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The Forgotten Family Law of Eisenstadt v. Baird

Susan Frelich Appleton†

The question is not whether gender, sex, and family are structured and regulated by the state; the question is what kinds of regulations exist and to what end.1

ABSTRACT: Recent Supreme Court rulings on marriage equality and religious objections to contraception have obscured the legacy of Eisenstadt v. Baird, the 1972 case that promised to change the course of family law. In extending constitutional protection to unmarried persons’ access to birth control, Eisenstadt heralded a new family law that would be more inclusive, liberatory, sex-positive, and feminist than its predecessors. Although several forward-looking shifts in family law can trace their roots to this case and it lives on in today’s jurisprudence, Eisenstadt’s full transformative potential has been forgotten, if not co-opted, in service of a narrow and largely traditional agenda.

This essay returns to Eisenstadt and its promise. The case offers an illuminating point of departure for examining family law because it defies the field’s traditional boundaries: Eisenstadt concerns sex, but has nothing to do with domesticity. It makes marriage beside the point, thus ignoring a central pillar of traditional family law. And while collectives—whether the couple, parents and children, or even communes and extended families—provide the typical focus of family law, Eisenstadt on its face emphasizes the individual.

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In recovering *Eisenstadt*'s legacy and exploring what it means for contemporary family law, this essay makes three contributions: First, it reveals how *Eisenstadt*'s mismatch with family law's usual concerns helped revise the understanding of the field itself. Second, in examining both *Eisenstadt*'s promise for family law and the ways this promise has remained unfulfilled, the analysis develops a critical framework that considers, in turn, three axes that have shaped, and reshaped, the field: family, sex, and gender. Finally, the look back at *Eisenstadt* exposes fundamental contradictions that riddle family law today, while offering valuable insights about recent controversies, particularly cases on birth control access and the right to marry.

As the analysis shows, *Eisenstadt* has survived recent retrenchments, but with its more expansive possibilities neutralized. Courts continue to cite it, but they fold it into a family law that—despite modernizing changes—remains stubbornly fixed on marriage and other traditional elements that *Eisenstadt* had boldly challenged.
INTRODUCTION

Despite scholars’ attempts to ascertain “the canon of family law” and to name the basic “principles” underlying the field, family law remains conspicuously unstable. In recent decades, family law has become an important battleground—in “the culture war,” in political skirmishes over “family values,” and in what contemporary reproductive rights advocates have dubbed a “war on women.” Not only do central components of family law demonstrate the capacity for once unimaginable change (witness the rapid success of the marriage-equality movement); in addition, family law’s very existence as an identifiable site of doctrine, theory, and reform has provoked a critique of “family law exceptionalism.”

Such shifting, unsettled terrain not only leaves family law’s boundaries elastic and porous. It also welcomes and often disguises contradictions about family law’s objectives and values. This paper engages with these challenges for family law by revisiting Eisenstadt v. Baird, the 1972 case in which the Supreme Court held unconstitutional a law criminalizing the distribution of contraceptives to unmarried individuals. Eisenstadt heralded a new family law that would be more inclusive, liberatory, sex-positive, and feminist than its predecessors. Despite its transformative potential, however, Eisenstadt survives today only as a ghostly remnant, exemplified in contemporary controversies about marriage equality and religious objections to contraception. Even when courts continue to cite Eisenstadt, they fold it into a family law that—despite

2. Jill Hasday introduced the term “canon” in family law scholarship, explaining that it refers to “the ways of thinking about family law that are widely shared by legal scholars and especially by legal authorities, like legislators and judges.” Jill Elaine Hasday, The Canon of Family Law, 57 STAN. L. REV. 825, 825 (2004). She continues: “the family law canon importantly determines what counts as family law, what constitutes a good reason or a convincing argument in a family law debate, what explanations have to be given, and what does not have to be explained.” Id. at 827; see also JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 1-6 (2014) [hereinafter HASDAY, FAMILY LAW REIMAGINED].


10. According to the analysis published by Roy Lucas in 2003, the case was “mentioned in over 52 subsequent Supreme Court cases from 1972 through December 2002.” Roy Lucas, Essay: New
modernizing changes—remains stubbornly fixed on marriage and other traditional elements that Eisenstadt had boldly resisted.

This essay returns to Eisenstadt and its promise. The case offers an illuminating point of departure for examining family law because it defies the field’s usual boundaries. As explained more fully below, Eisenstadt concerns sex, but has nothing to do with domesticity. It makes marriage beside the point, thus ignoring a central pillar of traditional family law. And while collectives—whether the couple, parents and children, or even communes and extended families—provide the typical focus of family law, Eisenstadt on its face emphasizes the individual.

In recovering Eisenstadt’s legacy and exploring what it means for contemporary family law, this essay makes three contributions: First, it reveals how Eisenstadt’s mismatch with family law’s usual concerns helped revise the understanding of the field itself. Second, in considering both Eisenstadt’s promise for family law and the ways this promise has remained unfulfilled, the analysis develops a critical framework that considers, in turn, three axes that have shaped, and reshaped, the field: family, sex, and gender. This framework clarifies Eisenstadt’s important effects and also helps track their course up through present-day cases about marriage equality (Obergefell v. Hodges\(^\text{11}\)) and access to birth control (Burwell v. Hobby Lobby Stores, Inc.\(^\text{12}\) and its progeny\(^\text{13}\)). Finally, the look back at Eisenstadt exposes fundamental contradictions and tensions that riddle family law today.

The essay proceeds as follows. Part I introduces and contextualizes Eisenstadt, situating it historically and doctrinally. The problem of family law’s boundaries frames Part II, with Section II.A presenting the significant ways in which Eisenstadt diverges from family law’s traditional considerations and examining the promise such departures might hold for the field along three pivotal axes: family, sex, and gender. In the process, the analysis recovers often forgotten details of the Court’s opinion and shows why some modern developments, such as the Affordable Care Act’s (ACA’s) contraceptive mandate, advance Eisenstadt’s libera
tory approach to family law. Section II.B returns to the axes of family, sex, and gender to consider the extent to which Eisenstadt’s promises for family law have fallen short, created destructive synergies, or encountered retrenchments, with recent cases on the right to marry and religious objections to contraception among the telling illustrations. Part III connects these conflicting signals to more basic contradictions and tensions in family law. Section III.A emphasizes the rhetoric of deregulation,

\footnotesize{Historical Insights on the Curious Case of Baird v. Eisenstadt, 9 Roger Williams U. L. Rev. 9, 48 (2003).}

\(^{11}\) 135 S. Ct. 2584 (2015).

\(^{12}\) 134 S. Ct. 2751 (2014).

typified by Eisenstadt, despite the significant regulatory work that family law has consistently performed. Section III.B grapples with the problem of equality/inequality in family law, highlighting the muddled picture that emerges when Eisenstadt’s legacy is taken together with the confluence of several contemporary developments, including constitutional recognition of marriage equality, the class-based “retreat from marriage,” family law’s regime of negative rights and privatized dependency, and challenges to the ACA’s contraceptive mandate. In the Conclusion, we see how Eisenstadt survives, but with most of its expansive possibilities overlooked, if not co-opted, in service of a narrow vision of family law.

I. Eisenstadt in Context

In 1967, William Baird gave a free sample of vaginal spermicidal foam to a student attending a lecture on contraception at Boston University, prompting his arrest and conviction for violating a Massachusetts law prohibiting the distribution of birth control to unmarried persons. According to historical accounts, Baird ignored the strategy mapped out by Planned Parenthood and other proponents of reproductive freedom who sought to press for legislative change. Instead, he set out to defy the statute so that he could challenge its constitutionality in court. Baird tells the story this way:

My own reason for challenging antiquated birth control laws was having witnessed the tragic death of an unmarried mother of nine at Harlem Hospital. She died by trying to abort with a wire coat hanger that was imbedded in her uterus. I was arrested and jailed 8 times in 5 states for merely lecturing on those rights.

On April 6, 1967 I tested “Crimes Against Chastity” before 2,500 Boston University students. After my speech, I was arrested and convicted for exhibiting birth control devices and giving one package of foam to a 19-year-old student.


16. E-mail from Bill and Joni Baird to author (Dec. 4, 2012, 01:54 p.m. CST) (on file with author).
Although Baird chose to provoke litigation with a relatively old-fashioned means of birth control, Emko Foam, the case's subtext necessarily included "the pill," approved by the Food and Drug Administration (FDA) in 1960, which had promised to liberate heterosex from some of its age-old disadvantages. Baird prevailed, with the Supreme Court invalidating the statute in 1972.

As a doctrinal matter, Eisenstadt emerged as one pea in the "right of privacy" pod—occupying the space in between Griswold v. Connecticut and Roe v. Wade. Griswold, decided seven years before, canvassed the protection for privacy emanating from the First, Third, Fourth, Fifth, and Ninth Amendments; found a constitutional right of privacy in the penumbras of those provisions; and overturned Connecticut's statute criminalizing the use of contraception, even by married couples. The majority opinion in Griswold, one of the "stalwarts of the family law canon," celebrates marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." The Griswold majority's conceptualization of privacy aims directly to insulate from state intrusion "the sacred precincts of the marital bedroom," as the Justices imagined the police invasion necessary to collect evidence of illicit use of birth control.

Although Griswold's focus on enforcement in the marital bedroom suggested that only laws criminalizing contraceptive use within marriage faced constitutional jeopardy, Massachusetts's statute prohibited distribution, a move designed to avoid such perils. In 1966, the Massachusetts legislature had responded to Griswold, carving out a narrow loophole in its ban to the extent

18. See May, supra note 17, at 58; see also Eig, supra note 17, at 319.
20. 381 U.S. 479 (1965).
22. Griswold, 381 U.S. at 484-85.
24. Griswold, 381 U.S. at 486. The full paragraph merits quoting: We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.
25. Id. at 485-86.
26. See id. at 485 ("And it concerns a [Connecticut] law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.").
necessary to steer clear of married couples. It did so by means of a statutory amendment that funneled all distribution through professionals, such as physicians and pharmacists, thus making them the gatekeepers for ascertaining the marital status of those obtaining birth control. The law had a wider impact, however, because it stopped clinics from providing contraception even to married clients.

In contrast to the Griswold majority’s analysis, which devoted little attention to Connecticut’s reasons for prohibiting the use of contraception or the legislature’s repeated refusal to repeal the law, the Eisenstadt Court engaged closely with the three possible justifications offered in support of Massachusetts’s denial of access to unmarried persons. Indeed, although Griswold remained silent on the governing standard of review, Eisenstadt expressly avoids the issue, on the ground that none of the justifications can pass even the rational basis test. Despite such evasion, the Court’s analysis reveals a close look at the relationship between ends and means. Regarding the state’s effort “to discourage premarital sexual intercourse,” the Court found irrational the use of pregnancy as “punishment” designed to deter the misdemeanor of fornication, especially given the widespread availability of condoms for the purpose of preventing the spread of STDs. Similarly, the Court rejected the state’s asserted health-based rationale, because such interests could not reasonably justify a law excluding married persons.

The Court offered a more extended—and provocative—analysis of the state’s third asserted rationale: moral opposition to birth control itself. Ducking the lingering questions from Griswold about the precise constitutional basis of

27. Eisenstadt v. Baird, 405 U.S. 438, 450 (1972) (quoting Commonwealth v. Baird, 247 N.E.2d 574 (Mass. 1969)). Note, however, that even before the amendment, the Massachusetts prohibition exempted condoms, which were considered devices to prevent the spread of disease. See infra notes 142-145 and accompanying text.

28. See id. at 441 n.2. Wisconsin had a similar law, which was struck down in an opinion that relied extensively on Eisenstadt. Baird v. Lynch, 390 F. Supp. 740 (W.D. Wis. 1974).

29. Others have noted how the ban on use struck down in Griswold similarly had a disproportionate impact on the poor. See, e.g., Catherine G. Roraback, Griswold v. Connecticut: A Brief Case History, 16 OHIO N. U. L. REV. 395, 396-97 (1989); Cary Franklin, Griswold and the Public Dimension of the Right to Privacy, 124 YALE L.J. 332, 334 (2015); see also Jill LePore, To Have and to Hold: Reproduction, Marriage, and the Constitution, NEW YORKER (May 25, 2015), http://www.newyorker.com/magazine/2015/05/25/to-have-and-to-hold (“The ban [in Griswold] was a real hardship, though, for the poor, and especially for poor women in relationships with men who refused to use condoms.”).

30. See Roraback, supra note 29, at 396.

31. “The legislative purposes that the statute is meant to serve are not altogether clear.” Eisenstadt, 405 U.S. at 442.

32. Id. at 446-47, 447 n.7.

33. E.g., id. at 447.

34. Id. at 447-48.

35. Id. at 448-49. Of course, today we think of condoms as protection against both disease and conception. See infra text accompanying notes 142-145.

36. Eisenstadt, 405 U.S. at 451-52. Also, as the Court noted, FDA regulation already addresses such safety concerns. Id.
the right of privacy, the Court turned to the Equal Protection Clause, explicitly confessing uncertainty about the very meaning of that right while ruling that marital status is an unacceptable classification in this context:

[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.37

Court observers have contended that these unusual verbal contortions—oddly hypothetical and alternative readings of a recent precedent—were purposely designed to leave wide room for the Justices to maneuver on the subject of abortion38 *Roe v. Wade*39 had come to the Court for argument in the same term as *Eisenstadt*, but then the constitutional challenge to abortion bans was scheduled to return for reargument the following term.40 *Roe*, in extending privacy to abortion decisions, seized on *Eisenstadt*’s hypothetical understanding of privacy as autonomy regarding life-altering personal decisions41—but severed this definition from the conditional language suggesting that the right of privacy might not mean anything ("If the right of privacy means anything . . . .").42 Further, *Roe* took the opportunity to clean up

37. *Id.* at 453-54 (emphasis added) (citation omitted).
42. *Eisenstadt*, 405 U.S. at 453.
some unfinished business from *Griswold* and *Eisenstadt*, first pinning down the Due Process Clause’s protection of “liberty” as the constitutional source of the right of privacy and then identifying strict scrutiny as the applicable standard of review for state infringements. Finally, the structure of the controversy in *Eisenstadt*—based on a law aimed at the distributor but with obvious implications for the interests of those seeking access to contraception—offered a valuable model for the challenges in *Roe* and later abortion cases, given that restrictions on abortion have always criminalized the conduct of the abortion provider but not the patient.

