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The Legal Regulation of Gay and Lesbian Families as Interstate Immigration Law

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RESPONSE

The Legal Regulation of Gay and Lesbian Families as Interstate Immigration Law

*Sarah Abramowicz**

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In *The Hidden Dimension of Nineteenth-Century Immigration Law*, Professor Kerry Abrams tells a story that illustrates what she terms the “productive” role of immigration law.¹ We typically conceptualize immigration law as regulation that restricts entry into a territory. Abrams, by contrast, examines how the law induces the development of a certain type of population by encouraging settlement and family formation by citizens considered desirable. These productive effects occur in part through legal mechanisms that we do not usually associate with immigration law, such as marriage and property law. Here, Abrams draws upon her innovative earlier work on the connections between immigration law and marriage² to show

* Assistant Professor of Law, Wayne State University Law School. I am grateful to Kerry Abrams and Courtney Joslin for their helpful suggestions and insights.

1. Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1401 (2009).

2. See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005).

that marriage law, by legitimizing and promoting a sought-after population, itself functions as a kind of immigration law.

Abrams's account entails an expansive definition of immigration law—one that encompasses not only international migration, but also interstate migration. The story of the Mercer Girls illustrates how the law encouraged a group perceived of as white “brides” to journey from Massachusetts to frontier Washington State in order to promote the growth of a white population. Abrams shows that this was achieved in part through an absence of legal restrictions, which enabled the westward migration of young, marriageable white women.³ At the same time, marriage and property laws were designed to promote the formation and prospering of white families to the exclusion of others,⁴ in particular an interracial population that was beginning to take hold.

This Response elaborates upon how Abrams's work is helpful in thinking about one of the most controversial contemporary examples of the legal shaping of a population: the current battle across the states over the formation, recognition, and protection of gay and lesbian families. Abrams's characterization of state-to-state migration as a form of immigration law, together with her notion of the productive dimension of immigration law, provides a useful framework for conceptualizing contemporary approaches to same-sex marriage and the regulation and recognition of gay and lesbian parents.

From the perspective of this framework, we can understand the current patchwork of state approaches to gay and lesbian families as a form of interstate immigration law that facilitates a further polarization of the United States into what Naomi Cahn and June Carbone have recently characterized as “blue families” and “red families.”⁵ Cahn and Carbone describe the United States as having become, in recent decades, divided into two groups of states with sharply opposing attitudes toward family life and family law. In their map of the nation, the coasts are lined with “blue family” states that favor a legal regime offering equality and sexual freedom of choice, while the middle of the country is filled with “red family” states that “continue[] to celebrate the unity of sex, marriage, and procreation.”⁶ One vector of polarization that Cahn and Carbone map out is the

3. See Abrams, *supra* note 1, at 1381–1401.

4. See *id.* at 1401–14.

5. NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010).

6. *Id.* at 2.

approach to same-sex marriage⁷ and custody of children by gay and lesbian parents.⁸

When applied to the family-law polarization Cahn and Carbone discuss, Abrams's expansive definition of immigration law can be used to tell a new story of twenty-first-century immigration regulation. Abrams notes that most historians characterize the population of the American West as "settlement history" and thus obscure the ways in which this story is also one of immigration. According to Abrams, we should recall that the development of a white population in the Western Territories helped to make the West "an American property" and to create the current geographic map of the United States.⁹ Similarly, we can think of today's cultural and political landscape—in which the coasts and the central states are sharply divided in both their practices of family formation and their normative stances on family forms—as the product of family- and property-law regimes that constitute, in Abrams's vocabulary, a form of immigration law.

In particular, there are three legal regimes that work to encourage patterns of interstate migration that may increase the current polarization of family forms in the United States: regulation of same-sex marriage, regulation of assisted reproductive technology, and the law of employee benefits.

I. GAY AND LESBIAN FAMILY REGULATION AS IMMIGRATION LAW

The current patchwork of state and federal law regulating same-sex marriage functions, from the perspective of Abrams's model, as a form of interstate immigration law. This regulation has three significant dimensions: the extension of, or refusal to extend, marriage rights to same-sex couples; the refusal by many states, and by the federal government, to recognize same-sex marriages formed in other jurisdictions; and the refusal of many states to dissolve same-sex marriages formalized in other jurisdictions by granting a divorce.

Currently, seven jurisdictions¹⁰ will issue marriage licenses to same-sex couples and recognize same-sex marriages formed

7. *Id.* at 131–37.

8. *Id.* at 141–50.

9. Abrams, *supra* note 1, at 1356.

10. This count includes neither Washington nor Maryland. Washington's governor signed a law legalizing gay marriage on February 13, 2012. The law does not go into effect until June 2012. Nicole Neroulas, *Washington State's Governor Signs Gay Marriage Law*, REUTERS, Feb. 13, 2012, <http://www.reuters.com/article/2012/02/13/us-gaymarriage-washington-idUSTRE81C15L20120213>. Maryland's governor signed a law legalizing gay marriage on March 1, 2012. The law does not go into effect until January 2013. Ian Duncan, *Maryland Governor Signs Same-Sex Marriage Law*, L.A. TIMES, Mar. 1, 2012,

elsewhere: Massachusetts,¹¹ Connecticut,¹² Iowa,¹³ Vermont,¹⁴ New Hampshire,¹⁵ the District of Columbia,¹⁶ and New York.¹⁷ In four states—Massachusetts, Connecticut, Iowa, and Vermont—the initial movement toward same-sex marriage was judicial rather than legislative. The supreme court of each of these states found that withholding from same-sex couples the right to marry, or the rights and benefits of marriage,¹⁸ violated the equivalent of the federal Due Process or Equal Protection Clause in the state constitution.¹⁹

The role of marriage in promoting child-rearing and protecting children was central to the case law striking down the ban on same-sex marriage in each of these states. As the Massachusetts Supreme

<http://articles.latimes.com/2012/mar/01/news/la-pn-maryland-gay-marriage-law-signed-20120301>.

11. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that the exclusion of same-sex couples from the rights and benefits of civil marriage violates the state constitution).

12. CONN. GEN. STAT. § 46b-20(4) (2011).

13. *Varnum v. Brien*, 763 N.W.2d 872, 906 (Iowa 2009) (holding that the exclusion of same-sex couples from civil marriage violates the state constitution).

14. VT. STAT. ANN. tit. 15, § 8 (2011).

15. N.H. REV. STAT. ANN. § 457:1-a (2011).

16. D.C. CODE § 46-401(a) (2011).

17. N.Y. DOM. REL. LAW § 10-a(1) (Consol. 2011).

18. In both Vermont and Massachusetts, the court's holding concerned the denial to same-sex couples of the rights and benefits of marriage, rather than of the status of marriage. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) ("We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."); *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999) ("While some future case may attempt to establish that—notwithstanding equal benefits and protections under Vermont law—the denial of a marriage license operates per se to deny constitutionally-protected rights, that is not the claim we address today. We hold only that plaintiffs are entitled . . . to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples."). The Massachusetts court subsequently held, in an advisory opinion, that providing same-sex couples the right to enter into civil unions, rather than to marry, would not suffice to remedy the constitutional violation. See *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004). The Vermont legislature initially provided same-sex couples with the right to enter into civil unions with rights and benefits equivalent to those of marriage, but, in 2009, extended to same-sex couples the right to marry. See VT. STAT. ANN. tit. 15, § 8 (2011) (defining marriage as the "legally recognized union of two people").

19. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 411–12 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 872, 906 (Iowa 2009); *Goodridge*, 798 N.E.2d at 948; *Baker*, 744 A.2d at 867. The California Supreme Court reached the same conclusion, *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008), only to be overturned through a popular referendum amending the state constitution to define marriage as between a man and a woman. CAL. CONST. art. I, § 7.5. That state constitutional amendment, in turn, was subsequently found to violate the Due Process and Equal Protection Clauses of the federal Constitution in a case still wending its way through the federal courts. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995, 1003 (N.D. Cal. 2010). The Ninth Circuit upheld the district court on the basis of Equal Protection. *Perry v. Brown*, No. 10-16696, 2012 U.S. App. LEXIS 2328, at *115–16 (9th Cir. Feb. 7, 2012).

Judicial Court observed in *Goodridge v. Department of Public Health*, enabling parents to marry makes a significant difference in the protections afforded their children.²⁰ The children of married couples are

the recipients of special legal and economic protections obtained by civil marriage. Notwithstanding the Commonwealth's strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, the fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.²¹

Just as antimiscegenation laws were designed to refuse recognition and legal benefits to the offspring of interracial marriages—thus promoting the development and economic success of a desired white population²²—bans on same-sex marriage, as the court in *Goodridge* recognized, disadvantage not only gay and lesbian couples, but also their children.²³ Like the antimiscegenation laws of earlier times, such bans create a class of children and their parents unable to avail themselves of either the legal protections of marriage or the corresponding legal, economic, and social benefits available to heterosexual families. The California Supreme Court aptly characterized this ban as creating a type of “second-class citizenship”²⁴ that encompasses the children of same-sex parents as well as the parents themselves. Because the ban on same-sex marriage affects children as well as adults, the result is to discourage the development of certain populations, namely, those who are raised in households headed by same-sex couples.

One must keep these points in mind to fully understand the importance of the decision by a majority of states and the federal government to ban recognition of same-sex marriage. After Hawaii's highest court suggested that same-sex marriage might be

20. *Goodridge*, 798 N.E.2d at 962–64.

21. *Id.* at 957 (citations omitted).

22. See Abrams, *supra* note 1, at 1412.

23. Even in the absence of marriage, there are a number of legal protections available to same-sex couples and their children. In approximately half the states, for instance, children born to same-sex couples can establish legally recognized parent-child relationships with both parents through second-parent adoptions. See Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683, 691–93 (2005) (discussing second-parent adoption laws and their limitations).

24. *In re Marriage Cases*, 183 P.3d at 452.

constitutionally required under Hawaii's Equal Protection Clause,²⁵ many expressed concern that gay and lesbian couples might travel to Hawaii, acquire a marriage license, and require their state to confer the benefits that marriage affords.²⁶ These concerns resulted in enactment of the federal Defense of Marriage Act ("DOMA") in 1996. The law limits federal recognition of marriages to those between a man and a woman²⁷ and permits states to refuse to recognize same-sex marriages performed in other states.²⁸ Alongside the federal DOMA, forty-two states currently enforce "mini-DOMAs," statutory and constitutional prohibitions on performing or recognizing same-sex marriages.²⁹

The result of this current state of the law is that same-sex couples who are able to marry will find it difficult to move to other states with their marital status intact. A further limitation on the mobility of married same-sex couples is the prevalence of jurisdictions that refuse to dissolve same-sex unions by granting a divorce.³⁰ States with a mini-DOMA will typically refuse to recognize a same-sex marriage formalized elsewhere, even for the purpose of dissolving the marriage.³¹ Even states without a mini-DOMA may refuse to recognize a same-sex marriage, and to issue a divorce, if the state does not perform such marriages.³² Same-sex spouses who relocate to a state that refuses to recognize their marriage may be effectively

25. See *Baehr v. Lewin*, 852 P.2d 44, 63–67 (Haw. 1993) (finding that Hawaii's limitation of marriage to a man and a woman created a sex-based classification, and as such was subject to strict scrutiny under article I, section 5 of the Hawaii Constitution).

