explained how private policy architecture can be purchased to create stability for couples and families who have financial means. This possibility carries obvious class implications—those who can afford it can more readily insulate themselves from the pressures of a hostile state—and it triggers concerns about the development of a neoliberal state in which private market transactions replace government-provided services and practices, thereby potentially exacerbating inequalities.[13]

The violence of nonrecognition and misrecognition is emotional and material. In some states where their marriages go unrecognized, same-sex couples had to file up to five separate tax forms. First, for federal taxes, they completed an official joint federal form. Then, for state taxes, they completed but, in some cases, did not file federal and state forms meant to untangle their finances and render them legal strangers. This process yields complicated questions such as how charitable donations are accounted for if the amount is drawn from a joint checking account and, if the couple has children, how they can be recognized as dependents if the couple is considered unmarried in the tax-filing process. These questions are difficult to answer without expert advice, particularly when "[e]ach state can have slightly different rules, but, when asked about them, state employees don't always give consistent answers."[14] Complications are evident in the extra time and expense created. Same-sex married couples "face extra paperwork, heftier tax-prep fees, and tax questions that puzzle even the experts."[15] Exasperation is a prominent response: "There is no way that I, as a Joe Q. Public, who happens to be gay and in a same-gender marriage, would figure out how to file this form out. I mean, it's just impossible."[16]

Tax season is only one instance that illuminates this circumstance of variable recognition. In April 2015, shortly after taxes were filed, the question of whether the Fourteenth Amendment of the United States Constitution requires states to recognize same-sex marriages, and thus whether variable recognition was constitutional, was argued before the Supreme Court in *Obergefell v. Hodges*. At stake were hardly just questions about how one files taxes—although a ruling would certainly clarify that matter—but more fundamental assessments of the balance of state and federal power as well as the state's responsibility to recognize equally all of its citizens. The Court's ruling would clarify a range of rights and responsibilities, including but not limited to parental rights, inheritance, healthcare responsibilities, and survivor benefits rendered unclear by the variable recognition that *Windsor* reinforced.

During oral argument in *Obergefell v. Hodges*, the Supreme Court justices mused on the scope of what was before them. Some were troubled by what they thought they were being asked to consider, to alter the meaning of marriage, an institution that, for Justice Anthony Kennedy, had for "millennia" meant "only heterosexual marriage." This Court was tasked to say something that is "very difficult for the court to say, 'Oh, well, we know better.'"[17] Picking up this argument, Chief Justice John Roberts wondered if ruling in favor of same-sex marriage would do more harm than good because, he remarked to Mary Bonuato, the lawyer representing advocates for same-sex marriage, "If you prevail here, there will be no more debate. . . . [C]losing of debate can close minds." Cautioning that litigating for social change may only inflame public debate, Roberts continued, "and it will have a consequence on how this new institution is accepted. People feel very differently about something if they have a chance to vote on it than if it's imposed on them by the courts."[18]

The irony of the justices' concerns is that they imagined a nation far more divided on marriage equality than public opinion data suggested. Support and institutional recognition proceeded at lightning pace. While majorities had endorsed same-sex-marriage recognition since 2011, a tidal wave of state recognition followed *Windsor*, when state and lower federal judges began to interpret that ruling as invalidating state constitutional bans on marriage recognition.[19] Prior to *Windsor*, twelve states and the District of Columbia recognized same-sex marriage. By

the time of oral argument in *Obergefell*, same-sex marriages were recognized in twenty-five more.