II. *EISENSTADT* IN FAMILY LAW

Whatever the import of *Eisenstadt* in other fields, such as First Amendment law and criminal law, that this case should have a prominent place in family law is not entirely self-evident. On its surface, *Eisenstadt* does not seamlessly match up with family law’s standard content. The campus scene portrayed in the case conveys no hint of domesticity, but rather evokes what was then called “sexual freedom” and today is called “hooking up,” again not obvious topics for family law. Indeed, only a few years after *Eisenstadt*, college students sharing a home—and hence actually performing “domestic relations”—failed to win the protective mantle of “family” in their attempt to challenge a restrictive zoning ordinance.

Under a traditional conceptualization of family law centered on marriage, *Griswold* would lie at the heart of the field, which would not necessarily include *Eisenstadt*. *Griswold*’s encomium to marriage focuses on a civil relationship that some theorists celebrate as central, while others criticize this


44. *Id.* at 155, 162-63.

45. *Eisenstadt*, 405 U.S. at 443-46 (upholding Baird’s standing); *id.* at 462 (White, J., concurring).


47. See 405 U.S. at 455 (Douglas, J., concurring) (analyzing Baird’s right to distribute contraceptives as protected activity under the First Amendment).


49. See *SELF*, supra note 1, at 189-98.


centrality because it makes marriage "the measure of all things" familial\textsuperscript{52} and the prerequisite for countless state-granted family privileges and benefits.\textsuperscript{53} Certainly, the Supreme Court's marriage-equality milestone, \textit{Obergefell v. Hodges},\textsuperscript{54} reinforces this understanding by extolling the superiority of marriage over all other possible relationships.\textsuperscript{55} In \textit{Eisenstadt}, arguments made in favor of the Massachusetts law described as "untenable" any claim "that the unmarried have a 'right' to indulge in the act of sexual intercourse which creates the need for professional contraceptive advice."\textsuperscript{56} The concurring opinion of Justice White, joined by Justice Blackmun, also invoked marriage, finding fault with the Massachusetts statute because of the burden it would impose on married persons' access to contraceptives.\textsuperscript{57}

\textit{Eisenstadt} fits no more comfortably within a second classic understanding of family law that emphasizes the parent-child relationship.\textsuperscript{58} From this perspective, \textit{Eisenstadt} contrasts with the Court's next foray into the question of access to birth control, \textit{Carey v. Population Services International}.\textsuperscript{59} \textit{Carey} raised an important and traditional family law issue, parental autonomy, because New York's restrictive law would have disallowed access even for those minors whose parents wanted them to have contraceptives.\textsuperscript{60} \textit{Eisenstadt}, however, does not directly present questions of parental autonomy.

Nor does \textit{Eisenstadt} quite fit into family law the same way that \textit{Roe v. Wade}\textsuperscript{61} does. True, both \textit{Eisenstadt} and \textit{Roe} emphasize individual interests over state interests to delink heterosex from procreation, but there are several important distinctions. First, because \textit{Roe}'s protection of abortion decisions does not turn on marriage or its absence, its holding applies to both married and unmarried women, thus encompassing the relationship that belongs to family law under the first understanding.\textsuperscript{62} \textit{Eisenstadt}, however, explicitly makes the \textit{unmarried individual} its exclusive focus. Second, perhaps because its analysis assumes an already pregnant woman or perhaps because subsequent scholarly treatment has highlighted this reading, \textit{Roe} has become a case about whether the state may compel motherhood,\textsuperscript{63} a status commonly included in the second

\begin{itemize}
\item[53.] NANCY D. POLIKOFF, \textit{BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW} 126 (2008) (criticizing marriage as the wrong "dividing line" for the distribution of rights and responsibilities).
\item[54.] 135 S. Ct. 2584 (2015).
\item[55.] Id. at 2594-2601.
\item[56.] Brief for Appellant at 16, Eisenstadt v. Baird, 405 U.S. 438 (1972) (No. 70-17).
\item[57.] \textit{Eisenstadt}, 405 U.S. at 463-64 (White, J., concurring).
\item[58.] See Hamilton, \textit{supra} note 3, at 42-44.
\item[59.] 431 U.S. 678 (1977).
\item[60.] Id. at 708 (Powell, J., concurring).
\item[61.] 410 U.S. 113 (1973).
\item[62.] But see Doe v. Bolton, 410 U.S. 179, 196-97 (1973) (describing abortion patient's situation as if she must always be unmarried).
\item[63.] E.g., ROBERT D. GOLDSTEIN, \textit{MOTHER LOVE AND ABORTION: A LEGAL INTERPRETATION} (1988); KRISTIN LUKER, \textit{ABORTION AND THE POLITICS OF MOTHERHOOD} (1984); Reva Siegel,
classic understanding of family law emphasizing the parent-child relationship. Or, perhaps the greater controversy generated by *Roe*, compared to *Eisenstadt*, has diverted attention from the ways in which *Eisenstadt* too challenges traditional gender roles, including motherhood, within the family itself. Finally, *Roe* has additional implications it shares with *Griswold*, but not with *Eisenstadt*. For example, given the then longstanding guarantee of a husband's sexual access to his wife (with spousal rape not legally recognized), both contraception and abortion promised married women much-needed relief from ceaseless pregnancy and childbearing. By contrast, the unmarried women (and men) whom *Eisenstadt* protects always fell outside coverture's reach and hence would be covered by sexual assault prohibitions, whatever the obstacles to their robust enforcement.

In sum, *Griswold* has an important place in an understanding of family law centered on marriage; *Carey* occupies a similar space in an understanding centered on the parent-child relationship; and *Roe* could well be at home under either of these traditional conceptualizations. *Eisenstadt* complicates these standard stories of family law's concerns and boundaries, in turn suggesting the possibility of a third or new understanding of the field.

So, what might this new family law entail? *Eisenstadt* stands out as an important early step in family law's trajectory toward more inclusive notions of the relationships that count as "family," greater acceptance of variations in sexualities and sexual behavior, and rejection of gender-based discrimination. The success of the contemporary marriage-equality campaign, which exhibits each of these characteristics to a degree, can be seen as one timely example, although its emphasis on marriage stands at odds with some of *Eisenstadt*'s distinctive contributions. Nonetheless, as this example illustrates, recognizing affiliations and performances that fail to fit traditional norms not only makes them visible and reduces stigma but also provides a basis for extending to many who need and deserve them family law's supportive functions—from material benefits to dispute-resolution mechanisms. Such moves help make good on

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66. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The Court cited *Eisenstadt* three times, id. at 2598, 2599, 2604, in deciding that "the right to marry is a fundamental right inherent in the liberty of the person," id. at 2604, and that "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty," id.

67. See id. at 2594-95 (recounting stories of families of named plaintiffs in *Obergefell*); see also Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 170-71 (2015) (criticizing family law, which focuses on marriage, for failure to provide legal institutions for the increasing number of nonmarital families).
family law’s oft-professed commitment to pluralism and its rejection of state efforts to standardize families.\(^{68}\)

This Part continues with analyses of *Eisenstadt* on three axes that long have shaped family law: family, sex, and gender. Section A takes a close look at the promising and largely deregulatory signals sent by *Eisenstadt*, mining the case for its transformative and liberatory potential, consistent with both its holding and its rhetoric. Section B revisits the axes of family, sex, and gender, presenting a more up-to-date and decidedly less optimistic reading that not only highlights *Eisenstadt*’s unfulfilled promises and but also takes into account the “dark side” of family planning initiatives of the era.\(^{69}\)

**A. Eisenstadt’s Promise for Family Law**

1. *Family*

Family law and its institutions necessarily exclude.\(^{70}\) Given this truism, “who’s in and who’s out”\(^{71}\) remain political choices. For those embracing a capacious understanding of “family” and thus of “family law,” *Eisenstadt* stands out as an important step forward, consistent with the pluralism that this field has long purported to respect.\(^{72}\)

*Eisenstadt*’s mandate for equal treatment of single individuals dethrones marriage,\(^{73}\) clearing the way for more inclusive conceptualizations. Including *Eisenstadt* in a family law casebook and placing it in a chapter devoted to alternative or nontraditional families reflect this understanding.\(^{74}\) *Eisenstadt* provides legal support for equal treatment of sexually active but unmarried individuals, as well as extended families or arrangements that exist outside the formalities of marriage or adoption and often flourish in minority

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71. Minow, supra note 70, at 269.

72. See supra note 68 (citing authorities).


communities. Under *Eisenstadt*, privacy becomes a "portable" right that one can take in and out of different familial arrangements over a lifetime.

Read in this way, *Eisenstadt* also challenges basic family law doctrines such as "illegitimacy," which had become constitutionally vulnerable around the same time. *Eisenstadt*’s implications could reach still further, casting doubt on the use of marriage as a criterion for the host of benefits that same-sex marriage cases typically recite—in turn portending the critique of marriage as "the dividing line" advanced by Nancy Polikoff and other contemporary scholars. Predictably, however, not everyone sees this characteristic of *Eisenstadt* in a positive light, with critics condemning the case as an "assault on marriage."

*Eisenstadt* does more than enlarge the meaning of "family." It also changes how we think about families, helping to establish planned families as normative. The Court recognized the decision whether to bear or beget a child as a momentous personal choice. Moreover, it decided the case two years after Congress enacted the Family Planning and Population Research Act of 1970. This legislation encouraged, inter alia, the development of accessible family planning services and gave rise to the Title X program, which provides

75. See, e.g., CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 62-107 (1975); Sacha Coupet, *Swimming Against the Great Adoption Tide: Making the Case for "Impermanence,"* 34 CAP. U. L. REV. 405 (2005); cf. Moore v. City of E. Cleveland, 431 U.S. 494, 510 (1977) (Brennan, J., concurring) (noting "prominence of other than nuclear families among ethnic and racial minority groups, including our black citizens").

76. *COTT,* supra note 73, at 199 ("Rather than tying privacy in reproductive decision-making to marital intimacy the *Eisenstadt* decision made it a more portable, individual right . . . .").


78. Courts in such cases routinely cite the many legal consequences that accompany marital status. See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015) (The "expanding list of governmental rights, benefits, and responsibilities" tied to "marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules"); United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) ("Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits"); Varnum v. Brien, 763 N.W.2d 862, 902 n.28 (Iowa 2009) ("Plaintiffs identify over two hundred Iowa statutes affected by civil-marriage status . . . ."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955-56 (Mass. 2003) (noting that "hundreds of statutes are related to marriage and to marital benefits" and listing examples (internal quotation marks omitted)).


82. See supra note 37 and accompanying text.

federal support for family planning services for low-income and uninsured individuals.84

The Court’s opinion does not mention the federal statute, although Baird had argued that it pre-empted the state law under which he was convicted.85 Yet, federal funds for family planning proved to be enormously important and certainly should count as family law, too.86 Indeed, increased legal and financial access to contraception emerged in tandem during this era, and social scientists have found these two developments—legalization and government funding—to be associated with “large and persistent improvements in the material living circumstances” of families and children.87 Thus, read against the background of a government-supported family planning program, Eisenstadt’s soaring language about reproductive autonomy makes children, family size, and family wellbeing all matters for deliberate decisionmaking.

Accordingly, Eisenstadt’s conceptualization of family reflects a sensitivity to the class distinctions that scholars find missing in family law today, even as such distinctions often define family life.88 Eisenstadt was decided at a time when a “dual system of family law” (one for the rich and one for the poor) was frankly acknowledged and criticized,89 when scholars thought the Supreme Court might be on the brink of recognizing a constitutional right to basic welfare against the states,90 and when family law casebooks covered the


86. Jill Hasday has criticized the way the mainstream conception of family law today ignores public assistance programs and the impacts of what she calls “family law for the poor.” HASDAY, FAMILY LAW REIMAGINED, supra note 2, at 195-220.


90. See Frank I. Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7, 13 (1969) (reading equal protection cases to conclude that “we can hardly avoid admitting that the injury consists more essentially of deprivation than of discrimination, that the cure accordingly lies more in provision than in equalization, and that the reality of injury and need for cure are to be determined largely without reference to whether the complainant’s predicament is somehow visibly related to past or current governmental activity”). See generally Karen M. Tani, Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor, 100 CORNELL L. REV. 825 (2015). Two prominent cases of this era held unconstitutional laws that created barriers to access for poor persons seeking to change their family status. Zablocki v. Redhail, 434 U.S.374 (1978) (marriage); Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce).
particular legal problems endured by families in poverty more than they do today. Scholars and other observers understood that laws like Massachusetts’s, which prohibited clinics from providing birth control, fell hardest on the poor (because the more financially secure members of society could obtain contraceptives from private doctors or travel out of state). A draft of Justice Brennan’s opinion also recognized how the law burdened the poor, although this point did not appear in the final version. Finally, recall that, despite Eisenstadt’s immediate focus on (presumably middle-class) Boston University students, Baird attributed his legal fight against birth control restrictions to the post-abortion death of a poor woman in a Harlem Hospital.