26. See H.R. REP. NO. 104-664, at 1–18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2905–22 (discussing the implications of *Baehr*).

27. 1 U.S.C. § 7 (2006).

28. 28 U.S.C. § 1738C (2006).

29. See Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73, 84 n.44 (2011) (listing state constitutional and statutory mini-DOMAs).

30. Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1671 (2011) ("Thousands of same-sex couples . . . are in marriages considered valid in some jurisdictions in the U.S. but, as a practical matter, are unable to obtain a divorce."); Oppenheimer, *supra* note 29, at 76 ("[S]ome gay couples find themselves in the unique situation of being married without any way to divorce.").

31. See *Kern v. Taney*, 11 Pa. D. & C.5th 558, 575–76 (Berks Cnty. Ct. Com. Pl. 2010) (finding that Pennsylvania's statutory ban on recognizing same-sex marriage precluded state courts from granting a divorce and upholding the ban as constitutional). A number of mini-DOMA jurisdictions have also enacted legislation refusing to recognize civil unions, domestic partnerships, or even private contracts "purporting to bestow the privileges or obligations of marriage" on same-sex couples. VA. CODE ANN. § 20-45.3 (2012).

32. See *Chambers v. Ormiston*, 935 A.2d 956, 967 (R.I. 2007) (finding that Rhode Island Family Court was without jurisdiction to entertain a divorce proceeding involving a same-sex couple married in Massachusetts). *But see* *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740, 743 (App. Div. 2008) (recognizing same-sex marriage celebrated in Canada, even though New York did not at the time issue marriage licenses to same-sex couples).

unable to obtain a divorce, because they may fail to fulfill the domicile or residency requirements for divorce in the state that married them.³³

State mini-DOMAs, working in tandem with the federal DOMA, constitute a form of what Abrams terms immigration law—they encourage the development of a desired population while discouraging the development and flourishing of an unwanted population. Like the nineteenth-century bans on interracial marriage in the Western Territories, these statutes and state constitutional amendments may dissuade migration from other states by families deemed undesirable, in this case, same-sex couples and their offspring. By withholding the privileges of marriage, family law severely curtails the mobility of same-sex couples. If not dissuaded from moving by legal regimes that refuse to recognize their relationships, same-sex couples who are already married may well find themselves disadvantaged and burdened as a result of their moves, often—as in the case of inability to divorce—in unanticipated ways.

II. ASSISTED-REPRODUCTIVE-TECHNOLOGY REGULATION AS IMMIGRATION LAW

Gay and lesbian parents often employ assisted reproductive technology (“ART”), including surrogacy, egg donation, and sperm donation, to create their families. The turn of gay and lesbian parents toward ART makes them vulnerable where states wish to discourage gays and lesbians from population development. Through the regulation of ART and the parental rights of children born through ART, states unfavorable to gay and lesbian parents can both undermine the security and stability of their families and dissuade them from having children in the first instance.

First, states can place obstacles in the way of gay and lesbian family formation through the legal regulation of custody rights. By refusing to recognize the status of the nonbiological parent of a gay or lesbian couple, states can inflict uncertainty and instability on the families of these couples.³⁴ Other ways in which states can, and do,

33. See *Kern*, 11 Pa. D. & C.5th at 560 n.2, 563 (refusing to grant divorce to same-sex couple residing in Pennsylvania on the basis that Pennsylvania law precluded recognition of their marriage, while noting that the couple did not meet the residency requirements necessary to obtain a divorce in the state in which they married).

34. See Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 31 (2010) (“Over the years, the law’s failure to recognize the legal status of one of the child’s two intended parents has left tens if not hundreds of thousands of children emotionally and financially vulnerable.”).

discourage family formation by gay and lesbian parents include denying custody and visitation rights on the basis of sexual orientation;³⁵ refusing to allow gay and lesbian couples to adopt;³⁶ and denying second-parent adoptions,³⁷ which are currently the most reliable mechanism for gay and lesbian parents to protect their ties to their nonbiological children, as they require recognition by all states under the Full Faith and Credit Clause.³⁸

More powerful still, in some ways, is the ability of states to either facilitate or prevent procreation by regulating the forms of ART that gays and lesbians often employ. Lesbian women who desire a child with a genetic link must employ, at a minimum, a sperm donor, either anonymous or known, in order to procreate. Gay men with the same goal require an egg donor and also require a surrogate—either the donor herself or a gestational carrier—to carry the pregnancy. The regulation of ART and surrogacy is especially effective at shaping population development, because such regulation can either encourage or dissuade gays and lesbians—either individually or as couples—from procreating in the first instance. The current patchwork of approaches to ART has combined with private market forces to create a polarized regime in which some states are especially open to procreation by gay and lesbian parents. This situation may encourage interstate migration of gay and lesbian individuals or couples to more favorable jurisdictions and spur family formation by those already residing in such jurisdictions.³⁹

California, for instance, has developed a line of parentage case law especially favorable to family formation by gay and lesbian

35. For a discussion of different state approaches to the relevance of sexual orientation in child custody disputes, see CAHN & CARBONE, *supra* note 5, at 141–50. As Cahn and Carbone observe, most states require a showing of at least potential harm to the child before they will take sexual orientation into account in determining custody. *Id.*

36. A number of states either prohibit adoption by same-sex couples, *see, e.g.*, MISS. CODE ANN. § 93-17-3(5) (2011), or effectively do so by prohibiting adoption by unmarried cohabitants while refusing to recognize same-sex marriages, *see, e.g.*, UTAH CODE ANN. §§ 78B-6-117(3), 30-1-2(5) (LexisNexis 2011).

37. *See* Joslin, *supra* note 23, at 691–93 (noting that only about half the states permit second-parent adoptions).

38. Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 587–89 (2009) (noting the acceptance by courts and scholars that adoption judgments require full faith and credit, and contending that other judicial determinations of parentage are entitled to full faith and credit as well).

39. Some couples might instead resort to forum-shopping, for instance, in the surrogacy context, by contracting with a surrogate who lives in a state favorable to surrogacy or by arranging for the surrogate to give birth in such a state. *See generally* Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399 (examining the legal implications where a couple from a surrogacy-restrictive state seeks to make a surrogacy arrangement in a surrogacy-permissive state).

parents. California law, while still unsettled, seems particularly supportive of gay male parents who wish to bear children through the use of a gestational surrogate, that is, a surrogate who has no genetic tie to the child.⁴⁰ California is one of only a handful of states to consider gestational surrogacy agreements in determining legal parentage.⁴¹ While California does not enforce such agreements, it does look to them as evidence of intent to parent, which can determine parentage in cases where the parentage statutes do not produce a clear result.⁴² Unlike many of the states that regulate gestational surrogacy through a statutory scheme, California does not explicitly require that the intended parent or parents be married—read, heterosexual⁴³—or that there be a genetic tie to the child.⁴⁴

California custody law coincides with California's support of surrogacy and ART by tending to recognize the parental rights and obligations of same-sex partners. Thus, California case law gives parental recognition to same-sex partners who create children through ova sharing.⁴⁵ It will also recognize as a parent a same-sex partner who functions as a parent even in the absence of any formalized or genetic tie to the child.⁴⁶ California law further facilitates same-sex

40. California's intermediate courts have refused to enforce a traditional surrogacy agreement, that is, one where the surrogate mother has a genetic tie to the child. *In re Marriage of Moschetta*, 25 Cal. App. 4th 1218, 1222 (1994).

41. See *Johnson v. Calvert*, 851 P.2d 776, 777–78, 782 (Cal. 1993) (considering gestational surrogacy agreement as evidence of parties' intent, and using that intent to break a tie between multiple parties with a statutory claim to parental status). In *Johnson*, the court found that the agreement did not violate public policy and therefore could be considered as evidence of intent to parent. *Id.* at 783–85.

42. See *id.* at 782–83; see also *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 1422 (1998) (“There is a difference between a court's *enforcing* a surrogacy agreement and making a legal determination based on the intent *expressed in* a surrogacy agreement.”).

43. Several states with statutory schemes permitting gestational surrogacy require that the intended parents be married, while denying marriage to same-sex couples. See, e.g., TEX. CONST. art. 1, § 32 (limiting marriage to a man and a woman); TEX. FAM. CODE ANN. § 160.754(b) (West 2011) (providing that, for recognition of a gestational surrogacy agreement, “[t]he intended parents must be married to each other”). Other surrogacy statutes are by their terms limited to married heterosexual couples. See, e.g., VA. CODE ANN. § 20-156 (2012) (defining the “intended parents” in a surrogacy agreement as “a man and a woman, married to each other” who enter into such an agreement).

44. See *In re Marriage of Buzzanca*, 61 Cal. App. 4th at 1412 (recognizing legal status of intended parents where an embryo created from a donated egg and donated sperm was carried by a gestational surrogate). While the *Buzzanca* court stated in a footnote that it was not addressing the parental rights of unmarried couples, *id.* at 1419 n.11, some trial courts in California have issued judgments declaring gay male couples the legal parents of children born through surrogacy. See COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 4:18 (2011) (noting reports of such judgments).

45. *K.M. v. E.G.*, 117 P.3d 673, 675 (Cal. 2005).

46. *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005).

parentage by providing for registered domestic partnerships,⁴⁷ which, under California's parentage statutes, give same-sex partners the same parental status as parents in heterosexual marriages.⁴⁸

California has also created an environment favorable to the development of private businesses providing surrogacy and ART services. Whereas some states either prohibit surrogacy altogether or prohibit compensated surrogacy arrangements, California's highest court held that a compensated surrogacy agreement does not violate public policy.⁴⁹ California's legal regime thus creates the potential for a surrogacy-services market and for an ART market more generally. Indeed, California is home to one of the largest sperm banks in the country,⁵⁰ as well as to a large number of fertility centers that advertise themselves as catering to gay men and lesbians.⁵¹ California has further facilitated ART by holding that medical providers may not employ a religious exemption to refuse fertility treatment on the basis of sexual orientation.⁵²

California's favorable setting for the creation and recognition of gay and lesbian families is especially likely to influence interstate migration patterns given the backdrop of less friendly legal regimes in other states. As Professor Courtney Joslin notes, there is currently a "wide and expanding gulf" in the various states' legal treatment of gay and lesbian parents.⁵³ In many parts of the country, the legal rights of gay and lesbian parents who create families through ART are uncertain at best. Many states extend rights to the nonbirth parent of a child born of ART only in the case of married parents, and at the

47. CAL. FAM. CODE §§ 297–299.6 (Deering 2011).

48. *Id.* § 297.5(d) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."). This statute would, for instance, provide parental status to the partner of a woman who undergoes artificial insemination, giving her the same rights as a husband under California Family Code § 7613(A) (deeming a husband the legal father of any child born to his wife through artificial insemination with his consent).

49. *Johnson v. Calvert*, 851 P.2d 776, 783–85 (Cal. 1993).

50. See Gina Kolata, *In Search of Sperm Bank's Mr. Perfect*, INT'L HERALD TRIB., Feb. 18, 2007, available at <http://www.nytimes.com/2007/02/18/health/18iht-sperm.4637446.html> (describing California Cryobank).

51. See, e.g., *Information for Lesbians, Gay, and Same Sex Couples*, CAL. IVF: DAVIS FERTILITY CTR., INC., http://www.californiaivf.com/lesbian_gay_same-sex-couples.htm (last visited Feb. 14, 2012) ("[We] will work with gay men who desire to have a baby. We have also worked with lesbian couples that have traveled here from other states due to more restrictive treatment policies."); PAC. REPROD. SERVS., <https://www.pacrepro.com> (last visited Feb. 14, 2012) (marketing facility as a "lesbian-owned sperm bank").