But perhaps one of the more dizzying aspects of *Obergefell* as well as of *Windsor* was the prominence of a particular argument in favor of same-sex marriage. Kennedy's ruling for the Court in *Windsor* emphasized how denying same-sex marriage recognition harmed children of same-sex couples. The federal government's refusal to recognize same-sex marriages under DOMA "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[20] Kennedy spoke to the material harm government policy inflicted on these children: "DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security."[21] Kennedy wrote that DOMA "instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others."[22]

Solicitor General Douglas Verrilli reiterated this sentiment at oral argument in *Obergefell*. And, Kennedy called opponents of recognition to task. Opponents maintained that expanding marriage recognition beyond opposite-sex couples would undermine the attachment to children. Without the states' commitment to opposite-sex marriage as a unique institution, "men and women would still be getting together and creating children, but they wouldn't be attached to each other in any social institution."[23] But Kennedy contended that this was the exact—and undesirable—situation into which states were compelling same-sex couples with children. Turning the argument on its head, Kennedy contended, "I think the argument cuts against you," for it "assumes that same-sex couples could not have the more noble purpose [of parenting], and that's the whole point."[24] Precisely because the 1970s homophobic campaigns of Anita Bryant, which intended to "Save the Children" from expansion of gay and lesbian rights and which fostered the successful repeal of local ordinances protecting citizens from discrimination on the basis of sexual orientation, are within lived memory,

the enlisting of parental rights and the security of children in the service of equality for gays and lesbians is an ironic development.[25]

Supreme Court oral arguments in *Obergefell* came on the heels of public debate that once again raised the question of whether individuals could be legitimately discriminated against on the basis of their sexual orientation. Discussion centered on the passage of a Religious Freedom Restoration Act in Indiana. The law, according to proponents, aimed to protect individuals from being compelled to act contrary to their religious beliefs. But the scope was unclear: would it protect from being forced to provide services to a same-sex wedding or would it enable discrimination against gay, lesbian, bisexual, and transgender persons, and is there a substantive difference between those two questions?[26]

The law was amended, although whether or not the revision ameliorated the prospect of discrimination is open to question, particularly as Indiana has no statute barring discrimination based on sexual orientation or gender identity.[27] Nevertheless, what is remarkable is that public backlash against the Indiana law was spearheaded by the private sector. The most vocal opponents showcased by news media were not state or national gay rights groups but Salesforce.com, whose CEO, Marc Benioff, announced that the company would stop all corporate travel to Indiana, and Angie's List, whose CEO, Bill Oesterle, announced that the company would halt planned expansion in the state. Apple CEO Tim Cook took to the pages of the *Washington Post* to pen an op-ed denouncing the law. The Indiana Chamber of Commerce called the law bad for business, as it "was always going to bring the state unwanted attention." The NCAA, which was holding the finals of the Division I collegiate basketball tournament in Indianapolis, expressed concern.[28] Media showered attention on companies that came out against discrimination, suggesting that the private sector was recognizing the value of LGBT persons far differently and more robustly than public institutions were doing.

These three episodes, all occurring during the spring of 2015, illustrate the variable and contextual meaning of citizenship for LGBT individuals. They reveal how much public opinion has shifted, how much the LGBT rights movements have achieved, and how much remains on the horizon to secure. In particular, they foreground the need to grapple with the way private sector developments affect public or state recognition of the status of LGBT persons. Spring 2015 revealed how much

citizenship—that relationship between the individual and state in which the latter acknowledges the former as falling within its responsibility to recognize, protect, and regulate in key sites, e.g., market, military, family, immigration, etc.—is fragmented and contingent for those who identify as gay, lesbian, bisexual, or transgender.

## Gay and Lesbian Sexuality, Citizenship Status, and American Political Development

"Citizenship" is not easily defined. The term's multiple meanings create conceptual messiness. Rogers Smith refers to citizenship as "an intellectually puzzling, legally confusing, and politically charged and contested status."[29] Linda Bosniak imposes order by disaggregating the concept into distinct components: (1) enjoyment of rights, (2) legal recognition by a community, (3) social and political engagement, and (4) an identity of belonging.[30] Her definition points to philosophical traditions on which each component draws. Liberal theory focuses on citizenship as conferring rights; civic republicans stress the participatory engagement and sense of belonging to a community that citizenship engenders.[31]

In this book, the citizen is a person subject to the state's sight or recognition, identification, and classification. A citizen is included in and acknowledged by the body politic.[32] Citizenship is not just a legal status of rights but "a claim on the public attention and concern."[33] It connotes a set of power relations in the dynamic between the individual and the governing institution—whether public or private—with which she interacts. To bring focus and emphasis to the centrality of institutional recognition does not replace rights or responsibilities as giving content and meaning to citizenship. It is only to suggest that even if recognition is necessary but not sufficient to establish citizenship, it is prior to any enactment of citizenship status. Recognition connotes dynamics of institutionalized power more than substantive guarantee. It turns the analytical lens away from the rights claimant and toward those institutions that constitute, exercise power over, and enable the citizen.