Hence, in its day, the Eisenstadt majority opinion’s respect for access to birth control, regardless of marriage, might well have been read as an intervention capable of combatting poverty. The federal statute, part of the legal landscape, suggests a role for public assistance to facilitate the exercise of such autonomy. Put differently, in the absence of a narrow definition of “access,” the Court invited, or at least left open, consideration of a generous approach that might include government or other affirmative support. So read, Eisenstadt might have marked the beginning of an appreciation for how family and state are intertwined, in contrast to today’s insistence on both “personal responsibility” and a rigid public/private divide that reinforce class differences.

This strand of Eisenstadt’s promise reemerged years later in the ACA’s contraceptive mandate. It treats birth control as a matter of public health,  


92. See supra note 29 and accompanying text. For example, Cary Franklin describes Eisenstadt’s precursor, Griswold, as a “poverty case” and notes the central role of clinics in that case. Franklin, supra note 29, at 335-37.  

93. See supra note 29 and accompanying text.  

94. Justice Brennan excised this reference at the request of Justice Stewart. See Lucas, supra note 10, at 45-46.  

95. See E-mail, supra note 16; Bill Baird, The Real History of Your Right to Birth Control, PRO CHOICE LEAGUE, http://prochoicelgoue.org/history.html (last visited Apr. 29, 2016).  


97. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014). A majority of the Court required exemptions from the mandate for for-profit employers asserting religion-based objections. In reaching its conclusion, the Hobby Lobby majority decided the following: that closely held for-profit corporations are persons who can exercise religion; that the mandate imposes a substantial burden on their exercise of religion; that this burden, which must rest on subjective assessments, is not necessarily dissipated by the intervening actions of the employees in choosing or obtaining contraception themselves; that cost-free access to the challenged contraceptive methods can be assumed to be a compelling interest although exemptions already provided for “grandfathered” and small employers undercut the arguments that the government’s interests in health and gender equality are compelling; and that the government had not satisfied the Religious Freedom Restoration Act’s least-restrictive-means requirement because government-provided contraception would more directly achieve
while highlighting the connections among family planning, economic wellbeing, and (women's) employment. In addition, perhaps above all else, it emphasizes the importance of the financial accessibility of birth control by relieving employees of all cost-sharing. Although it imposes a new regulation on employers, the mandate advances the theme of liberty and deregulation in family law, consistent with Eisenstadt.

2. Sex

Despite the sexual revolution underway at the time, ongoing regulation of sex in family law and criminal law, along with generally sex-negative attitudes, make it easy to imagine how Eisenstadt could have come out the other way. Not only could the Justices have distinguished Griswold because of that case's emphasis on marriage and the married couple as an entity, firmly at home in the private sphere, but also the public distribution for which Baird was convicted could have made Griswold's "right of privacy" far less salient. In later years, in cases about sex toys, some courts would find that anti-distribution laws raise no privacy concerns, regardless of the site of the contemplated use of the product.

Further, the oft-cited understanding that family law performs a channeling function, specifically channeling sex into marriage, could well have tilted the Court toward a different outcome in Eisenstadt. After all, Massachusetts had a criminal fornication statute, which functioned as a family law prohibiting nonmarital sex, to which the Court could have accorded more weight when examining the purposes of the contraception restriction.

the stated goals and objecting for-profit corporations could be included in already existing accommodations for nonprofit organizations, which can self-certify their religious objections to require the insurer to provide the contraceptive coverage.

98. See id. at 2787-88 (Ginsburg, J., dissenting).
99. See id. at 2762 (majority opinion); Nora V. Becker & Daniel Polsky, Women Saw Large Decrease in Out-of-Pocket Spending for Contraceptives After ACA Mandate Removed Cost Sharing, 34 HEALTH AFFAIRS 1204 (2015).
Finally, Chief Justice Burger’s *Eisenstadt* dissent plausibly argued that health concerns might support the Massachusetts law. First, contraceptive devices or substances to be introduced into the human body, such as Emko vaginal spermicidal foam, could pose hazards for some users.\(^{107}\) Second, for women whose health requires them to avoid pregnancy, the need for medical advice about the most effective type of birth control could justify limiting distribution to professional channels.\(^{108}\)

Instead, however, consistent with the spirit of the times, *Eisenstadt* not only gestures toward a more liberatory vision of sex but then also finds it worthy of constitutional review (here, based on equal protection). Treating the fornication misdemeanor merely as a data point, but not a serious deterrent,\(^{109}\) in contrast to the risk of pregnancy,\(^{110}\) the Court signifies that sex need not serve marriage or procreation.\(^{111}\) The Court assumes without analysis that restrictions on distribution by third parties amount to restrictions on use by those wishing to have nonprocreative sex—a point the Court addressed explicitly a few years later in *Carey v. Population Services International*.\(^{112}\)

Although Sylvia Law contends that *Eisenstadt* focused exclusively on the burdens imposed by the Massachusetts restriction, rather than acknowledging the value of sexual expression for its own sake,\(^{113}\) the two seem to be sides of a single coin, especially if the Court assumes that at least some sexual activity will flourish “naturally” once unleashed from costs and limits (including legal limits) that keep such behavior in check.\(^{114}\) Indeed, despite more limited

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107. *Id.* at 470 (Burger, C.J., dissenting).
109. See supra note 34 and accompanying text.
114. Ariel Dubler explains how such assumptions about sex influenced the emphasis on marriage in *Skinner*, 316 U.S. 535, in which the Court struck down a law imposing sterilization as punishment for certain crimes. Dubler, supra note 111, at 1361 (“Sterilization, far from imposing social order as eugenicists claimed it would, actually could bring about sexual chaos. Forced sterilization was billed as a remedy for a particular set of social evils, but, in fact, it generated a different set of social evils. By
readings by some scholars, others have interpreted Eisenstadt and related cases as protecting sexual freedom. A different group of Justices resolved this uncertainty some thirty years later in Lawrence v. Texas, which constitutionalized sexual freedom more explicitly by striking down criminal prohibitions on same-sex sodomy.

At the very least, as Ariela Dubler has pointed out, with Eisenstadt, "the status of sex outside of marriage clearly had begun its migration over the illicit-illicit divide," a process culminating in Lawrence, in which no claim to marriage could be advanced at the time. Although Eisenstadt does not go as far as Lawrence, because the criminal fornication statute was not before the Court, we might nonetheless discern evidence of what Melissa Murray calls "a space between marriage and crime that, in the relative absence of legal regulation, offer[s] the possibility of sexual liberty untethered to the disciplinary domains of the state." She finds in Eisenstadt a continuum that replaces the once prevailing marriage/crime or family law/criminal law binary, in turn working "a subtle shift in the organization of intimate life." Yet, I would argue that Eisenstadt, on its face, does far more than create a continuum and that the shift it works is anything but subtle. Rather, the majority's equal protection analysis reaches the then-pathbreaking conclusion that marriage-based distinctions have no place in the sorts of intimate decisions exemplified by sex and reproductive choices. Severing sex from marriage represents a remarkable and consequential move, with the potential to open up and reshape family law. We can find support for this conclusion in today's "retreat from marriage." We can also find such support in the contemporary

Nonetheless, many modern theorists understand sex and sexualities not as products of an inner drive but rather as performances of socially constructed scripts. See, e.g., Jeffrey Weeks, Sexuality 18-23 (3d ed. 2010); Ken Plummer, Symbolic Interactionism and Sexual Conduct: An Emergent Perspective, in Sexuality and Gender 20, 23-24 (Christine L. Williams & Arlene Stein eds., 2002). Of course, legal changes, such as those represented by Eisenstadt, help rewrite such scripts.

115. E.g., Ziegler, supra note 113, at 669 (stating that Eisenstadt did not determine whether the state could pursue the goal of discouraging premarital intercourse, but concluded only that the means chosen "could not conceivably have achieved or even been intended to accomplish such an end").


117. 539 U.S. 558 (2003). But see Rosenbury & Rothman, supra note 101 (contending that the Court celebrated intimacy, not sex).


119. Id. at 809.

120. Melissa Murray, Marriage as Punishment, 112 Colum. L. Rev. 1, 54 (2012).

121. Murray, supra note 48, at 1297.


123. See, e.g., Sawhill, supra note 14; Lundberg & Pollak, supra note 14.
argument that widening access to birth control, as accomplished by the ACA mandate, necessarily reflects a policy choice in favor of "sex without consequences."  

3. Gender

Eisenstadt was well ahead of its time on issues of gender, exhibiting remarkable sensitivity to inequalities even in the absence of explicit claims of discrimination. The absence of such claims should come as no surprise. At the time, the Court had decided only the first of the cases that subjected gender-based classifications to equal protection scrutiny, Reed v. Reed, which held that a statutory preference for male over female family members to administer decedents' estates constituted arbitrary state action with no rational basis. By the time of Eisenstadt, the Court had not yet settled on intermediate scrutiny, the "anti-stereotyping principle," or the consideration of "real differences" that later became hallmarks of its gender equality jurisprudence. The Eisenstadt majority cites Reed solely for the general equal protection rule that legislative classifications must be reasonable, not arbitrary, without explicitly noting the issue of gender in that precedent.

Nonetheless, one can find in the Eisenstadt majority opinion observations that reveal a Court attuned to matters of gender—perhaps even more than we would expect today. Indeed, one can infer from Eisenstadt an openness to recognizing as discriminatory laws that more heavily burden women, regardless of the state actor's intent.

First, by emphasizing the right of the individual, regardless of marital status, Eisenstadt looks beyond the institution that had long defined women. Indeed, marriage both gave women their position in society and relieved them

130. Shortly after Eisenstadt, however, the Supreme Court made clear that its "cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." Washington v. Davis, 426 U.S. 229, 239 (1976). The Court noted that a disproportionate impact might reveal an underlying discriminatory purpose, but the latter must be shown to support a conclusion of unconstitutionality. Id. at 241-42. The Court subsequently ruled that the same requirements apply in cases of alleged gender-based discrimination. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (rejecting an equal protection challenge to a state preference for veterans for civil service positions, despite its disproportionate disadvantage to women applicants).
from the dishonor of being single—but only for a price: the disabilities of
coverte, which merged a wife’s legal identity into that her husband.131
Invoking a contemporaneous development in popular culture, journalist
Rebecca Traister has described Eisenstadt as “a legal equivalent of Ms.
Magazine: the recognition that Americans’ rights should neither be
circumscribed nor made more expansive based simply on whether they were
wed.”132 No wonder Kenneth Karst wrote in his influential article on intimate
association that “Eisenstadt is correctly seen as a case involving the status of
women.”133
Second, in rejecting pregnancy and birth as appropriate punishments for
the misdemeanor of fornication,134 the majority necessarily acknowledges that
restricting access to contraception has a disproportionate impact on women,
compared to men. Although the Court waited until Roe v. Wade to
acknowledge the stigma that women of the time experienced for nonmarital
pregnancies,135 evidence abounds of the shame, emotional pain, and destructive
policies that such women endured in the pre-Roe era—burdens much more
severe than those imposed on their male co-conceivers.136 Members of the
Court reinforced this understanding of pregnancy as a form of punishment
years later in upholding California’s crime of statutory rape law that applied
exclusively to males who have intercourse with minor females, with the
plurality reasoning as follows:

It is hardly unreasonable for a legislature acting to protect minor
females to exclude them from punishment. Moreover, the risk of
pregnancy itself constitutes a substantial deterrence to young females.
No similar natural sanctions deter males. A criminal sanction imposed

131. See REBECCA TRAISTER, ALL THE SINGLE LADIES: UNMARRIED WOMEN AND THE RISE OF AN
INDEPENDENT NATION 27 (2016).
132. Id.
134. Eisenstadt, 405 U.S. at 448.
135. Roe v. Wade, 410 U.S. 113, 153 (1973) (listing detriments that the state would impose on
women by denying the choice to terminate a pregnancy, including “a distressful life and future”; “psycho-
logical harm”; the burdens of child care on “[m]ental and physical health”; “the distress, for all
concerned, associated with the unwanted child”; “the problem of bringing a child into a family already
unable, psychologically and otherwise, to care for it”; and the “continuing stigma of unwed
motherhood”); see also Doe v. Bolton, 410 U.S. 179, 196-97 (1973) (noting that Georgia’s requirement
of committee approval for abortions “is necessarily somewhat degrading to the conscientious physician,
particularly the obstetrician, whose professional activity is concerned with the physical and mental
welfare, the woes, the emotions, and the concern of his female patients,” given that he, “perhaps more
than anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty, so-
called ‘error,’ and needs”).
136. See, e.g., ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN
WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE ROE V. WADE (2006).
solely on males thus serves to roughly “equalize” the deterrents on the sexes. 137

Recall that during the Eisenstadt era child support obligations arising from nonmarital heterosexual intercourse without contraception might not pose even theoretical problems for fathers, much less constitute a practical burden for them. This was so because, in many states, a child born outside marriage was “filius nullius,”138 and fathers of such children had no support duties,139 if such men were recognized as “parents” at all.140 Even if today’s more vigorous, even relentless, efforts to collect child support in all cases141 might provoke debate on whether restrictions on access to contraception are more disadvantageous for women or for men, in 1972 the answer would have been beyond dispute: women. The Eisenstadt Justices likely appreciated this disparity.