52. *N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 189 P.3d 959, 962 (Cal. 2008).

53. Joslin, *supra* note 38, at 565.

same time refuse to recognize marriages between same-sex couples.⁵⁴ Some states either refuse to recognize surrogacy agreements⁵⁵ or prohibit compensated surrogacy,⁵⁶ thus leaving gay male parents and their children much more legally vulnerable. Others have refused to recognize the rights and obligations of an intended parent where a lesbian couple creates a child through artificial insemination.⁵⁷

Gay and lesbian parents, then, may be drawn to jurisdictions such as California that are most likely to recognize their parental status. Just as nineteenth-century family law encouraged the migration westward of white women and thus the development of a white population in the Western Territories, twenty-first-century family law may encourage migration to the coastal states by gay and lesbian parents who desire legal recognition. Moreover, where gay and lesbian parents remain in jurisdictions that fail to recognize their status, they are deprived of the legal certainty necessary for the flourishing of children and families. Here, too, an analogy to Abrams's story is instructive. Abrams suggests how nineteenth-century antimiscegenation laws harmed the stability and financial well-being of interracial families that formed despite discouragement from the local legal environment.⁵⁸ In the same vein, the current divide in family law tends to undermine households formed by gay and lesbian parents. Faced with the possibility that their families will not be recognized when the parents dissolve their relationship with each other, when they wish to travel to another jurisdiction, or when one parent dies, gay and lesbian parents and their children alike become psychologically and financially vulnerable.

III. EMPLOYEE BENEFITS LAW AND THE INTERSTATE MIGRATION OF SAME-SEX COUPLES

In Abrams's account, states and the federal government both extended entitlements that worked alongside family law to promote the expansion of a white population in the American West. These included federal homestead acts that granted land in the territories

54. See Joslin, *supra* note 34, at 34–36 (surveying state laws on ART).

55. See, e.g., N.Y. DOM. REL. LAW § 122 (Consol. 2011) (providing that surrogacy contracts are void and unenforceable).

56. See, e.g., MICH. COMP. LAWS § 722.859 (2011) (criminalizing the participation in and facilitation of compensated surrogacy arrangements).

57. See Joslin, *supra* note 34, at 35 (citing Utah as an example).

58. See Abrams, *supra* note 1, at 1412 (“[I]n later years when the offspring of Indian-white marriages tried to gain a share of their white fathers' estates, these laws were frequently used to invalidate longstanding marriages.”).

first to marriageable white women and then to married white couples,⁵⁹ and state laws designed to encourage white women to migrate west by granting them the right to vote and to serve on juries.⁶⁰

As in the nineteenth century, today family law shapes population development by working in tandem with other areas of law. A prominent contemporary instance is the law of employment benefits. State variation in the extension of employment benefits to same-sex spouses and same-sex domestic partners provides a further mechanism for influencing interstate migration by gays and lesbians.

States and other localities have only a limited ability to directly regulate the provision of benefits by private employers. Private employers are free to provide health insurance and other benefits to same-sex spouses or domestic partners—although, under DOMA, those benefits are not entitled to the same federal privileges, such as tax-exempt status, as those that stem from opposite-sex marriages.⁶¹ Any state attempt to mandate such coverage, however, runs the risk of being preempted by the Employee Retirement Income Security Act of 1974 (“ERISA”).⁶² ERISA’s preemption rules generally supersede state laws that “relate to” any employee plan governed by ERISA, including health benefit plans.⁶³ As a result, states are limited in their ability to require private employers to provide same-sex partners or spouses with the same benefits that opposite-sex spouses receive.

A few jurisdictions have sought to work around ERISA preemption by developing mechanisms for indirectly requiring private employers to provide same-sex partners or spouses with the same benefits as opposite-sex spouses. San Francisco made an early attempt to do so in 1996 and 1997 by enacting the Equal Benefits Ordinance, which prohibited the city from entering into contracts with businesses that failed to provide equal benefits to domestic partners and spouses.⁶⁴ The Air Transport Association of America and Federal Express challenged the ordinance on ERISA-preemption grounds. It

59. *Id.* at 1403–05.

60. *Id.* at 1406–08.

61. See Janice Kay McClendon, *A Small Step Forward in the Last Civil Rights Battle: Extending Benefits Under Federally Regulated Employee Benefit Plans to Same-Sex Couples*, 36 N.M. L. REV. 99, 111–12 (2006) (noting that health care provided by an employer to a same-sex spouse, but not to an opposite-sex spouse, counts toward gross income for federal income tax purposes, unless the spouse is a dependent of the employee).

62. 29 U.S.C. §§ 1001–1461 (2006).

63. See *id.* § 1144(a). For a discussion of ERISA preemption of state attempts to mandate provision of equal benefits to same-sex domestic partners and spouses, see McClendon, *supra* note 61, at 107–12.