The actions that give citizenship depth, such as claiming rights or participating in civic life, are not enough to establish citizenship status. These are premised upon and require *recognition* by regulatory authorities. As queer theorist Shane Phelan posits,

> Whether an action fosters citizenship depends upon the interplay between the actor and those with and toward whom s/he acts. It is never a matter simply between individuals or even between groups, but is a contest among and within polities concerning the constitution of those polities. . . . Although dissent may be an important vehicle for expressing citizenship, dissent in the face of total rejection is not citizenship but rebellion. Such rebellion becomes citizenship not simply when the rebel claims to be a member of the polity but when the *other* members of that polity *recognize* her as such.[34]

Defining citizenship as grounded in processes of acknowledgment, Phelan writes, "the specific rights and obligations of citizens may vary from state to state, but recognition of members is prerequisite to a claim on any configuration of rights and duties."[35] Citizenship is rendered by "structures of acknowledgment," through which "the polity decides who is eligible" for rights and duties.[36]

This book identifies and examines many such "structures of acknowledgment" with which sexual minorities interact, including administrative agencies, courts, legislatures, executive authorities, and private workplaces. It describes the shifting meanings of gay and lesbian personhood and citizenship by connecting these changes over time to the dynamics and development of different public and private regulatory authorities. Since citizenship is here defined as a relational identity dependent on institutional recognition, I draw on concepts prominent in American political development (APD) scholarship—a field that explores the historical development of institutions, ideas, and processes of the American state—to explain why, even as public opinion shifts to favoring gay and lesbian equality and new rules mandating equal treatment are put into place, inequalities persist.

While citizenship studies has grown,[37] and more of this work overlaps with APD scholarship, particularly with regard to race and gender identity,[38] APD's focus has been elsewhere. According to Suzanne Mettler and Andrew Milstein,

> APD research has probed deeply into the processes of state-building and the creation and implementation of specific policies, yet has given little attention to how such development affects the lives of individuals and the

> ways in which they relate to government. . . . APD scholars, being deeply engaged in questions about institutional development and historical processes, are well equipped to illuminate much about the relationship between citizens and government. The problem is that, to date, they have largely refrained from doing so.[39]

Studying sexuality goes some way toward filling this research gap. The political development of gay and lesbian politics in the United States is important and ought to receive more attention, especially as "some skepticism about its legitimacy and scholarly worth" troublingly persists among political scientists.[40] Such attention would shed light upon more general dynamics of American political development.

Equality and inclusion within the political community as a recognized citizen, much less a recognized person, for any member of a discriminated-against group, has hardly followed a smooth trajectory. Despite myths of progress and rhetoric of how the arc of history bends in the United States, institutional and policy obstacles undermine constitutional ideals. In addition, achieving equal treatment is not only a matter of changing opinions, beliefs, or attitudes. As Rogers Smith expressed, when describing the persistent history of racism and gender bias, "these beliefs were not merely emotional prejudices or 'attitudes.' Over time, American intellectual and political elites elaborated distinctive justifications for these ascriptive systems. . . . Many adherents of ascriptive Americanist outlooks insisted that the nation's political and economic structures should formally reflect natural and cultural inequalities, even at the cost of violating doctrines of universal rights."[41] Generalizing the assessment, Joseph Lowndes, Julie Novkov, and Dorian Warren contend that we limit our understanding of inequality—its sources and the possibility of policy remedies—when we consider it only as an artifact of attitudes.[42]