Third, the Eisenstadt majority implicitly takes note of the prevailing “double standard” for sexual activity—although the Massachusetts law might well have made the issue difficult to escape. As the Court points out, condoms fell outside the restriction because Massachusetts permitted “birth-control devices for the prevention of disease, as distinguished from the prevention of conception.”142 (Of course, this distinction seems strange today, when we commonly think of condoms as serving both purposes—birth control and disease prevention. And note how the opinion uses the term “birth-control devices” here, regardless of the purpose behind their use.) In rejecting the state’s claim that health considerations justified the restrictions, the majority dropped two pertinent footnotes signaling awareness of the law’s gendered impact. In one footnote, the majority writes:

Appellant insists that the unmarried have no right to engage in sexual intercourse and hence no health interest in contraception that needs to be served. The short answer to this contention is that the same devices the distribution of which the State purports to regulate when their asserted purpose is to forestall pregnancy are available without any controls whatsoever so long as their asserted purpose is to prevent the spread of disease. It is inconceivable that the need for health controls

139. See Gomez v. Perez, 409 U.S. 535 (1973) (invalidating as a violation of equal protection Texas laws granting marital children a judicially enforceable right to support from their fathers while denying that right to nonmarital children).
140. See Stanley v. Illinois, 405 U.S. 645 (1972) (holding unconstitutional Illinois laws that excluded all unmarried fathers from the protections afforded to “parents”).
141. Courts have made clear that even a woman’s fraudulent assurances about birth control or infertility will not relieve a man of support obligations for a child he conceived by sexual conception. See, e.g., Dubay v. Wells, 506 F.3d 422 (6th Cir. 2007); Wallis v. Smith, 22 P.3d 682 (N.M. Ct. App. 2001).
varies with the purpose for which the contraceptive is to be used when the physical act in all cases is one and the same.\textsuperscript{143}

In another footnote, the \textit{Eisenstadt} majority quotes from the opinion of the court of appeals:

\begin{quote}
"[W]e must take notice that not all contraceptive devices risk 'undesirable . . . [or] dangerous physical consequences.' It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a 'redingote anglais.' The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products."\textsuperscript{144}
\end{quote}

These footnotes about condoms highlight the gendered double standard under which premarital and extramarital intercourse was disapproved for women but expected for men—a double standard that assumed a proper exercise of the police power included allowing access to the means for such men to protect themselves and their more sexually restrained wives or future wives from contracting infections. But even without this gloss, the availability of condoms, whatever their purposes, meant that men could control reproduction, but women could not. Whether or not the (then exclusively male) Justices rejected this double standard as unfair to women,\textsuperscript{145} the footnotes invite us to read \textit{Eisenstadt} as an advance for gender equality.

In any event, given the availability of condoms, lifting the ban on the distribution of contraceptive products that women control, such as Emko vaginal spermicidal foam, marks an important feminist step, providing yet another reason why, as noted, Kenneth Karst sees \textit{Eisenstadt} "as a case involving the status of women."\textsuperscript{146} Other scholars have added detail to this statement, for example finding that the availability of the birth control pill around the time of \textit{Eisenstadt} lowered the risk of loss associated with women's

\begin{footnotes}
\footnotetext{143}{\textit{Id.} at 451 n.8.}
\footnotetext{144}{\textit{Id.} at 451 n.9 (citing Baird v. Eisenstadt, 429 F.2d 1398, 1401 (1st Cir. 1970)).}
\footnotetext{146}{Karst, supra note 133, at 676. \textit{See} Neil S. Siegel & Reva B. Siegel, \textit{Contraception as a Sex Equality Right}, 124 \textsc{Yale L.J.} 349, 356-57 (2015) (noting how \textit{Griswold} secures equality as well as liberty for women while \textit{Eisenstadt} reflects “a dawning recognition that equality values were at stake”).}
\end{footnotes}
career investments and also enhanced the marriage market for career women. Finally, protecting access to forms of contraception controlled by women dovetailed with feminist health initiatives of the era, such as the project that ultimately resulted in the publication of successive editions of *Our Bodies, Ourselves.*

Today, the rationale for the ACA’s contraceptive mandate makes explicit the link between birth control access and women’s equal citizenship that *Eisenstadt* suggests. In defending the mandate against religious objections by for-profit employers in *Burwell v. Hobby Lobby Stores, Inc.*, the Department of Health and Human Services (HHS) asserted that covering birth control as preventive health care, without cost-sharing by employees, promotes the compelling governmental interest in gender equality. Although HHS failed to stop the Court from granting religion-based exemptions to for-profit employers under the Religious Freedom Restoration Act (RFRA), its argument helps reveal, in hindsight, *Eisenstadt*’s promise for a family law cognizant of gender inequities, whether such inequities arise in the form of intentional discrimination, disproportionate impact, or social and cultural sexual norms.

**B. Eisenstadt’s Promise for Family Law Unfulfilled**

1. Family

Despite *Eisenstadt*’s promise to make marriage irrelevant for important decisions in intimate life, marriage has persisted as the holy grail in family law. In fact, when a family law casebook features *Eisenstadt* in coverage of

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149. 134 S. Ct. 2751 (2014).

150. *Id.* at 2779. In ruling against HHS, the Court majority side-stepped the status of the government’s interest and the means-end connection, finding the issues unnecessary to decide. Instead, the majority “assume[d] that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA.” *Id.* at 2780. For critique, see Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025 (2015).

alternative or nontraditional families, it reinscribes marriage as the norm by presupposing a marital baseline against which all departures are measured. The determined campaign to win access to marriage (and not simply marriage’s tangible benefits and responsibilities) for same-sex couples throughout the United States and this campaign’s rapid progress reinforce marriage’s continuing primacy. In recognizing a right to marry for same-sex couples in Obergefell, the Supreme Court reflected repeatedly on marriage’s perceived superiority over all other adult relationships, giving the opinion the feel of a public-service announcement designed to persuade the uncommitted to join the marital ranks. Obergefell thus leaves Eisenstadt dangling as a family law misfit even while citing it as authority for marriage’s constitutional protection. In this way, Eisenstadt retains a place in family law, but with its potential for opening new paths suppressed. Indeed, although post-Eisenstadt law reforms had partially closed the gap between marital relationships and functionally equivalent partnerships, nationwide access to marriage for same-sex couples and Obergefell’s rhetoric might well have the effect diminishing such nonmarital possibilities.

If marriage equality has been principally a project of the political left, then views that align with the political right also undercut Eisenstadt’s potential. Critics of the “moral deregulation” exemplified by developments like Eisenstadt argue that relaxation of the pressure to confine sex to married couples has been bad for women, men, and society. Some attacks go further, asking—in effect—whether Eisenstadt belongs in family law at all. In this vein, Eisenstadt has been denounced for its “identification of a radically

152. See supra note 74 and accompanying text.
153. See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.”).
154. See, e.g., id. at 2599 (“Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”).
155. Id. at 2598-99.
individualistic liberalism as the moral content of American constitutionalism."160

Yet, such reservations about Eisenstadt might expose some problematic limitations of family law itself. The critique of Eisenstadt as espousing "radically individualistic liberalism" ignores the associations and relationships at stake in the case. For women, contraception permits heterosex with a significantly reduced chance of pregnancy, thus permitting physical connections that might otherwise prove too risky. (Of course, that's precisely what the Massachusetts legislature sought to accomplish by ensuring that unmarried women would be required to consider unwanted consequences of sexual activity.) Further, pregnancy itself might well be the most intimate of associations, so that the freedom to avoid it implicates First Amendment values.162

By making such associations and relationships invisible, the "radically individualistic liberalism" critique not only fails to acknowledge women's interests but also reveals how we exclude from "family" those who live domestic life on their own.163 Despite Eisenstadt's foreshadowing of a more inclusive family law, those who are not just "single" in the legal sense but "solo" in the domestic (and sexual) sense continue to fall outside. Even in liberating gay sex in Lawrence v. Texas, the Court constructed a relational context (an "enduring" "personal bond") to reach this result, despite the one-night stand that gave rise to the case.166


161. See supra note 160 and accompanying text.


164. On "solo sex," see David A.J. Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 HASTINGS L.J. 957, 1002 (1979), which states that "for humans to experience sex is never, even in solitary masturbation, a purely physical act, but is imbued with complex evaluational interpretations of its real or fantasied object, often rooted in the whole history of the person from early childhood on."


166. See DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS 45, 68 (2012); Rosenbury & Rothman, supra note 101.
Perhaps such moves reflect the legacy of "domestic relations," the name once used for what we now call "family law." Further, there might well be "upsides" to remaining outside family law's regulatory grasp. Nonetheless, in order to deliver on Eisenstadt's promise, family law must embrace a more expansive understanding of modern practices and arrangements.

Yet, locating Eisenstadt within family law could well have a confining, instead of a broadening, impact on the field. Whatever its liberatory spirit, Eisenstadt helps maintain an understanding of family law as a web of (often masked) sexual regulations—a characteristic that I have called elsewhere family law's sex-centricity. The question raised is whether sexual activity itself constitutes both a necessary and a sufficient condition for a matter of concern to family law. Accordingly, one reading of Eisenstadt's place in family law, despite the absence of domesticity, would emphasize its relevance to what Martha Fineman has called "the sexual family." Although Fineman would shift family law's focus from conjugal couples to the mother-child dyad, other critics would supplement the sexual paradigm with additional relationships, including nonconjugal domestic partnerships, friendships, associations formed through the outsourcing of traditional familial responsibilities, and emotionally intimate communities formed by self-

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167. See generally Susan Frelich Appleton, Leaving Home? Domicile, Family, and Gender, 47 U.C. DAVIS L. REV. 1453, 1464-69 (2014) (describing distinctive features of "old school domestic relations law," which was "modern family law's predecessor"). On the importance generally of a relational approach, see JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW (2011). See also ANN LAQUER ESTIN, DOMESTIC RELATIONSHIPS: A CONTEMPORARY APPROACH (2013), a family law casebook covering contemporary domestic relationships, regardless of family type.

168. See, e.g., Franke, supra note 52, at 2686 (arguing that "efforts to secure marriage equality for same-sex couples must be undertaken, at a minimum, in a way that is compatible with efforts to dislodge marriage from its normatively superior status [in family law] as compared with other forms of human attachment, commitment, and desire"); Murray, supra note 120, at 62 (exposing the history of "marriage as punishment" and expressing concern that expanded access to marriage will simply expand marriage's "regulatory terrain to include new constituents").

169. See, e.g., Appleton, supra note 167, at 1481-1500.


171. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 3-6 (1995) (challenging the "sexual formulation of intimacy" and proposing, instead, that law should recognize the mother-child dyad as the "core family unit").

172. See id.


174. See Rosenbury, supra note 163.

identified asexuals,\textsuperscript{176} to name a few. As these variations illustrate, \textit{Eisenstadt}'s step toward increased inclusivity provides only the beginning of the analysis.\textsuperscript{177}

Subsequent developments and new understandings have also recast the message about a supportive role for the state in achieving planned families, once suggested by reading \textit{Eisenstadt} together with the Family Planning and Population Research Act of 1970.\textsuperscript{178} First, historians and other critics have called attention to the federal statute's deployment as part of a late twentieth century eugenics project that targeted minorities and the poor with coercive interventions, including forced sterilizations.\textsuperscript{179} “Planned families” and “family planning” take on much darker meanings when viewed through the lens of eugenics, with its “shifting justifications,” which Laura Kessler identifies as “racism; concerns about hereditary degeneracy; controlling women’s sexuality; channeling sex and reproduction into the marital family and maintaining the gendered marital family more generally; social and economic efficiency; population control; and theological determinism.”\textsuperscript{180} Even if \textit{Eisenstadt} avoided references to the federal statute,\textsuperscript{181} regarding the two as connected developments requires no significant stretch.

Second, \textit{Eisenstadt}'s privacy rhetoric quickly became a justification for leaving in place existing structural and economic inequalities. In the late 1970s and early 1980s, a majority of the Court made clear in the abortion-funding cases that reproductive decisionmaking constitutes a strictly negative right, requiring no government assistance.\textsuperscript{182} Welfare reform, enacted in 1996, and its underlying neoliberal ideology\textsuperscript{183} have now naturalized the notion that

\begin{footnotes}
\item[176.] See Elizabeth F. Emens, \textit{Compulsory Sexuality}, 66 Stan. L. Rev. 303 (2014); \textsc{(A)sexual} (Arts Engine, Inc. 2010).
\item[178.] 42 U.S.C. § 300 (2012).
\item[179.] See \textsc{Rickie Solinger}, \textit{Beggars and Choosers: How the Politics of Choice Shapes Adoption, Abortion, and Welfare in the United States} 9-11 (2001); Kessler, supra note 69. Kessler focuses on a 1978 case in which the Supreme Court recognized immunity for a judge who ordered a nonconsensual sterilization, without any procedural protections, to bring to light “the other side of reproductive rights.” \textit{Id.} at 838.
\item[180.] Kessler, supra note 69, at 893.
\item[181.] \textsc{See supra} note 83 and accompanying text.
\item[183.] See, e.g., \textsc{David Harvey}, \textit{A Brief History of Neoliberalism} 2 (2005) (defining neoliberalism as “a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade,” with “the role of the state... to create and preserve an institutional framework appropriate to such practices”).
\end{footnotes}
dependency creates needs to be met by the family (regardless of marriage), not the state.\(^{184}\)

Thus, the emphasis on privacy seen in *Eisenstadt* has morphed into a principle of “privatization” of dependency.\(^{185}\) We can see this idea in the frequent references to “personal responsibility” in federal laws providing conditional funding for certain state programs, including those for public assistance for poor families, for child support enforcement, and for sex education that includes more than abstinence education (called “personal responsibility education”).\(^{186}\) Nonetheless, in many communities “abstinence only” provides the one official lesson conveyed about family planning.\(^{187}\)

According to this lesson—shown to be both highly gendered\(^{188}\) and highly ineffective\(^{189}\)—delaying sex until marriage is the only way to plan’s one family. In short, the ideas of privacy and planned families that received the Court’s constitutional imprimatur in *Eisenstadt* have now acquired a neoliberal gloss.