64. See McClendon, *supra* note 61, at 108 (discussing the San Francisco ordinance).

was invalidated insofar as it attempted to regulate benefits covered by ERISA and offered through ERISA plans, such as health insurance and pensions.⁶⁵ The ordinance was upheld in part, however. For example, the ordinance was allowed with respect to benefits not covered by ERISA, such as travel and relocation benefits.⁶⁶ Moreover, the majority of companies conducting business with San Francisco decided to voluntarily provide full benefits to domestic partners as the code had originally contemplated.⁶⁷ The State of California as well as twelve cities and counties—many of them in California—now have similar equal-benefits ordinances.⁶⁸

Another state approach to procuring equal benefits for same-sex partners and spouses while avoiding ERISA preemption is to regulate the insurance industry rather than employers. ERISA's savings clause exempts state laws regulating insurance from the broader preemption provision.⁶⁹ Thus, states retain considerable freedom to enact insurance-focused rules. One insurance-regulation approach to requiring benefits for same-sex domestic partners was employed with some success by the State of California. In 2004, California enacted a law preventing insurance companies from selling group health care plans that did not offer registered domestic partners the same benefits as spouses.⁷⁰ Under this law, employers that offer health insurance but are not self-insured can purchase only plans providing equal benefits to domestic partners.⁷¹ Similarly, in many other states that provide or recognize either same-sex marriages or domestic partnerships, insurance companies are required to offer

65. *Air Transp. Ass'n of Am. v. City & Cnty. of S.F.*, 992 F. Supp. 1149, 1180 (N.D. Cal. 1998). New York City's ordinance requiring city contractors to provide equal benefits to same-sex partners was similarly struck down as preempted by ERISA, as well as on other grounds. See *Council of N.Y. v. Bloomberg*, 846 N.E.2d 433, 440–42 (N.Y. 2006).

66. *Air Transp. Ass'n of Am.*, 992 F. Supp. at 1180. The current version of the ordinance is found at S.F., CAL. ADMIN. CODE chs. 12B–12C (2011).

67. See CITY & CNTY. OF S.F. HUMAN RIGHTS COMM'N, SEVEN YEAR UPDATE ON THE SAN FRANCISCO EQUAL BENEFITS ORDINANCE 2 (2004) (finding a compliance rate of nearly ninety-five percent in 2003–2004).

68. See *Equal Benefits Ordinances*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/equal-benefits-ordinances> (last visited Feb. 14, 2012) (listing twelve cities and counties with equal-benefits ordinances).

69. See 29 U.S.C. § 1144(b)(2)(A) (2006) (exempting state insurance, banking, and securities regulations from ERISA preemption). For an early proposal to use state insurance regulation to circumvent possible ERISA preemption of state laws on domestic-partner benefits, see Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN'S L.J. 267, 279–80 (1998).

70. See Maria O'Brien Hylton et al., *Same Sex Marriage and Its Implications for Employee Benefits*, 9 EMP. RTS. & EMP'T POL'Y J. 499, 513 (2005) (discussing the California Insurance Equality Act).

71. CAL. HEALTH & SAFETY CODE § 1374.58 (Deering 2010); CAL. INS. CODE §§ 381.5, 10121.7 (Deering 2010).

same-sex spouses and partners the same plans that are available to opposite-sex spouses.⁷² The drawback of this approach is that it does not reach self-insured plans, i.e., health plans where an employer itself assumes the financial risk of paying benefits instead of purchasing a policy from a state-regulated insurance company. ERISA's deemer clause expressly prohibits states from treating self-insured plans as insurance companies for the purpose of state insurance regulation.⁷³ Thus, a self-insured plan need not follow any state insurance mandates, including those requiring equal benefits for domestic partners.⁷⁴

While limited in their ability to require private employers to extend benefits to same-sex partners or spouses, states have extensive power to determine whether such benefits are provided to state and local employees. States vary significantly in this respect, with potentially profound consequences for the interstate migration of gays and lesbians. Whether public employers offer equal benefits to same-sex couples is especially likely to affect interstate movement with respect to state universities, which tend to recruit on a national level.⁷⁵

In the states that recognize same-sex marriage, state employees in such marriages are entitled to the same employment benefits as their opposite-sex counterparts.⁷⁶ Again, these benefits come with the important exception that they are not given equal treatment under federal law.⁷⁷ Nonetheless, such benefits align with the other advantages of marriage, both material and expressive, to render these states especially appealing destinations for gays and lesbians.

Of the states that provide for domestic partnerships or civil unions, those that offer the more robust version of these unions,

72. See, e.g., ME. REV. STAT. ANN. tit. 24, § 2319-A(2) (2011) (requiring insurance policies subject to state insurance law to offer domestic partners the same benefits as married spouses); VT. STAT. ANN. tit. 8, § 4063a(b) (2011) ("Notwithstanding any law to the contrary, insurers shall provide dependent coverage to parties to a civil union that is equivalent to that provided to married insureds.").

73. 29 U.S.C. § 1144(b)(2)(B).

74. See Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 TUL. L. REV. 373, 400–01 n.106 (2001) (citing studies indicating that more than half of employers with five hundred or more employees are self-insured).

75. See *infra* text accompanying notes 89–91.

76. See, for example, New York's recently enacted Marriage Equality Act, N.Y. DOM. REL. LAW § 10-a(2) (Consol. 2011) ("No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex.").

77. See *supra* note 61 and accompanying text.

including California,⁷⁸ New Jersey,⁷⁹ Oregon,⁸⁰ and Washington,⁸¹ mandate equal treatment by government entities of married couples and domestic partners or those in civil unions, thus requiring state and local governments to provide equal benefits. Some states with a weaker form of domestic partnership permit the extension of insurance and other employment benefits to the domestic partners of public employees without requiring full equal treatment. For instance, Wisconsin created domestic partnerships,⁸² authorized the extension of insurance benefits to the domestic partners of state employees,⁸³ and permitted local governmental units to extend such benefits as well.⁸⁴ Similarly, Nevada, while providing for domestic partnerships, explicitly leaves it up to each public employer to determine whether to provide registered domestic partners with the same benefits as spouses.⁸⁵

Most states have neither same-sex marriage nor formal domestic partnerships and forbid recognition of same-sex marriages. Some of these states—Montana and Alaska, for example—offer benefits to the same-sex partners of their employees as the result of a judicial finding that, in the absence of same-sex marriage, the denial