So, in this book, I do not seek to examine why public opinion toward gay and lesbian rights concerns—decriminalization, marriage, military service, adoption rights, employment and housing protections—has turned favorable in recent years or to question its necessary if not sufficient role in explaining successes of gay rights activism. Instead, I hope not only to show how, given the institutional design of federalism, the dynamics of incomplete political change, and the diverse issues

that comprise the contemporary gay rights aims, the citizenship status of gays and lesbians varies across space, time, and issue but also to account for how inequalities persist despite opinion change and despite active attempts and successful alterations in policy and formal rules and statutes that guarantee equal treatment. Doing so, I argue, requires that we shift focus when recounting the dynamics of gay and lesbian politics, from individual rights to institutional recognitions.

My objective to trace changes in the regulatory recognition of gay and lesbian status is animated by two questions, one substantive and one disciplinary. The first: how and why do inequalities for gay and lesbian citizens persist even as formal rules mandating equal treatment are put into effect? The second: what would a political developmental approach to gay and lesbian politics look like and what insights might it provide that are different from those that follow from growing research in history, sociology, economics, and other, particularly behavioral, branches of political science?

TABLE 1.1. Variation in Laws Affecting LGB Persons (as of November 1, 2014)[43]

| State | Nondiscrimination Employment Law | Same-Sex Marriage | Joint/Step Adoption |
|---|---|---|---|
| *Alaska* | *No* | *Yes* | *Status Undefined* |
| *Arizona* | *No* | *Yes* | *Status Undefined* |
| California | Yes | Yes | Yes |
| Colorado | Yes | Yes | Yes |
| Connecticut | Yes | Yes | Yes |
| Delaware | Yes | Yes | Yes |
| DC | Yes | Yes | Yes |
| Hawaii | Yes | Yes | Yes |
| *Idaho* | *No* | *Yes* | *Yes* |
| Illinois | Yes | Yes | Yes |
| *Indiana* | *No* | *Yes* | *Yes* |
| Iowa | Yes | Yes | Yes |
| Kansas | No | Yes | Status Undefined |
| Maine | Yes | Yes | Status Undefined |
| Maryland | Yes | Yes | Yes |
| Massachusetts | Yes | Yes | Yes |
| Minnesota | Yes | Yes | Yes |
| *Montana* | *No* | *Yes* | *Step/Joint Undefined* |

Some of the inequalities experienced by gay and lesbian citizens—made evident by the difficulties in tax filing, the ongoing litigation for marriage recognition, and the continued development and implementation of state laws with potential discriminatory effects—can be accounted for by the institutional design of federalism, which is unlikely to produce a common approach to any statutory concern.[44] And, on a range of contemporary concerns, including but not limited to nondiscrimination in employment, adoption access and parental rights, and marriage recognition, the states form a patchwork of dissimilar status across space (see table 1.1).

Nevertheless, this policy variation is not only a consequence of federalism. Rather, as this book aims to show, it stems from the very processes of political change itself. My argument rests on a conception

TABLE 1.1 (*cont.*)

| State | Nondiscrimination Employment Law | Same-Sex Marriage | Joint/Step Adoption |
|---|---|---|---|
| Nevada | Yes | Yes | Yes |
| New Hampshire | Yes | Yes | Yes |
| New Jersey | Yes | Yes | Yes |
| New Mexico | Yes | Yes | Status Undefined |
| New York | Yes | Yes | Yes |
| *North Carolina* | *No* | *Yes* | *Obstacles* |
| *Oklahoma* | *No* | *Yes* | *Status Undefined* |
| Oregon | Yes | Yes | Yes |
| *Pennsylvania* | *No* | *Yes* | *Step/Not Joint* |
| Rhode Island | Yes | Yes | Yes |
| *South Carolina* | *No* | *Yes* | *Status Undefined* |
| *Utah* | *No* | *Yes* | *Yes* |
| *Virginia* | *No* | *Yes* | *Status Undefined* |
| Washington | Yes | Yes | Yes |
| *West Virginia* | *No* | *Yes* | *Status Undefined* |
| Wisconsin | Yes | Yes | Obstacles |
| *Wyoming* | *No* | *Yes* | *Status Undefined* |