Class differences are baked into *Eisenstadt*—from the self-abortion casualty who inspired Baird’s challenge\(^{190}\) to the private-university students who attended the lecture that resulted in his arrest. Yet, even if the Court’s approach took a step toward bridging that gap, class continues to mark contraceptive use. As June Carbone and Naomi Cahn point out, wealthy,  

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190. See E-mail, supra note 16.
educated women more consistently practice birth control than their counterparts who live in poverty and have less than a high school education.\textsuperscript{191} Indeed, some studies of the birth control pill’s transformative effect on women’s careers and marriage opportunities focus on those with college educations.\textsuperscript{192} To the extent that abortion rates suggest failures in the availability of contraception, data show notable racial disparities, too, with African-American women and poor women more likely to terminate their pregnancies than their white and more economically well-off counterparts.\textsuperscript{193}

The class disparities regarding contraceptive use and availability that persist in Eisenstadt’s wake have become part of a conversation about a modern family norm: unmarried parenthood. Data show that roughly forty percent of children today are born outside of marriage,\textsuperscript{194} although certainly not all of these pregnancies are unplanned.\textsuperscript{195} Unmarried parenthood is often associated with poverty—with the widening inequalities among families in part attributable to the absence of the benefits and supports triggered by marriage itself.\textsuperscript{196} Studies claim that the most effective response to such problems is better access to birth control, specifically long-acting reversible contraceptives (LARCs),\textsuperscript{197} which are expensive to obtain (roughly up to $1000) although less costly than the pill over a reproductive lifetime.\textsuperscript{198} Title X supports increasing the availability of LARCs,\textsuperscript{199} and the ACA’s contraceptive mandate makes LARCs accessible without cost—at least to women who work for covered employers.

\begin{footnotes}
\item[192.] See Goldin & Katz, supra note 147.
\item[193.] “Non-Hispanic white women account for 36% of abortions, non-Hispanic black women for 30%, Hispanic women for 25% and women of other races for 9%,” and forty-two percent of women obtaining abortions are below the federal poverty level. Moreover, three-quarters of women obtaining abortions say they cannot afford a child. Facts on Induced Abortion in the United States, GUTTMACHER INST. (March 2016), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion_0.pdf. For an historical examination, see Loretta J. Ross, African-American Women and Abortion, in THE ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000, at 161 (Rickie Solinger ed., 1998).
\item[194.] Joyce A. Martin et al., Ctrs. for Disease Control & Prevention, Births: Final Data for 2012, 62 NAT’L VITAL STATS. REP. 1, 7 (2013) (reporting that 40.7% of all births in 2012 were to unmarried mothers).
\item[197.] See Gina M. Secura et al., Provision of No-Cost, Long-Acting Contraception and Teenage Pregnancy, 371 N. ENG. J. MED. 1316, 1316 (2014).
\end{footnotes}
Even if we interpret these developments as advancements for reproductive autonomy, free from the taint of earlier efforts that sought to limit reproduction by the poor,200 *Hobby Lobby* sends a counter message to *Eisenstadt*’s. *Hobby Lobby* held that RFRA compels an exemption from the contraceptive mandate for for-profit family businesses with religious objections, given that less restrictive alternatives will allow coverage for the employees of such businesses.201 Despite reasoning that could support broadly applied religious exemptions under RFRA for all manner of employer obligations, the Court emphasizes that its analysis reaches the contraceptive mandate alone.202 In thus treating contraception as an exceptional benefit (a status long affixed to abortion),203 *Hobby Lobby* rejects the norm of planned families discernable in *Eisenstadt* and solidifies the idea that birth control should be a private burden—or a matter of “personal responsibility.”204 This is so even if some of those poor women and families most in need of contraceptive assistance might not be those whom *Hobby Lobby* will directly affect. So viewed, *Hobby Lobby* represents a step backward, emerging as the neoliberal response to *Eisenstadt*.

Of course, *Hobby Lobby* downplays such problems when it invokes the possibility of government subsidies for contraception as a less restrictive alternative to the mandate.205 Such speculation that government could assume the cost does nothing to contradict the abortion-funding cases or the underlying rejection of positive rights, which became explicit constitutional doctrine soon after *Eisenstadt*.206 Rather, this hypothetical alternative simply would entrust to the democratic process the decision whether to provide such funding—a very unlikely possibility in today’s political environment.207 Indeed, some current members of Congress would prohibit all federal spending on the ACA and would defund the Title X family planning program altogether.208

200. See supra notes 179-180 and accompanying text.
201. See supra note 97 (providing additional details of the ruling).
203. See, e.g., Nicole Huberfeld, *Conditional Spending and Compulsory Maternity*, 2010 U. ILL. L. REV. 751, 767-68 (criticizing Court rulings that uphold the Hyde Amendment, which prohibits federal spending for most abortions, and explaining how these cases have a “broad influence that may reach beyond the abortion realm into general reproductive services, including contraception and sterilization, for both women in public programs and women who have private insurance”).
204. See supra notes 96, 186 and accompanying text.
205. 134 S. Ct. at 2780-81.
206. See supra note 182 and accompanying text.
207. See Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 161 (2015) (“Funding for direct government coverage of contraceptives or a substantially larger exchange-tax credit is not politically viable, and it is disingenuous to suggest otherwise.”).
One additional aspect of *Hobby Lobby* merits note as we trace the course of the expansive conceptualization of “family” suggested by *Eisenstadt*. The Court referred to Hobby Lobby Stores, Inc. and the other corporation owned and operated by David and Barbara Green as a “family business.” In a move evocative of the important family law principle that parents have a right to direct the upbringing of their children, *Hobby Lobby* treats the corporate entity and its employees as family. In effect, the corporation, occupying the role of parent, successfully objected to a law that “standardizes” the treatment of employees, who assume the place of children, and prevents the transmission of chosen “family values” to them.

This maneuver could have far-reaching repercussions, further undercutting *Eisenstadt*’s promise. First, this maneuver permits post-*Hobby Lobby* rulings like the injunction issued just days later to Wheaton College, which challenged the form that nonprofit organizations must complete, under an existing accommodation, to obtain an exemption from the contraceptive mandate. The Court granted such relief, pending appeal, despite having invoked this existing accommodation as a less restrictive alternative that could be made available to for-profit corporations like *Hobby Lobby* and subsequently has struggled with how to decide the issue on the merits. Second, transplanting the principle of family autonomy to the employment setting fuels efforts like that of at least one state legislator, who has asserted the right to an exclusion from the contraceptive coverage provided by his government-provided health insurance. He claims that such coverage interferes with his and his wife’s “parental rights and fundamental right to family integrity,” intruding on how

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209. 134 S. Ct. at 2765.
215. After agreeing to hear several consolidated cases raising this issue, the Court vacated and remanded so that the courts of appeals can determine whether the religious nonprofit employers’ objections can be accommodated while still assuring their women employees access to contraceptive coverage, consistent with the ACA mandate. *Zubik v. Burwell*, No. 14-1418, 2016 WL 2842449 (U.S. May 16, 2016).
they rear their daughters. In other words, while the objections to the mandate in *Hobby Lobby* focused on four forms of contraception that the challengers argued worked as abortifacients, this suit suggests that objections to birth control might take aim at nonmarital sex or the use of birth control itself. Finally, on a more theoretical level, the Court’s transplantation of the parental autonomy doctrine to the commercial setting blurs the family/market distinction in a way that prioritizes powerful families (those that own and operate businesses) at the expense of families dependent on the former for their subsistence, including health care.

In sum, the Court’s recent opinions in both *Obergefell* and *Hobby Lobby* erect barriers to *Eisenstadt’s* promising possibilities for legal understandings of “family.” The road ahead looks far narrower once we revisit, in light of these new cases, *Eisenstadt’s* suggestions about family pluralism, the importance of planned families, and the connections between contraception and economic wellbeing.

2. Sex

Even if sex provides the thread linking *Eisenstadt* to family law, today the horizon seems much more limited than the Court’s emancipatory language might have suggested. True, gains made in the sexual revolution never completely abated, even during the height of the AIDS panic. Still, we certainly have seen a curtailment in abortion rights, which had originally rested on *Eisenstadt’s* foundation. Defunding Planned Parenthood and other family


planning programs has become a subject for political bragging rights. Perhaps even more telling developments are the rise and persistence of abstinence-only sex education, which by design communicates to many young persons, especially females, both sex negativity and sex exceptionalism. Here, of course, marriage re-enters the picture, the end-point of abstinence and the site where sex becomes legitimate.

Yet, even when marriage becomes the legal focus, sex is missing from the analysis. As Mary Anne Case points out, the majority opinions in the Court’s marriage-equality cases (like earlier cases about same-sex relationships) desexualize the couples in question. In extolling the myriad benefits of marriage, the Obergefell majority omits explicit “sex talk,” never acknowledging that marriage is about sex and leaving unanswered references to procreation and promiscuity in Chief Justice Roberts’s dissent. Despite the landmark status of the marriage-equality cases, they do nothing to challenge the prevailing legal tradition of sex negativity and sex exceptionalism.

In turn, such sex negativity and sex exceptionalism afford a deeper look at challenges to the ACA’s contraceptive mandate, including those that surfaced in Hobby Lobby and that drive continuing litigation in its wake. Helen Alvaré identifies the underlying problem as profound resistance to sexual freedom for women and profound skepticism about its value, with both rooted in religious teachings:

[T]here is a rational and empirically supported possibility that women’s freedom—including freedom from unwanted pregnancies, addictions, violence, and depression—is better achieved when women and men practice the virtues and disciplines expressed in the Christian and other churches’ conscientious objection to the [ACA’s] Mandate. . . . [T]he churches opposing the Mandate hold, and teach women and men to maintain, an understanding of the sacredness of sexual freedom for women and profound skepticism about its value, with both rooted in religious teachings:


221. See Hendricks & Howerton, supra note 188, at 589.

222. See Rosenbury & Rothman, supra note 101, at 812-14.

223. As Jennifer Rothman explains, the term “sex exceptionalism” refers to the way that laws treat sex differently from other activities. This sex exceptionalism often exhibits a negative view of sex that either dismisses the value of sex or, worse yet, treats it as something harmful. This sex negativity can also manifest as sex normativity in which the state channels sex into preferred forms while excluding or penalizing other forms of sex.

224. See Mary Anne Case, Missing Sex Talk in the Supreme Court’s Same-Sex Marriage Cases, 84 UMKC L. REV. (forthcoming 2016) (on file with author).

225. See id. (manuscript at 9).

intercourse, and its intrinsic connection with the procreating of new, vulnerable, human life. . . . There is a great deal of evidence, in fact, indicating that women in particular benefit physically, mentally, and otherwise, from practicing the personal and religious disciplines flowing from these teachings.227

As Linda Greenhouse wrote in generalizing this point of view:

What drives the anger about [the contraceptive mandate] is that, as the opponents see it, the government is putting its thumb on the scale in favor of birth control, of sex without consequences. . . . To the extent that [better access to contraception] changes anything on the American reproductive landscape, it will be to reduce the rate of unintended pregnancy and abortion. The objection, then, has to be not to the mandate’s actual impact but to its expressive nature, its implicit endorsement of a value system that says it’s perfectly O.K. to have sex without the goal of making a baby. While most Americans surely share this view, given the personal choices they make in their own lives, many nonetheless find it uncomfortable to acknowledge.228

Other media commentators captured the notion more succinctly: “[Hobby Lobby] is about sex.”229 Priscilla Smith explains that this opposition to contraception revives assumptions and arguments underlying the nineteenth century’s Comstock laws, with their criminal prohibitions on all birth control, abortion, and information about such choices.230

Beyond such explanations for resistance to more accessible birth control, new learning raises questions about how we should frame women’s sexual freedom itself and the supports that might help realize it. The emergence of both Catharine MacKinnon’s dominance feminism and sexuality studies as a

227. Alvaré, supra note 159, at 435; see id. at 414 (criticizing Institute of Medicine report on which the contraceptive mandate was based and noting that the report “failed to consider that increasing access to contraception—associated with a message of sexual expression as freedom, and the good of sexual expression outside the context of a relational commitment, or parenting—might itself harm women’s health”).


229. Emily Bazelon, Supreme Court Breakfast Table, SLATE (June 30, 2014), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme-court-hobby-lobby_decision_it_was_all_about-sex.html; see also Brian Beutler, The Hobby Lobby Ruling Isn’t About Religious Liberty—It’s About Conservative Sexual Morality, NEW REPUBLIC (June 30, 2014), http://www.newrepublic.com/article/118475/supreme-court-hobby-lobby-ruling-will-lead-more-government. This opposition to birth control, especially by unmarried women, seems to animate the suit by the Missouri legislator who has sued to halt such coverage for his daughters. See supra notes 216-217 and accompanying text.

scholarly discipline have helped expose the heteromale norm undergirding the progress that Eisenstadt represented. Yes, Eisenstadt protects sex for its own sake (not in service to procreation or marriage), yet the focus on the importance of contraception assumes penis-in-vagina intercourse as the universal and inevitable desiratum. While Margaret Sanger might have appreciated what contraception could mean for women’s sexual freedom, support for the pill also came from Hugh Hefner (the founder of the Playboy Clubs and magazine). Consistent with MacKinnon’s observations about abortion, contraception makes women more sexually available to men—a claim echoed by proponents of more traditional family values. Studies indicate that women do not want all the sex to which they consent. Increased access to contraception does not fully address that problem.