78. CAL. FAM. CODE § 297.5(a) (Deering 2011).

79. N.J. STAT. ANN. § 37:1-32(e) (West 2011).

80. OR. REV. STAT. § 106.340(1) (2009).

81. WASH. REV. CODE ANN. § 26.60.015 (LexisNexis 2011).

82. Wisconsin simultaneously created two types of domestic partnerships. The first is a same-sex domestic partnership that affords those who register as domestic partners a limited array of rights. WIS. STAT. §§ 770.001–.18 (2012); *see also* *Appling v. Doyle*, No. 10-CV-4434, 2011 WL 2447704 (Wis. Cir. Ct. June 20, 2011) (discussing rights that attach to same-sex domestic partnerships). The second, available to both same-sex and opposite-sex couples, applies only in the context of the public employee trust fund, which administers the group health insurance provided to state employees. *See* WIS. STAT. § 40.02(21d) (defining domestic partnership for purpose of administration of public employee trust fund); *id.* § 40.02(25) (defining “eligible employee” for purpose of group insurance administered through public employee trust fund).

83. *See* WIS. STAT. § 40.02(20) (defining “dependent” for purpose of administration of public employee trust fund to include domestic partners, but providing that the department administering state group health insurance plans “may promulgate rules with a different definition of ‘dependent’ than the one otherwise provided in this subsection for each group insurance plan”); *id.* § 40.51(2m)(a) (requiring public employees to submit an affidavit in proof of domestic partnership as a condition of health benefits administered by the public employee trust fund).

84. WIS. STAT. § 66.0137(5)(b) (“The state or a local governmental unit may provide for the payment of premiums for hospital, surgical and other health and accident insurance and life insurance for employees and officers, their spouses and dependent children, and their domestic partners under ch. 770 and dependent children.”).

85. *See* NEV. REV. STAT. § 122A.210(1) (2009) (“The provisions of this chapter do not require a public or private employer in this State to provide health care benefits to or for the domestic partner of an officer or employee.”).

of such benefits violates the state constitution.⁸⁶ Others, such as Kentucky, offer benefits to the same-sex partners of certain state employees, such as employees at some state universities, without a judicial mandate to do so.⁸⁷ The State of Arizona initially offered such benefits voluntarily; when it attempted to rescind the benefits in 2009, it was blocked by a federal injunction on the ground of Equal Protection.⁸⁸

One oft-articulated reason for voluntarily providing same-sex-partner benefits to state university employees is that doing so helps to recruit faculty in a competitive national market, especially given the difficulty and expense of procuring health insurance outside of the employment context.⁸⁹ A related argument is that the provision of benefits to gay and lesbian partners extends a measure of welcome and respect to gays and lesbians considering joining a new community.⁹⁰ On the other side of the debate, some have opposed the extension of benefits to same-sex partners in order to discourage the migration of gays and lesbians to their state. One Kentucky legislator, for instance, objected to the University of Louisville's decision to offer domestic-partner benefits on the ground that it would draw "the wrong kind of people" to Kentucky.⁹¹

86. See *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 793–94 (Alaska 2005) (holding that the state constitution mandates extension of benefits to same-sex partners of public employees in absence of same-sex marriage); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 451–52 (Mont. 2004) (holding that the Montana University System violates the state constitution by withholding insurance benefits from same-sex domestic partners); see also *Bedford v. N.H. Cmty. Technical Coll. Sys.*, No. 04-E-229, 2006 WL 1217283, at *11 (N.H. Super. Ct. May 3, 2006) (holding, prior to New Hampshire's decision to license same-sex marriages, that denying benefits to the domestic partners of state employees violates state antidiscrimination laws); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 448 (Or. Ct. App. 1998) (holding, prior to Oregon's establishment of domestic partnerships, that denial of benefits to same-sex partners of public employers violates the privileges and immunities clause of the state constitution).

87. See *Open Enrollment Plan: Domestic Partners*, UNIV. OF LOUISVILLE, <http://louisville.edu/hr/benefits/openenrollment/plan/eligibility/domesticpartners.html#eligibility> (last visited Feb. 14, 2012) (defining "domestic partner" for purpose of receiving domestic-partner benefits at the University of Louisville).

88. *Collins v. Brewer*, 727 F. Supp. 2d 797, 802–07, 815 (D. Ariz. 2010).

89. See, e.g., Patrick Marley & Georgia Pabst, *Couples Line Up to Register as Domestic Partners*, MILWAUKEE J. SENTINEL, Aug. 3, 2009 (citing University of Wisconsin-Madison's position that domestic-partner benefits would help in recruiting efforts); Sarah Vos & Ryan Alessi, *UK to Consider Domestic-Partner Benefits to Stay Competitive*, LEXINGTON HERALD-LEADER, Sept. 12, 2006; see also Megan Boehnke, *Is UT at Disadvantage Over Partner Benefits?*, KNOXVILLE NEWS-SENTINEL, Mar. 6, 2011 (discussing the University of Tennessee's difficulty in recruiting and retaining faculty internationally and from out of state, given its inability to provide benefits to same-sex partners).

90. See Boehnke, *supra* note 89 (citing the argument that an employer who offers equal benefits "signal[s] to other fair minded Americans that it is a welcoming and inclusive employer").