In the fourteen italicized states, getting married—and thus outing oneself as gay or lesbian—could threaten employment, as there are no statutory protections from discrimination on the basis of sexual orientation in those states. All other states not listed do not currently recognize same-sex marriage and do not protect from discrimination in hiring, firing, or promotion in employment.

of the polity offered by APD scholars, particularly Karen Orren and Stephen Skowronek. They describe the normal condition of the polity as fractured, with different policies adopted at different times such that unexpected and unforeseen frictions may arise: "the institutions of a polity are not created all at once, in accordance with a single ordering principle; they are created instead at different times, in light of different experiences, and often for quite contrary purposes."[45] As new policies are layered upon those in place, the juxtaposition and lack of integration creates the "interplay of multiple institutions [which is] a source of both tensions and opportunities."[46] Consequently, attempts to establish equality often expose or foster previously unseen inequities. From this friction-inducing dynamic spring opportunities, which entrepreneurial actors may seize to push for policy, legal, and institutional innovation.[47] Politics is constituted by the interaction of multiple regulatory authorities, constructed at different times and potentially overlapping and conflicting with one another. These authorities are implicated and engaged in the definition of fundamental human attributes and relationships, including sexuality. If they exist in tension, then we might expect the definitions and recognitions they offer to similarly be in tension.

Developmental scholarship also highlights patterns that enable empirical analysis and normative recommendation. Certain regularities emerge over time. By focusing on patterns, APD scholars "locate the key components of a situation and demarcating them helps to identify meaningful points of change."[48] Consequently, "pattern identification is the sine qua non of the enterprise."[49]

These two concepts—the polity as multiple governing authorities in tension and patterns of political change that pinpoint meaningful shifts in political practices, ideas, laws, or institutions—are employed in this book to evaluate changes in the recognized personhood and citizenship status of gay and lesbian Americans since the late nineteenth century.[50] Given the polity's qualities of fragmentation, its acknowledgment or recognition of persons and citizens is likely not to be all at once or of a piece. Rather, as Phelan contends, "we may, then, expect to see that exclusions at certain points coexist with cautious inclusions at some other sites and comfortable equality at yet others."[51] This book provides a developmental accounting of institutional

recognitions of gay and lesbian status to illustrate the rendering of fragmented citizenship.

A developmental approach to gay and lesbian politics aims to consider how attention to sexuality as an ordering concern of governance and regulation enriches our explanations of institutional change, partisan behavior, policy development, and state-society interaction. The payoff is at least twofold. First, developmental conceptions of political change can account for the persistence of inequalities in ways that enrich traditional answers, which tend to emphasize the interplay of movement push and countermovement pushback.[52] Second, a developmental approach compels rethinking about citizenship, what it connotes and how it is determined. If the developmental polity is always bound in internal tension among distinct and potentially incongruent governing authorities and if these governing authorities confer recognition upon individuals that gives their citizenship meaning and content, then different governing authorities may offer differing forms of recognition. Consequently, a developmental account of gay and lesbian politics offers a conception of citizenship that is hardly whole. Despite rhetoric of progress toward a constitutionally whole citizen, that ideal is fragmented by the dynamics of political change itself. Citizenship, precisely because it is a relational concept that depends upon the recognition of others, is always negotiated and challenged; its boundaries shift, and change is hardly unidirectional. Citizenship is fractured and fragmented by dynamics that define development of the polity.