I do not mean to minimize the importance of women’s access to contraception, as protected by Eisenstadt or provided by the ACA. Rather, I call attention to the underlying norms and invite development of a more inclusive view, in the name of both Eisenstadt’s promise for sexual liberty and family law’s sex-centricity. Although Lawrence v. Texas stands out as a significant sex-positive move despite its preoccupation with enduring relationships, it fails to address several issues that a feminist approach to sexualities would uncover, as sketched out in the next subsection.

3. Gender

Despite Eisenstadt’s importance for “the status of women” and the substantial constitutional gains toward gender equality in the ensuing years,
such concerns seem to have lost their salience. As Chief Justice Roberts’s questions during oral arguments in Obergefell explicitly acknowledged, bans on same-sex marriage discriminate on the basis of gender.\(^2\) Indeed, such laws rest on unconstitutional gender-based stereotypes.\(^2\) Obergefell’s failure to include such discrimination in its analysis, along with the dissenters’ positions, have prompted worries about the future of gender equality.\(^2\)

In addition, several different gendered “double standards” are alive and well today. First, even if Lawrence followed Eisenstadt in unsettling prevailing sexual norms, women’s erotic lives remain in family law’s shadows.\(^2\) As Kim Buchanan and others have observed, the Court has failed to offer the same constitutional protection to women’s sexual interests that it has provided to men’s pursuit of sexual pleasure.\(^2\) One could draw a similar comparison between the legal and cultural treatment of Viagra and other erectile-dysfunction drugs compared to women’s sexual aids,\(^2\) including birth control:

Even recent pre-ACA opinions continued to hold that employers’ coverage of Viagra does not require coverage of contraception, despite Title VII’s proscription of sex-based discrimination.\(^2\) Yet, as both Viagra’s manufacturers and sex therapists would insist, sexual pleasure constitutes a critical element of sexual health for women and men alike.\(^2\)

\(^{242}\) Transcript of Oral Argument pt. 1 at 62, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556); see Case, supra note 224 (manuscript at 3 n.16).

\(^{243}\) See, e.g., Appleton, supra note 241; Mary Anne Case, What Feminists Have to Lose in Same-Sex Marriage Litigation, 57 UCLA L. REV. 1199 (2010).

\(^{244}\) See Case, supra note 224. Yet, the majority opinion acknowledges with approval how the Court has used “equal protection principles to invalidate laws imposing sex-based inequality on marriage.” Obergefell, 135 S. Ct. at 2604.

\(^{245}\) See, e.g., Kim Shayo Buchanan, Lawrence v. Geduldig: Regulating Women’s Sexuality, 56 EMORY L.J. 1235, 1239-40 (2007); see also Katherine M. Franke, Theorizing Yes: An Essay on Feminism, Law, and Desire, 101 COLUM. L. REV. 181, 182 (2001) (arguing that feminist legal theorists have focused on “the elimination of sexual danger and dependency for women” and have ignored “the job of imagining the female body as a site of pleasure, intimacy, and erotic possibility”). But see Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 747 (5th Cir. 2008) (holding unconstitutional a Texas statute banning the sale of sex toys).


\(^{249}\) Not all feminists reach the same conclusions on how such values should play out, however, as shown in the controversy generated by flibanserin, a drug for women’s “hyposexual desire disorder.”
Perhaps the phenomenon of pregnancy— with its physicality and visibility— accustoms us all to expecting certain sacrifices from women that only become notable when we imagine a man undergoing the experience. Fran Olsen used this rhetorical device in underscoring how policies designed to protect "human life" necessarily rest on unarticulated value judgments that privilege men's freedom and pleasure over women's. Similarly, in reasoning why employer medical plans (pre-ACA) must cover contraception, one district judge made the case for such preventive health care by offering a gender-neutral description of pregnancy, the condition to be prevented by the treatment in question:

Our typical patient becomes aware that he has contracted the [condition] when he experiences extreme fatigue, accompanied by nausea and vomiting. These symptoms diminish after a few months, as his abdomen begins to distend. Pressure on his bladder requires that he urinate frequently. He feels hot and sweaty, and has headaches and dizziness. As his digestive tract slows, he becomes constipated and suffers heartburn and hemorrhoidal symptoms. His weight increases by twenty per cent, with most of the gain centered in his abdomen, altering his balance and causing strain and discomfort in his lower back. His breasts, ankles, and feet swell, and his legs cramp. His mobility, his sleep, and even his breathing are impaired as his abdomen expands to twice its normal circumference. Stretch marks appear on his thighs, chest and abdomen. The ligaments in his hips and pelvis soften, and he develops sciatica, causing tingling and numbness. After nine months, he feels the onset of intense, intermittent pain, accompanied by diarrhea and nausea. His pain increases and accelerates over approximately 15 hours as his genital opening, usually the size of a pencil lead, is stretched to a diameter of 10 centimeters. Surgical incisions are used to facilitate the opening of his genitals. His pain may require general anesthesia, but usually can be managed through other methods, such as injections in the fluid surrounding his spinal cord. He is encouraged to reject pain medication entirely so he can remain alert to assist in the treatment of his disease. The incisions and tears in his genitalia are closed with internal and external sutures. His breasts continue to swell, and his nipples become sore. Healing of his genitals takes about six weeks, during which time his pain may be

Supporters praise its recent approval by a federal panel as a positive development toward gender equality, but critics not only question the "dysfunction" it claims to alleviate but also condemn the intervention as a means to facilitate patrician sex. See Sabrina Tavernise & Andrew Pollack, Aid to Women, or Bottom Line? Advocates Split on Libido Pill, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/us/aid-to-women-or-bottom-line-advocates-split-on-libido-pill.html. Compare Andrew Pollack, 'Viagra for Women' Is Backed by an F.D.A. Panel, N.Y. TIMES (June 4, 2015), http://www.nytimes.com/2015/06/05/business/panel-backs-a-drug-to-increase-womens-sex-drive.html, with Stiritz & Appleton, supra note 247, at 419.

relieved by sitz baths, heat lamps, ice packs, and anesthetic sprays. Finally, he has a heavy bloody discharge from his genitals, lasting several weeks.252

This depiction, with its male pronouns, unsettles our ability to take pregnancy and its impact for granted. The court of appeals did not buy the analysis, however, permitting the employer to exclude women’s contraception coverage, even while covering men’s erectile-dysfunction drugs.253 Of course, the ACA mandate was designed to prevent such gendered disparities.

Yet, even ready access to contraception does not necessarily place women and men on an equal plane. Shari Motro details how the most effective forms of birth control pose health risks to women and often compromise their sexual enjoyment, constituting a gendered “price of pleasure.”254 The much-heralded LARCs may also present health risks, as critics of the ACA mandate have been quick to point out.255 Yet, others cite scientific evidence contradicting such assertions and showing health benefits from hormonal contraception.256 In the meantime, despite years of talk on the subject, a male birth control pill has yet to materialize.257 Although we might debate whether, if a male pill or long-acting device were available, women should trust men who claim to have used it, the absence of such options reinforces the notion that planning in advance for nonprocreative sex is (and should be) a woman’s responsibility.

254. As Motro puts it: [Although pharmaceutical companies work hard to create the impression that hormonal contraception, commonly known simply as “the pill,” is not only safe but good for you, its harmful side effects are incontrovertible. Documented risks include strokes, heart attacks, migraine headaches, cancer, diabetes, asthma, breast pains, vaginal dryness and infections, and loss of sexual desire. According to some studies, newer “third generation” pills developed in the 1980s to reduce earlier pills’ minor side effects like acne or facial hair actually double the risk of blood clots—which can result in a stroke, deep vein thrombosis, or pulmonary embolism. Women who are aware of these risks presumably feel the pill’s benefits outweigh its potential harms, but in this tradeoff most of the downsides fall on the woman (although men suffer too when their partners’ libido and natural lubrication are inhibited, or when the women they love suffer from more drastic side effects).]

Shari Motro, The Price of Pleasure, 104 NW. U.L. REV. 917, 934-35 (2010); see also MAY, supra note 17, at 129-36, 147.  
255. See, e.g., Alvaré, supra note 159, at 419.  
256. See Smith, supra note 230, at 998-1012.  
Even if women's access to contraception does not go far enough to accord equal respect to their sexual pleasure, singling out this one form of covered health care for an exceptional exclusion, as *Hobby Lobby* does, necessarily diminishes "the status of women." Such action validates "private biases" that the Court, when responding to other types of discrimination, has held must be omitted from consideration. *Hobby Lobby* also degrades the government's asserted interest in gender equality, describing it as insufficiently focused and too broadly framed. As Elizabeth Sepper explains, gender operates in contradictory ways in *Hobby Lobby*, with the Court both ignoring women's interests and burdens and simultaneously limiting to contraception new protections for religious objections—both to women's disadvantage. Any judicial sensitivity to gender inequality suggested by *Eisenstadt* evaporates in *Hobby Lobby*, and the resistance to contraception coverage epitomized in the case forms part of what reproductive rights activists describe as today's "war on women."

Although a feminist analysis from the *Eisenstadt* era might well have stopped here, focusing on gender apart from race and other identities, today the widely held appreciation for both intersectionality and the critique of essentialism reveals additional shortcomings in the ultimate impact of this potentially transformative case. The birth control movement has a complicated racial history. Panics about "race suicide" prompted initial restrictions on (white) women's access to birth control and abortion, but African-American women, although supporting birth control, always embraced a much broader reproductive rights agenda than their white counterparts. Scholars like

258. See supra notes 133, 146 and accompanying text.
259. See *Palmore v. Sidoti*, 466 U.S. 429 (1984). In this case, the Court relied on equal protection to reverse the removal of a child from her mother's custody based on the mother's interracial relationship and concerns that the social stigma of living in a mixed-race household would undermine the child's best interests. The Court acknowledged "the reality of private biases and the possible injury they might inflict," but deemed them to be constitutionally impermissible considerations. Id. at 433.
262. See, e.g., Editorial, supra note 6; cf. *LePore, supra* note 29, at 38 (asking whether a jurisprudence of reproductive rights based on equality would have prevented the outcome in *Hobby Lobby*).
266. See *Beisel, supra* note 81.
Dorothy Roberts have traced this broader agenda to forced reproduction during slavery and high infant mortality rates in minority populations as well as more contemporary reproductive vulnerabilities of African-American women, including forced caesarians and sterilizations, family caps, and interventions for substance abuse during pregnancy. African-American women continue to terminate pregnancies at a disproportionate rate, suggesting greater economic constraints and/or possible contraception access problems. Thus, although Baird received inspiration from the abortion-related death of a poor woman from Harlem with nine children, Eisenstadt delivered only a narrow piece of this larger reproductive justice project and ultimately did little to improve family law’s weak record on race. Despite the ACA’s step toward a more expansive and economically sensitive approach, Hobby Lobby exposes its vulnerabilities and, perhaps ironically, highlights the improbability of increased government support for contraception.

III. CONTRADICTIONS IN EISENSTADT’S FAMILY LAW

Eisenstadt merits consideration today because it illuminates family law’s fundamental contradictions. True, the contrasts between the more inclusive, liberatory, sex-positive, and feminist family law promised by Eisenstadt and the more constrained approach that we see now might be understood simply as change over time. According to this temporal explanation, in the more than forty years since Eisenstadt, the sexual revolution has given ground first to conservative “family values” and then to neoliberalism, while changes in the Supreme Court’s composition have necessarily altered doctrine relevant to birth control and family law and on many other topics as well. Time has revealed the “progress narrative” heralded by Eisenstadt as an exaggeration, with the Court’s recent opinions about birth control (Hobby Lobby) and the right to marry (Obergefell) providing a useful bookend to demonstrate this point.

MEANING OF LIBERTY (1999); Lisa Chiyemi Ikemoto, Redefining Reproductive Freedom to Build Multicultural Coalitions, 17 BERKELEY WOMEN’S L.J. 229 (2002).
268. See ROBERTS, supra note 267. See also SOLINGER, supra note 179; Kessler, supra note 69.
269. See supra note 193.
271. See Gedicks, supra note 207. The irony lies in the Court’s reliance on government funding as a less restrictive alternative to doom the mandate under RFRA, while the Hobby Lobby conflict itself and the continuing challenges to the ACA in Congress underscore the obstacles that would prevent such funding from materializing. See also SELF, supra note 1, at 400 (noting failure of liberal left to win positive rights).
272. See generally SELF, supra note 1, at 12.
274. Cf. HASDAY, supra note 2, at 95-96 (challenging as overstatements frequent claims about family law’s progressive transformation).
Yet, a chronological frame masks a deeper tension that has persisted throughout this period—family law’s embrace of contradictory objectives: the protection of autonomy, liberty, and personal choice, on one hand, and the ongoing regulation of intimate life, on the other. Similarly, a purely chronological frame obscures inconsistencies about the place of equality in family law. Upon close inspection, we can discern these contradictions within *Hobby Lobby* and *Obergefell* themselves, which document *Eisenstadt*’s current status—forgotten but not gone, a ghostly and insubstantial presence.

Of course, in every legal domain one can find conflicting values and impulses, prompting various efforts to effectuate a balance. Yet, family law’s paradoxes run deeper because they implicate the very purposes of the field. The sections below expose and explore these paradoxes, focusing first on the autonomy/regulation problem and then turning to the myriad inconsistencies that mark family law’s approach to equality and inequality.