91. See Vos & Alessi, *supra* note 89 (quoting Kentucky State Senator Dick Roeding).

Perhaps the most significant issue currently being contested on the employment-benefits front is whether state provision of health insurance and other benefits to same-sex partners is consistent with state constitutional bans on same-sex marriage. Very few states have considered the issue. In Kentucky, the Attorney General issued an opinion finding that the provision of such benefits at the University of Kentucky and the University of Louisville violated the state constitutional ban on recognizing same-sex marriage or recognizing a legal status substantially similar to marriage.⁹² More recently, in Wisconsin, a court held constitutional a state law creating same-sex domestic partnerships and permitting the extension of benefits to the domestic partners of public employees.⁹³ The court found that Wisconsin's domestic partnerships, which offer many fewer rights than those of other states, were sufficiently different from marriage to satisfy the state's prohibition on affording same-sex couples "a legal status identical or substantially similar to that of marriage."⁹⁴

The Michigan Supreme Court is the only state supreme court to have considered whether the provision of same-sex domestic-partner benefits by public employers violates the state prohibition on recognizing same-sex marriage. In *National Pride at Work, Inc. v. Governor of Michigan*, the Michigan Supreme Court interpreted the state's marriage amendment to preclude public employers at the state or local level, including the state's public universities, from providing health insurance or other benefits to employees' same-sex domestic partners.⁹⁵ Michigan's constitutional marriage amendment provides that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."⁹⁶ The *National Pride at Work* court held that providing benefits to the same-sex domestic partners of public employees would

92. *Attorney General Stumbo Issues Opinion to Rep. Lee*, U.S. STATE NEWS, June 1, 2007, available at 2007 WLNR 12012124. However, the opinion suggested the deficiency could be corrected if the policies were redrawn to better differentiate domestic partnership from marriage. *Id.*

93. *Appling v. Doyle*, No. 10-CV-4434, 2011 WL 2447704 (Wis. Cir. Ct. June 20, 2011). The challenge to Wisconsin's domestic partnerships encompassed only the same-sex domestic partnerships created by WIS. STAT. ch. 770. *See supra* notes 82–84 and accompanying text (discussing differences between Wisconsin's same-sex domestic partnerships and domestic partnerships for the purpose of receiving benefits administered by the public employee trust fund).

94. WIS. CONST. art. XIII, § 13; *Appling*, 2011 WL 2447704. A similar challenge in Ohio to the provision of domestic-partner benefits by Miami University was dismissed for lack of standing. *Brinkman v. Miami Univ.*, No. CA2006-12-313, 2007 WL 2410390, at *1 (Ohio Ct. App. Aug. 27, 2007).

95. *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 534–35 (Mich. 2008).

96. MICH. CONST. art. I, § 25.

violate the marriage amendment by recognizing a union “similar” to marriage between two members of the same sex.⁹⁷

National Pride at Work exemplifies how state legal attitudes toward same-sex relationships can influence interstate migration by creating an employment market either favorable or unfavorable to gays and lesbians. In an amicus brief, several of Michigan’s public universities argued that prohibiting them from voluntarily offering health insurance and other benefits to domestic partners would make it difficult to “bring to the Universities and to the State of Michigan the talent necessary to sustain their respective positions as flagship institutions of higher education.”⁹⁸ The amicus brief further observed that the enactment of Michigan’s marriage amendment had already led at least one university professor to depart the state.⁹⁹ These observations suggest how a fragmented federal system—one in which some states offer employment benefits for same-sex partners (and, to the extent possible, require private employers to do the same) while others prohibit the extension of such rights—can encourage patterns of migration that will exacerbate the current polarization of “red” and “blue” states. Such polarization may draw gay and lesbian employees—as well as those who support recognizing gay and lesbian rights—to states that provide legal regimes most favorable to gay and lesbian families.

IV. CONCLUSION

The story of the Mercer Girls illustrates how marriage and property law work alongside restrictive immigration law to promote the formation and flourishing of a type of population deemed desirable. But Abrams’s history reminds us that there is another side

97. *Natl Pride at Work*, 748 N.W.2d at 552. A number of Michigan’s public employers responded to the ruling by replacing domestic-partner benefits with benefits provided to a broader category termed “other qualified adults,” which typically consists of nonrelatives and nontenants who have lived with an employee for more than six months. See, e.g., *Benefits Eligibility—Other Qualified Adults (OQA)*, UNIV. OF MICH., <http://www.benefits.umich.edu/eligibility/oqa.html> (last visited Feb. 14, 2012). The state legislature, in turn, responded by enacting legislation that prevents public employers from offering benefits to a cohabitant who is neither the spouse nor the dependent of an employee, and who does not stand to inherit from the employee under the laws of intestacy. Public Employee Domestic Partner Benefit Restriction Act § 3(1) (effective Dec. 22, 2011). In signing the bill into law, Governor Rick Snyder asserted that it did not extend to university or state civil service employees, because to extend it thus would violate the autonomy of universities and the state Civil Service Commission mandated by the state constitution. H.B. 4770 Signing Statement (Dec. 22, 2011), available at www.michigan.gov/documents/snyder/122111_HB_4770_Signing_Statement_372045_7.pdf.

98. Brief for Regents of the University of Michigan et al. as Amici Curiae Supporting Plaintiff-Appellants, *Natl Pride at Work*, 748 N.W.2d 524 (No. 133554), 2007 WL 3168663 at *3.

99. *Id.* at *15.

to family law's role in population development: populations deemed less wanted are refused the rights and recognition that will ensure their prosperity. This aspect of the story is perhaps the most troubling.

The story that Abrams tells is, in large part, a story about children. Family law shapes the nation by encouraging the birth of children to populations deemed desirable. Populations deemed undesirable, by contrast, are discouraged from forming families and having children. But children will be born to disfavored parents, nonetheless. And those children will develop in conditions that disparage their existence by denying them the full legal protections of family law.

While some families headed by gay men and lesbians may well migrate to more favorable legal regimes, others will likely stay behind. And those that do will contend with a system of family law that marks them with the "second-class citizenship" described by the California Supreme Court.¹⁰⁰ Gay men and lesbians in such jurisdictions will continue to form families and to have children. And when they do, they will face the possibility that their offspring will be denied the benefits, certainty, and stability that legally recognized marriage provides.

100. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008).