## A Developmental Approach to Gay and Lesbian Citizenship: Why Now? Why Needed?

When politics scholar Tim Cook assessed the status of gay and lesbian studies in political science for the *American Political Science Review*, he drew attention to an appreciable deficit. During the 1980s and 1990s, when scholars across the humanities and social sciences built a field that asked new questions, uncovered hidden histories, and provided pathways across stifling disciplinary boundaries, "political science was notably absent."[53] Over a decade later the landscape has changed. In a 2012 assessment for the *Annual Review of Political Science*, Richard Valelly noted the transformation. Where Cook had heard silence, Valelly

now heard an "exceptionally sophisticated conversation" of "cutting-edge work" in fields as varied as social movement studies, public opinion studies, and analyses of judicial politics.[54] This intellectual development took place despite concerns that research on lesbian, gay, bisexual, transgender, and queer identities remains problematically at the margins of political inquiry.[55] In this context, Valelly noted a silence. Far too little scholarship on LGBT politics evaluates links between sexuality and state development or has employed an APD perspective. As he saw it,

> APD has largely neglected both LGBT politics and the parallel backlash . . . the silence of APD on the subject of sexuality politics is noticeable. Since they began publishing in the late 1980s, the two leading journals associated with APD, *Studies in American Political Development* and the *Journal of Policy History*, have published fewer articles on LGBT politics (e.g., Bell 2010, Engel 2007) than other leading political science journals.[56]

Other scholars share Valelly's assessment. Dara Strolovitch has contended that social scientists increasingly conceptualize identities as multiple, contextual, and fluid, such that they are "dynamic, simultaneous, and mutually constitutive."[57] Nevertheless, she argues that attention to intersectional identities and the politics of marginalization, particularly along racial, ethnic, and gender lines, has only recently characterized research in American political development.[58] Similarly, while acknowledging that "a small group of scholars has worked in recent years to consider LGBT issues as they relate to politics, public opinion, and the state," Julie Novkov writes that "scholars have not yet produced a full historical institutional analysis of the relationship between LGBT identity and the state comparable to the literature on the relationship between processes of racialization and the state. As in studies of race and the state, we must distinguish between discriminatory individual attitudes (however deeply and structurally embedded) and institutionalized structures of subordination and control."[59]

Exposing this need for research begs a set of questions. What would a political development approach to and account of sexuality politics in the United States look like? What would its unit of analysis be? What kind of data would be gathered? And what methods would be utilized

to evaluate that data? Is there an existing literature in APD that already studies sexualities but that we might not see as doing so? There is now an extensive normative and empirical literature on queer citizenship and a large sociological literature on LGBT movements, and the history of sexuality is, according to eminent historian David Halperin, finally "a respectable academic discipline."[60] Does this scholarship not qualify as APD and, if not, why not? How might APD studies of sexuality be different from the burgeoning sexuality studies in history, sociology, law, normative theory, political behavior, etc.? How might sexuality studies cue off APD explorations of race, ethnicity, and gender, be distinct from such approaches, and intersect with them? Why is an explicitly developmental account of sexuality politics needed, and how would it contribute to developing insight into mechanisms of change of interest to historical scholars, e.g., path dependence, institutional/policy layering, drift, feedback, etc.?

This book tries to answer these questions. It provides a framework within which to explore how regulatory authorities in the United States recognized gay and lesbian sexuality, how that recognition has changed over time, and how distinct modalities of recognition by different governing authorities have fractured the status of gays and lesbians across space, over time, and by issue. It draws attention to pattern identification as a central principle of APD scholarship. And, it rests on the core definition of the polity that development scholars endorse—the polity as comprised of multiple governing authorities in tension—to reveal insights into changing content and meaning of personhood and citizenship status for gays and lesbians. Attending to how distinct modalities of recognition operate through distinct orders of governance can reveal why, even as formal rules of equality for gays and lesbians are established, inequalities persist and unseen challenges to equality come to the fore.