A. Autonomy and Regulation

1. Family Law’s Story of Deregulation

*Eisenstadt* stands out as one important case in a series striking down laws that forbid certain intimate relationships, sexual activities, or childrearing and reproductive decisions—all in the name of liberty, freedom, choice, autonomy, and privacy. Even before *Eisenstadt*, the Court’s opinions invoked “the liberty of parents and guardians to direct the upbringing and education of children,”275 “the private realm of family life which the state cannot enter,”276 and “the freedom of choice to marry.”277 Yet, as we have seen, *Eisenstadt* articulated this freedom for family matters in direct and bold terms: “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”278 *Eisenstadt*’s predecessors explicitly or implicitly assumed a marital norm, with all the regulatory authority that contemplates; they also treated each family as a unit, suggesting mutual or reciprocal discipline.279 By contrast, in using access to birth control regardless of marriage to promote *individual* autonomy, *Eisenstadt* makes the story of family law deregulation especially conspicuous, transgressive, and liberating.

Whether the story conveyed by Eisenstadt has been "continuous and enduring" or a more modern invention,280 this story communicates that one important role of family law—which includes relevant constitutional doctrine—is to halt "unwarranted governmental intrusion"281 into decisionmaking about family matters and intimate life. (Later cases have opted for vaguer, more philosophical language: "choices central to personal dignity and autonomy,"282 and "an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."283) Although not decided on constitutional grounds, Hobby Lobby's treatment of the "family businesses" challenging the contraceptive mandate articulates similar values, deferring to those businesses' and their owners' thoughts, beliefs, and expressions and deciding the controversy in favor of employer deregulation.284 The references to the corporations' "dignity" and "self-definition" in Justice Kennedy's concurring opinion in Hobby Lobby reinforce this reading.285

Supporting this story that keeping the state out serves as a fundamental principle of family law, the Court has often supplemented its language of autonomy with suggestions that it is simply returning family life to a natural, pre-legal, or law-free baseline. For example, in Griswold v. Connecticut, Eisenstadt's progenitor, the Court emphasized that the "right of privacy [is] older than the Bill of Rights—older than our political parties, older than our school system."286 In recognizing a constitutional right for same-sex couples to wed, Obergefell v. Hodges continues this trope, naturalizing marriage by describing it as an "institution [that] has existed for millennia and across civilizations,"287 a "timeless institution,"288 and "one of civilization's oldest institutions"289 that "always has promised nobility and dignity to all persons, without regard to their station in life."290 In other words, marriage is an inherent aspect of human nature. Likewise, the Court has cited "the natural duty of the parent[s]" to make educational choices for their children,291 in turn intimating

280. Minow, supra note 211, at 959 (challenging as "mythical" the story of "consistent and enduring constitutional protection for the privacy and self-determination of families and their members").
281. Eisenstadt, 405 U.S. at 453.
282. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992); see also Obergefell v. Hodges, 135 S. Ct. 2584, 2597 ("certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs").
284. See supra note 209 and accompanying text.
287. 135 S. Ct. at 2594.
288. Id.
289. Id. at 2608. Several of the dissenting opinions share this view. See, e.g., id. at 2612 (Roberts, C.J., dissenting); id. at 2636 (Thomas, J., dissenting).
290. Id. at 2594 (majority opinion) (emphasis added).
that, without the unconstitutional restriction, nature will freely take its course. Eisenstadt itself implies that nonmarital sex is a natural given, despite the fornication ban in place, with the only question being whether women must face the risk of pregnancy as punishment thanks to a state-constructed barrier to contraceptive access.292

Still additional evidence of this understanding comes from family law’s recent functional turn, under which behavior, performance, and affective ties will often lead to the recognition of family relationships or an affirmative response from family law, even without the customary formalities.293 For example, family law recognizes cohabiting nonmarital couples and “de facto parents” for various purposes.294 Accordingly, historians can generalize that “family law follows family life”—presenting family law not as an instrument that shapes decisionmaking and behavior but rather as a mirror of unfettered individual or collective action.

So understood, family life constitutes a set of practices and performances produced by choice, affection and nature, but not law. Moreover, one purpose of family law so important that it is enshrined in the Constitution, as Eisenstadt and other cases explain, is the protection of family life from state interference.

2. Family Law’s Counter Story

Although family law’s story of deregulation is easy to see because of its prominence in the Court’s rhetoric and oft-noted examples of “functional family” recognition, family law continues to perform substantial and far-reaching regulatory work. We could say that family law reflects deregulation by word, but clings to regulation by deed. Often, such state regulation remains difficult to detect, lying deeply embedded in the practices and experiences that it helps to shape and so taken for granted that it is invisible.296 Nonetheless, a few examples make the point.

First, even with its use of functional tests, family law necessarily determines which biological and affective ties count for purposes of legal rights and responsibilities and which ones remain legally irrelevant. Whether using

292. See supra notes 34-35 & 134 and accompanying text.
296. See Martha Minow, Justice Engendered, 101 HARV. L. REV. 10, 68 (1987) (“Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination. Daily social practices that reinforce existing arrangements stand in the way of efforts to expose unstated assumptions about the power behind attributions of difference.”).
formal or functional criteria, family law defines "family" and thus determines who remains outside its bounds. Such regulatory work is inherent in the law of parentage, not only in earlier rules governing "illegitimacy" (which refused to recognize some genetic parents as legal parents) but also in the resolution of recent disputes stemming from the use of assisted reproduction, which requires distinguishing parents from "donors" and "gestational carriers." Family law's embrace of marriage, on one hand, and its exclusion of friendship and paid caregiving, on the other, also illustrate this proposition. Eisenstadt's recognition of the reproductive and sexual rights of the individual, emphasized earlier, exemplifies how the definition of "family" itself is legally constructed, as distinguished from a phenomenon of nature.

Second, the idea of a "natural" baseline or status quo that might return in the absence of a particular restriction ignores the theory that family law performs a channeling function, which several scholars have explored, even after Eisenstadt. Per this understanding, family law—by design—influences personal choices and behaviors, rather than just mirroring them. In performing this channeling function, family law joins with culture to offer rewards that guide, among other things, sexual practices and activities into favored relationships, namely marriage. Whether or not marriage is "punishment," its disciplinary purpose and role seem beyond dispute. In promoting marriage, family law becomes a significant component of the social construction of sex, sexualities, and gender and effectively penalizes those who do not or cannot comply by withholding material benefits. Without

297. See, e.g., Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding unconstitutional Illinois laws that excluded unmarried fathers from the definition of "parents" and thus denied these men protections afforded to mothers and married fathers).
298. See, e.g., Elisa B. v. Superior Court of El Dorado Cty., 117 P.3d 660 (Cal. 2005) (recognizing two mothers as parents of child conceived by donor insemination); In re Roberto d.B., 923 A.2d 115 (Md. 2007) (recognizing one father and no mother for a child conceived with a donor egg and gestated by a "surrogate"); In re Paternity of M.F., 938 N.E.2d 1256 (Ind. App. 2010) (recognizing the genetic father as the legal parent of one child because he could not prove conception by alternative insemination but holding that he is not the legal parent of the child's genetic sibling for whom he could establish conception by alternative insemination). See also Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789 (Cal. Ct. App. 2014) (examining whether sperm donor may also be recognized as a parent).
299. See Rosenbury, supra note 163.
300. See, e.g., Laufer-Ukeles, supra note 88.
302. See, e.g., DeBoer v. Snyder, 772 F.3d 388, 404 (6th Cir. 2014) ("[G]overnments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse."), rev'd sub nom. Obergefell v. Hodges, 135 S. Ct. 2584 (2015); POSNER, supra note 105.
303. See Murray, supra note 120.
304. See id. at 39-64; see also Obergefell, 135 S. Ct. at 2630 (Scalia, J., dissenting) ("[O]ne would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie.").
305. See supra note 114 and accompanying text.
306. Similarly, government has sought to guide poor women to carry their pregnancies to term by supporting that choice while refusing to subsidize abortion. E.g., Harris v. McRae, 448 U.S. 297 (1980).
questioning such material benefits, Obergefell emphasizes marriage’s emotional and psychic benefits, suggesting that high-profile cases can provide a bully pulpit for advancing the channeling project and attempting to counter the contemporary “retreat from marriage.” Indeed, despite this retreat, the fact that so many people choose marriage, especially those who are most well-positioned to succeed without it, compels acknowledgment of this channeling function and its regulatory purpose and effects.

Third, restrictive understandings of family, sex, and gender have proven tenacious, even in the face of apparent deregulation, because family law does not work alone. Family law is one element of a larger culture, dynamically interacting with other influences on family formation and family life, including religious beliefs and practices. Indeed, Martha Minow has theorized that disputes about family privacy and autonomy should be read as struggles between religious groups. Family law’s deep entanglement with religion means that the “nature” freed to take its course by legal deregulation might actually strengthen such other sources of discipline.

Again, consider marriage as an example. Just like family law, religion privileges marriage as the site of sexual activity, and marriage reproduces gender, to which many faiths assign great importance. As the majority asserts in Obergefell: “Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm.” In other words, marriage itself serves as both a religious practice and the means to a civil status. Illustrating this dual character, a legal marriage may be performed by either religious clergy or a state official. This dual character helps explain one flashpoint in the wake of marriage equality—controversy over whether those with religious objections may be excused from participating in same-sex marital rites, whether as cake-bakers, photographers,

307. As noted earlier, one is tempted to read the opinion as a public-service announcement in favor of marriage. See supra note 154 and accompanying text.
310. Minow, supra note 211, at 959. Under Minow’s alternative reading, “the family serves as terrain for group conflict,” id. at 962, specifically “religious and ethnic conflict,” id. at 977.
311. See, e.g., Turner v. Safley, 482 U.S. 78, 96 (1987) (“[M]any religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.”).
312. See COTT, supra note 73, at 3 (describing marriage as “the vehicle through which the apparatus of state can shape the gender order”); see also id. (“The whole system of attribution and meaning that we call gender relies on and to a great extent derives from the structuring provided by marriage.”).
314. Id. at 2594.
316. For a typical statute, see, e.g., CONN. GEN. STAT. § 46b-22 (2015).
clergy, or state officials. This dual character persists even though marriage-equality jurisprudence has emphasized “civil marriage” alone, and some commentators have proposed that the state “get out of the marriage business” altogether, leaving only the religious ritual with whatever (nonlegal) meaning it might convey.

_Hobby Lobby_ also illustrates such entanglement, validating and fortifying the role of religion in shaping family behavior—in this case, outside the home and through the workplace. By allowing the religious preferences of owners and operators of for-profit corporations to prevail, _Hobby Lobby_ provides support for the regulatory work on family matters that certain religious faiths perform. Even if, as Justice Kennedy’s concurrence promises, the employers’ beliefs can be accommodated without denying employees cost-free access to contraception, to treat women’s birth control as exceptional, controversial, and more objectionable than all other health care coverage likely has a marginalizing, if not chilling, impact on employees who use such coverage. In this way, family law, including family law’s deference to some religious beliefs, challenges the field’s emancipatory rhetoric and confounds our understanding of “the private realm of family life which the state cannot enter.”

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323. See _supra_ note 276 and accompanying text.
B. The Uneasy Place of Equality in Family Law

1. Equality—and Inequality—Across Families

The analysis of family law’s warring commitments to autonomy and state regulation goes far toward introducing family law’s inconsistency on equality and inequality. Again, the examination seeks to uncover deep contradictions, rather than simply change over time.

The focus here is not on equality within families, even though Eisenstadt belongs with several developments that rooted out traditional gender-based legal role assignments within the family in favor of a gender-neutral system. Instead, Eisenstadt’s most salient contribution lies in its explicit commitment, anchored in the Equal Protection Clause, to equal treatment across families— that is, interfamily equality. Certainly, this motif of interfamily equality surfaces again in Obergefell’s extension to same-sex couples of access to the marital benefits that cross-sex couples could long enjoy. Its pledge of “equal dignity” for same-sex couples supports equal treatment of different families and advances the commitment to pluralism that has emerged as an important value in family law—one rationale for the constitutional protection of family autonomy and privacy, which limits the ability of the state to “standardize” families.

At the same time, however, Obergefell accentuates, rather than bridges, the divide between married and unmarried. It displays a narrow vision of pluralism focused on marriage. And its message of equality is muddled and ambivalent because the majority stops well short of a full-throated embrace of equal protection, instead assigning the laboring oar to the Due Process Clause’s protection of liberty. Thus, when Obergefell cites Eisenstadt three times, including specifically in support of due process protection for the right to

324. I have referred to this transformation as “family law’s equality project.” See Appleton, supra note 293; see also supra notes 131-133 and accompanying text. But see supra note 244 and accompanying text (suggesting Obergefell leaves room for retrenchment).

325. Eisenstadt shares this contribution with the challenges to “illegitimacy” and its disadvantages that were successfully brought during the same era. E.g., Clark v. Jeter, 486 U.S. 456 (1988); Gomez v. Perez, 409 U.S. 535 (1973); see supra note 77 and accompanying text.


327. Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925); see also supra note 68 (citing authorities).

328. 135 S. Ct. at 2599-601. But see, e.g., Joslin, supra note 157.

329. But see Tribe, supra note 326, at 31-32 (arguing that the “equal dignity” approach used in Obergefell extends to those who choose alternatives to marriage).

330. See, e.g., Yoshino, supra note 157, at 168.
marry, the context downplays Eisenstadt’s transformative possibilities. Put differently, Obergefell does nothing to disrupt family law’s reliance on a marital-family paradigm. Obergefell’s equivocal and diluted engagement with equality overlays more profound inconsistencies. Interfamily inequality pervades family law. We can discern such inequality back in the Eisenstadt era itself, when a range of interventions targeted poor and nonmarital families, from compromised privacy under welfare laws to coercive limits on procreation. Today, such inequality flows principally from two interrelated regulatory tools that we have already seen at work earlier in the analysis. The first is the privileged position of marriage, including special state-conferred benefits attached to this status—a key prong in the effort to channel relationships into this norm. The second is the treatment of the family as an independent economic entity with legal obligations to meet the needs of dependent members of the unit. This notion of the private family, reinforced with a regime of negative rights and principles of “personal responsibility,” justifies the absence of a robust social welfare system and plays a powerful role shaping family life, by design.