## Chapter Overview

This book details the way public and private regulatory authorities have defined lesbian and gay personhood and citizenship status over time. It explores citizenship as a relational status conferred in the recognition of the individual by regulatory authorities. By using this definition,

coupled with a developmental approach to politics, it aims to explain how inequalities persist for lesbian and gay citizens even as formal rules banning discrimination and indicators of public support for equality have increased. It develops an account of gay citizenship as constructed, fragmented, contingent, contextual, and temporally and spatially unstable. It does not offer a comprehensive history of gay, lesbian, and bisexual rights mobilization, and it is not about the rise and life of these movements in the United States. Instead, it identifies distinct modalities through which governing authorities have defined homosexuality over time and examines episodes of regulatory, legal, and policy congruence and incongruence among these authorities to illustrate the ongoing fragmented status of gay and lesbian Americans. By shifting analytical focus from rights mobilization to recognition of status, it aims to provide an intervention in political developmental scholarship to promote and value the study of sexualities.

Chapter 1 provides more detailed discussion of central concepts in developmental scholarship—pattern development, governing orders in tension, and path dependency—as frameworks for conceptualizing change over time in institutional recognitions of gay and lesbian status. It begins by articulating why reconceptualizing citizenship as grounded in recognition rather than rights and/or responsibilities is a necessary move for a developmental study. Grappling with the way governing regulatory authorities may define citizenship differently across time, space, and issue—how they may see an individual distinctly depending on temporal, spatial, and issue contexts—will foster a richer notion of citizenship, one that views citizenship as more than a status that protects natural or liberal rights or confers republican responsibilities.

Chapter 2 examines varieties of same-sex intimacies prior to the political construction and recognition of the modern homosexual person. Paying particular attention to the administrative state as a site of recognition, it points to evaluations of immigration and civil service policy that illustrate how identifying and excluding homosexuals from the United States encouraged the growth of administrative state capacities. The chapter draws attention to Progressive Era (1880–1920s) concerns with sexual otherness expressed in the private and public sectors, an otherness inextricably bound with extant discourses and assumptions of gender and racial inferiorities. It integrates Progressive fears of sexual

otherness and aberrant gender presentation within a broader project that included scientific racism, eugenics, and democratic institution building to cultivate a particular national community and democratic citizen. It details the policy shifts taken to move from homosexual sodomy as a criminal act toward establishing a generally consistent form of recognition of the homosexual as a dangerous person threatening to healthy civic growth and national security.

Chapter 3 describes the tensions that emerged when gays and lesbians began to define themselves and to be seen as an unjustly persecuted minority. This transition is borne out in dissent within the early homophile organizations as to whether to frame homosexuality as analogous to race, such that remedies against discrimination would require active state intervention, or to frame homosexuality as a private act, such that the primary remedy would be decriminalization and thus call for existing beyond the purview of state regulation altogether. And, this new recognition of discrimination and of a clearly defined minority class was reflected back from institutional authorities as varied as the Supreme Court, municipal governments, and the human resource policies of private sector firms.

Chapter 4 examines how two national LGBT interest organizations—the National LGBTQ Task Force and the Human Rights Campaign—premised their work on the recognition of gays and lesbians as a distinct persecuted minority group. That identity underlay different strategies for social change, and the tactics employed created distinct organizational identities. This chapter focuses on that organizational self-definition, and it assesses the way reputations—or the way these groups have identified themselves and are seen by others—constrain and enable strategies and abilities to secure political and legal reform. A particular organizational identity may conform or clash with the regulatory recognition offered by state and private institutions. Conformity may enable more incremental shifts toward some LGBT equality claims. Clashes or misfits between organizational identity and regulatory recognition may not foster immediate or incremental change, but may serve long-term aims of establishing foundations for a regulatory recognition not yet widely adopted. Consequently, congruence between regulatory recognition and self-definition may undermine more expansive aims of social change.

Chapter 5 explores simultaneous trends in public opinion, public policy, and jurisprudential development at the end of the twentieth century that supported the privatization and closeting of gays and lesbians. It begins with a discussion of patterns in public opinion that illustrate support for gay rights when they are conceptualized within a framework of private liberty but opposition when those rights are considered as a matter of public recognition and equality. It examines how television news media framings of these rights claims exhibit similar patterns. The chapter then evaluates federal statutes and Supreme Court rulings that parallel and reinforce this privatization and closeting imperative. These policies and rulings reveal a refusal to see LGBT citizens at all. While no longer criminalized, these citizens were left beyond the boundaries of state recognition.

Chapter 6 examines how the recognition that gays and lesbians constitute an unjustly discriminated-against minority, which is an element of the jurisprudential doctrine of suspect class and tiered scrutiny, has been used by executive officials and state and federal judges from the mid-1990s through the present day to promote same-sex marriage. Recognition of a history of discrimination and political powerlessness are two characteristics that comprise suspect-class status and the corresponding tiered-scrutiny doctrine, which has been developed by the Supreme Court over the latter half of the twentieth century. That doctrine is a central vehicle through which the Court has recognized discrimination, promoted equal protection against racial and sexual discrimination, and defined its own role in reenforcing pluralist democracy.

Chapter 7 examines the Supreme Court's refusal to recognize gays and lesbians as a suspect class or discriminated-against minority within the parameters of its tiered-scrutiny doctrine even as it has decriminalized homosexual conduct, ruled against state-based discrimination against gays, lesbians, and bisexuals, and required federal and state recognition of same-sex marriages. Those victories for gay rights rest on an emerging doctrine of human dignity that, while perhaps rhetorically appealing, fosters an abstract notion of liberty blind to social, political, and historical contexts. This doctrine may supplant the tiered-scrutiny doctrine, which was historically premised on the Court's responsibility to recognize and counter actively the deficiencies of majoritarian democracy that rendered minorities oppressed and voiceless. Recognition of

suspect-class status, of a deeply contextualized history of discrimination and political powerlessness, has given way to an abstract and ill-defined notion of "dignity" as the foundation for gay rights claims. Nowhere is this more clearly stated than in the Court's ruling in *Obergefell* that the Constitution's guarantee of due process liberty requires all states to recognize same-sex marriages. And yet, this amorphous concept of dignity may provide only limited support as gay and lesbian rights move beyond marriage recognition and may sharpen clashes with others who claim that antigay stances fall within their own guarantees of dignity.

The conclusion begins by assessing the contemporary status of policies affecting gay and lesbian equality. Prior to 2014, two distinct regimes of recognition were evident. One group of states had established policies protecting gays, lesbians, and bisexuals (and, to a lesser extent, transgender individuals) from workplace, housing, and other forms of discrimination and creating stable relationship and familial recognition. Another set had tended to offer none of these protections. Yet, as state bans on same-sex-marriage recognition have failed to withstand judicial review since *Windsor*, states have been compelled to recognize same-sex marriage even as they do not provide other protections from discrimination. The Court's ruling in *Obergefell*—which nationalizes marriage equality—only reinforces the instability of status for gays and lesbians since their recognized marital status may leave them vulnerable to discrimination grounded in their sexual identity. The fragmented status of lesbian and gay citizens continues, and the incoherence of variable recognitions is further revealed. Finally, the chapter summarizes the themes and main contention of this book: Examining gay and lesbian politics from a developmental perspective yields insights not only into how state development and social construction of sexuality overlap and interlock but also into how tracing distinct modalities of regulatory recognition of sexuality across distinct sites of authority illustrates developmental claims about the nature of political change as not comprehensive, creating unexpected results, and often not moving in a singularly progressive direction.

This book sketches one developmental account of gay and lesbian status and politics. By drawing attention to the fragmented nature of the polity as its normal condition, the book enables not only fuller examination of the persistence of inequalities but also clearer understanding that

the condition of gays and lesbians is fragmented. If citizenship is neither only a comprehensive bundle of rights nor a set of participatory responsibilities but is first constituted by processes of recognition, and if the polity is not stable but is always in tension across multiple institutional sites of authority, then citizenship, as an institutionally granted status, is perhaps just as temporally and spatially contingent and unstable as the polity itself. In short, the fragmented state creates a fragmented citizen. This may be at least one important insight gained by greater attention to sexuality, particularly gay and lesbian sexualities, from a developmental point of view.