These tools combine to foster inequality across families. Marriage has become a marker, if not an engine, of class, with a widening economic divide between marital and nonmarital families. Treating marriage as the gateway for various material benefits exacerbates disparities, while also revealing that the “privatization” of dependency operates in an incomplete or selective fashion. After all, marital families do receive public support denied to those living outside marriage—in exchange for taking on the financial and other obligations that marriage entails.

With or without marriage-based benefits, however, leaving families largely on their own makes inequality an integral part of contemporary family law. As Anne Alstott has argued, the prevailing vision of the private family puts “the

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331. 135 S. Ct. at 2599. The Court also cites Eisenstadt as authority for due process protection of intimate choices, id. at 2597-98, and for a relationship between due process and equal protection, id. at 2604.

332. See, e.g., Huntington, supra note 67, at 170 (noting how family law assumes marriage and overlooks nonmarital families).


334. See, e.g., Kessler, supra note 69 (discussing Stump v. Sparkman, 435 U.S. 349 (1978)).

335. But see Susan Frelich Appleton, Obergefell’s Liberties, 77 OHIO ST. L.J. (forthcoming 2016) (analyzing how Obergefell’s protection of marriage differs from classic negative rights); Yoshino, supra note 157, at 168 (same).

336. See supra notes 96, 186, 204 and accompanying text.

337. See supra notes 88, 308 and accompanying text.

338. See POLIKOFF, supra note 53, at 126; Hamilton, supra note 79.

339. See supra note 185 and accompanying text.


341. See id. ("[J]ust as [in marriage] a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union.").
family at odds with equality.\textsuperscript{342} Relegating childrearing and child support largely to parents results in very different life opportunities for the various members of the next generation. As a result, the line running from \textit{Eisenstadt} to \textit{Obergefell} does not consistently arc toward greater equality, despite the latter’s confident and optimistic assurances about how “new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”\textsuperscript{343}

2. \textit{Following Eisenstadt: Birth Control Access as Family Law}

No one would question \textit{Obergefell}'s position as a significant family law case. By contrast, today's controversies about access to contraception, especially the ACA and \textit{Hobby Lobby}, are typically read through other lenses. Because these controversies center on the employer-employee relationship and the federal government’s role, analyses are typically guided by principles from domains such as law and religion, corporate law, health law, insurance law, employment law, and employee benefits. Although the \textit{Hobby Lobby} majority cites \textit{Griswold} in summarizing the government’s brief,\textsuperscript{344} it does not mention \textit{Eisenstadt}. (Justice Ginsburg’s dissent emphasizes the link between reproductive autonomy and gender equality, but she cites an abortion precedent for this point.\textsuperscript{345}) Yet, just as \textit{Eisenstadt}'s relevance for family, sex, and gender makes it an important family law case despite its failure to fit within family law’s traditional frame,\textsuperscript{346} more recent developments in the law of birth-control access also implicate family, sex, and gender. In addition, using the lens of family law to explore present-day birth control issues coincides with contemporary scholarly analyses of the myriad influences in the “public sphere”\textsuperscript{347} that affect purportedly private family life.\textsuperscript{348}

Read through a family law lens, controversies about access to birth control illuminate family law’s inequality problem as well as the indeterminacy of family law’s asserted public/private divide. \textit{Eisenstadt} seems to have assumed that, without the distribution ban invalidated in that case, women would have easy access to birth control—through a combination of the market, the free disbursements practiced by Baird and others, the clinics vindicated in \textit{Griswold}

\textsuperscript{342} See Alstott, \textit{supra} note 88.
\textsuperscript{343} \textit{Obergefell}, 135 S. Ct. at 2603.
\textsuperscript{344} Burwell v. \textit{Hobby Lobby Stores, Inc.}, 134 S. Ct. 2751, 2779-80 (2014).
\textsuperscript{345} \textit{id.} at 2787-88 (Ginsburg, J., dissenting) (quoting Planned Parenthood of Se. Pa. v. \textit{Casey}, 505 U.S. 833, 856 (1992)).
\textsuperscript{346} See \textit{supra} notes 47-65 and accompanying text.
\textsuperscript{347} See, e.g., \textit{STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR How LOVE CONQUERED MARRIAGE} 170, 197 (2005).
a few years before, and the extant Family Planning and Population Research Act of 1970. Whatever might have been the Eisenstadt Court’s sensitivity to economic constraints, it had no need to go further than declaring a negative right to access for unmarried individuals in order to equalize them with their marital counterparts in obtaining birth control. Even the fornication misdemeanor lay outside the scope of the issue before the Court.

Taking a more proactive and nuanced position, the ACA’s contraceptive mandate looks beyond purely negative freedom to recognize that access is a matter of degree. The ACA mandate highlights, in particular, cost considerations by insisting that covered employees pay nothing for contraception as the best way to ensure access. Early studies bolster claims about the ACA’s effectiveness in improving access, showing that free contraception increases use and that the mandate coincides with considerable financial savings for women.

In looking to the employer for coverage, the ACA mandate reflects several insights and commitments. First, birth-control coverage ought to be treated the same as other health care. Second, employees earn their benefits. Third, care unique to women should not be excluded, as a matter of gender equality. Yet, these justifications fail to address how family law might approach such issues.

Through a family law lens, resistance to the contraceptive mandate embodies contemporary attitudes reflected in the legal and popular

349. See supra note 29 and accompanying text.
350. See supra notes 83, 178-181 and accompanying text.
351. See supra note 88 and accompanying text.
352. See supra note 106 and accompanying text.
353. This proposition is also reflected in the numerous, costly obstacles that states have recently imposed on abortion and the indeterminacy of the prevailing “undue burden” standard used to evaluate them. See, e.g., Whole Women’s Health v. Cole, 790 F.3d 563 (5th Cir. 2015), cert. granted, 136 S. Ct. 499 (2015).
355. See Becker & Polsky, supra note 99. Accordingly, despite appearances, legislative proposals to make contraception available over the counter would not increase access in today’s world if, as a result, the nonprescription status eliminated insurance coverage and required individual women to pay. See Peter Marcus, Over-the-Counter Birth Control Fight Ensues: Dueling Legislation Highlights Politics Behind the Issue, DURANGO HERALD (June 13, 2015), http://durangoherald.com/article/20150613/NEWS01/150619825/-1/NEWS13/Over-the-counter-birth-control-fight-ensues (contrasting two proposed laws). Some physicians report difficulties with the mandate’s implementation. See Mary C. Politi et al., Addressing Challenges to Implementation of the Contraceptive Coverage Guarantee of the Affordable Care Act, J. AM. MED. ASS’N (Feb. 16, 2016), http://jama.jamanetwork.com/article.aspx?articleid=2488044.
358. Hobby Lobby, 134 S. Ct. at 2779.
preoccupation with "personal responsibility." This ideology of the family envisions sexual actors as autonomous decisionmakers who should avoid reproduction through their own efforts, whether abstinence or the purchase and use of birth control. This view accords with a notion of sex as quintessentially private, while assuming that individual financial responsibility is the "natural" baseline and that any other allocation (even in the name of gender equality) must constitute illegitimate redistribution. To the extent that the female employee's family shares the burden (because the funds come from the family's disposable income or wages), we see privatized dependency and neoliberalism at work.

Beyond the particular religious objections that carried the day in Hobby Lobby, in our "neoliberal political culture" and our neoliberal family law in particular, the contraceptive mandate looks doubly wrongheaded: It disrupts what might appear to be the "natural" allocation of such costs (the individual or family seeking contraception), and it inserts government both in the market (the employer-employee relationship) and in family morality (by classifying contraception as health care and assigning its costs to the employer). In providing more freedom for employees and their families, it imposes additional regulation on the employer, departing from the primacy that neoliberalism accords to both individual responsibility and business interests. However sound the mandate's approach might be, the opposition it continues to provoke should come as no surprise from a family law perspective.


361. See Self, supra note 1, at 400.

362. See Alstott, supra note 184.

363. We might find a helpful parallel for birth control in the arguments for support for pregnancy, which also results from sexual decisionmaking and activities. Examining reforms like the Pregnancy Discrimination Act (which was enacted after Eisenstadt), Deborah Dinner has shown convincingly that spreading the costs of reproduction and childcare "is a critical component of sex equality." Deborah Dinner, The Costs of Reproduction: History and the Legal Construction of Sex Equality, 46 Harv. C.R.-C.L. L. Rev. 415, 418 (2011). The subsequently enacted Family and Medical Leave Act (FMLA) can be seen in this light—as a measure that advances gender equality by spreading the costs of pregnancy and family care, although it falls considerably short of similar measures in other countries. See Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721 (2003); see also Rebecca Ray et al., Parental Leave Policies in 21 Countries: Assessing Generosity and Gender Equality, CTR. FOR Econ. & Pol'y Res. (rev. June, 2009), http://www.lisdacenter.org/wp-content/uploads/parent-leave-report1.pdf. (I studiously avoid the term "redistribute" when talking about these costs because I do not want to beg the question of where they belong in the first place.).
Such concerns help explain follow-on controversies, including new contraceptive-mandate cases with which the Court has grappled. In these cases, religious nonprofit employers challenged the accommodation fashioned for such organizations. The organizations argue that completing and submitting the form that allows them to opt out of the contraceptive mandate (so that insurers can cover the cost of employees’ contraception) substantially burden the exercise of their religion by “making them complicit in the provision of contraceptive coverage.” Although the challengers frame their objections in terms of complicity, at bottom they are claiming a right not to be involved at all in employees’ contraceptive needs and practices—which should remain a private or personal responsibility.

Although Hobby Lobby lends some credence to such neoliberal, atomistic thinking, Hobby Lobby also invites consideration of a very different—indeed, contradictory—approach. Among the less restrictive alternatives for advancing the government’s goals, the majority hypothesizes full public funding of contraception, including the four methods that the challengers classify as abortifacients. Apart from the sparks that would surely fly about using federal funds for even would-be “abortions,” full public funding almost certainly will not become a political reality, as the Hobby Lobby Justices must appreciate. In fact, proposed federal law reforms would take the opposite tack, defunding existing contraceptive programs.

Yet, the suggestion is tantalizing, even if it is so unrealistic that it commands the support of birth-control opponents. What would it mean to understand birth control the way that Obergefell apparently understands

364. See, e.g., Zubik v. Burwell, No. 14-1418, 2016 WL 2842449 (U.S. May 16, 2016) (vacating and remanding litigation so that courts of appeals may attempt to accommodate employers’ religious exercise while assuming their employees' access to contraception without cost-sharing).


366. See Nelaime & Siegel, supra note 322.

367. Hobby Lobby uses an entirely subjective reference point for determining what constitutes a substantial burden on religion. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2778-79 (2014). In other words, if the employer claims a substantial burden, there is a substantial burden. See also Wheaton College v. Burwell, 134 S. Ct. 2806, 2812 (2014) (Sotomayor, J., dissenting) (dissenting from grant of emergency injunction and challenging a subjective standard for a substantial burden).

368. Hobby Lobby, 134 S. Ct. at 2780.


370. See Sepper, supra note 320.

371. See supra note 208 and accompanying text.

372. Elizabeth Sepper summarizes the arguments. Sepper, supra note 320, at 1491-95; see also Gedicks, supra note 207.
marriage, to assume that the government must offer it equally to those who want it? Assuring full access through, say, government funding might be rooted in family autonomy, sexual freedom, or gender equality, all values suggested in Eisenstadt. Full government funding, in theory, would offer many advantages. It would make visible how family and state are intertwined, rather than distinctly “separate spheres.” It would elevate support for contraception to a national priority, it would put the government’s “money where its mouth is” in advancing gender equality, and it would actualize some of Eisenstadt’s unfinished possibilities—including reestablishing family law’s expansive commitment to interfamily equality.

CONCLUSION

In recent years, marriage equality has preoccupied family law, and the field’s attention to birth control has focused on Hobby Lobby’s recently imposed limitations and new litigation seeking still additional limitations—but not Eisenstadt. References to Eisenstadt, when they appear at all, fail to acknowledge the transformational possibilities of this case. In fact, as Obergefell shows, these references appropriate Eisenstadt in service to marriage and marriage’s legally favored position, despite Eisenstadt’s very different import.

Nonetheless, Eisenstadt holds deep significance for family law’s contemporary challenges and instability—a volatility all the more intense now that the Supreme Court awaits a new Justice in an exceptionally charged political climate. As historian Robert Self observes in the epigraph at the beginning of this essay: “The question is not whether gender, sex, and family are structured and regulated by the state; the question is what kinds of regulations exist and to what end.” Eisenstadt’s protection of access to birth control outside of marriage marks fundamental shifts along all three axes, but other developments, often with notably different “ends,” complicate Eisenstadt’s legacy and expose deep contradictions in family law’s

373. See SELF, supra note 1, at 423-24 (noting how “the ‘right’ to marry . . . because marriage is a state-subsidized institution . . . behaves like a classic positive right”).
375. See Olsen, supra note 218; Deborah L. Rhode, Feminism and the State, 107 HARV. L. REV. 1181, 1187 (1994).
379. See supra note 1 and accompanying text.
fundamental assumptions, commitments, values, and goals. A Court with changed membership will have opportunities to confront these inconsistencies and, we may hope, to remember *Eisenstadt* and its promise.