Critical Dialogue

Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India. By Narendra Subramanian. Stanford, CA: Stanford University Press, 2014. 400p. $65.00.
doi:10.1017/S1537592716000323

— Mark E. Brandon, *University of Alabama School of Law*

Although half a world apart geographically, the United States and India are similar in important respects. Each was once a colony of Britain, though the colonization and independence of the United States preceded India's by roughly a century-and-a-half. Each experienced secessionist movements—successful against India as British rule came to a close, suppressed in the mid-nineteenth-century United States. Both now have democratic political systems. Both have secular states. Both are religiously pluralistic. Both have legal systems that, in varying degrees, retain elements of the British common law. Each has institutional and ethical elements of constitutionalism, including a written constitution and a supreme court that plays a prominent constitutional role. Historically, each nation has rested on strongly gendered assumptions about rights, roles, hierarchy, and responsibilities in social, civic, and political spheres. In each to different degrees, social class has been a marker of status and inclusion. And many political and legal elites in each have embraced, in various ways, values of modernity.

Given these similarities, how to explain differences in the trajectory and content of legal change in India and the United States? For that matter, how to explain the differences between India and recent post-colonial regimes in South Asia, Africa, and the Middle East? These are the questions of Narendra Subramanian's insightful book, *Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India*. As the title suggests, Professor Subramanian approaches these questions through an examination of family law—especially as family law is inflected and reflected in religious institutions, values, and practices, and as it implicates the social statuses of gender and (to a lesser extent) class.

The substance of family law (or, in India's case, "personal law") is itself diverse. It includes laws regulating marriage, separation, and divorce, laws governing sexual conduct, laws regulating the management of familial property, laws prescribing modes of inheritance, and laws governing adoption and guardianship. The focus on family law is apt, not only because it provides a window onto dynamics of political and legal change, but also because it is an important site for understanding the relationship between state and society and for understanding how disputes over basic values (both religious and secular), civic status, legal rights and obligations, and political inclusion are implicated in the project of building a nation.

As Professor Subramanian points out, there is no single path to nationhood for a post-colonial multi-cultural society, nor is there a single form of modernity toward which nation states may gravitate. There are, however, structural relationships within which change happens. Borrowing from Michel Foucault, he observes that discourses about nations, constituent cultures, and forms of modernity, along with discourses about and reconstructions of traditions, influenced projects to make citizens, establish norms for recognizing religious and other cultural groups, and shape family. A key word here is "influenced." Professor Subramanian rejects the notion that the trajectory or content of change is determinate. In the context of India, the mutual interaction of colonial legal forms and requirements, social reform agendas of anti-colonial and post-colonial nationalists, and post-colonial multi-cultural politics produced a new post-colonial regime. The chief agents for this process—at least the agents who are central to his account—are elites. These agents come in a variety of forms, from a host of social sites, with a wide range of values, visions of nationhood, and strategies for change. They are lawyers and judges and bureaucrats. They are political elites. They are religious figures. They are secular intellectuals. And they are social activists who are variously animated by religion, tradition, feminism, and human rights.

It is no surprise that public actors are important to the story of legal change, given their role as gate-keepers to the creation and enforcement of positive law. Professor Subramanian's insight is that public actors did not deploy a thoroughly Western conception of modernity, but instead developed their own understandings of the forms of modernity that are appropriate for particular societies, based on local traditions, social forms, social mobilization, and prior (think "colonial") arrangements. This permitted public actors—in conversation with persons and groups in civic spheres—to deploy autochthonous conceptions of modernity in the pursuit of goals of national cohesion, cultural

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https://doi.org/10.1017/S1537592716000335 Published online by Cambridge University Press

de-colonization, the management of ethnic and religious difference, and maintaining and changing social structure.

Viewed through the eyes of colonial governors and administrators, personal laws in Colonial India were useful devices for social control in a multi-cultural environment. In colonial India, there were three major systems of personal law, each rooted in religion: Hindu, Muslim, and Christian. Colonial rule witnessed the rise of religious mobilization for legal change among Muslims and Hindus, but interestingly not among Christians. Some mobilizers (both Hindu and Muslim) were seeking versions of modernity, including greater equality with respect to gender. Others, more conservative, wanted privilege for certain castes or groups, and sought restrictions on women.

Initially, Islamic scholars and elites had resisted the colonial incorporation of Islamic law into personal law. Over time, however, they came to view Muslim personal laws as importantly linked to Muslim identity. Having made that shift, they became invested in the content of Muslim personal laws. Religious elites and secularized Muslim intellectuals successfully advocated statutory changes in the law during colonial rule. The dynamics of Hindu mobilization in the same period followed a slightly different path. Just as Islam had sacred texts and commentaries that informed the content of personal laws, so too did Hinduism. Colonial lawyers, courts, and bureaucrats, however, took liberties with Hindu sources, creating the image—or illusion—of what Professor Subramanian calls a "pan-Indian Hindu tradition." One consequence was that Hindu mobilizers tended to adopt strategies that were less oriented toward change than did Muslims in the same period.

In the transition from colonial to post-colonial rule, Indian nationalism began to flourish. To complicate matters, there were multiple versions of Indian nationalism: Two became especially significant during and after the struggle for independence. The modernist nationalists, including Jawaharlal Nehru, embraced a centralized state, economic development, parliamentary democracy, and secularism. They supported changing personal laws to promote greater equality (with respect to both gender and caste), though they would temper this value with respect for groups' norms. Moderate traditionalists, like Mohandas Gandhi, embraced a different vision. Gandhi imagined a nation that was decentralized and agrarian: a non-industrial nation of villages. Although he was no egalitarian, Gandhi urged better conditions for the lower castes and weakening the doctrine of untouchability. As India approached independence, Nehru and Gandhi united under the umbrella of the Indian National Congress.

After the Partition in 1947, the INC formed a governing majority and embraced an agenda that included reforming Hindu law and retaining minority personal laws. Why the decision not to change minority laws? Dominant scholarly opinion has held that the failure to reform personals laws for Muslims and Christians was because minorities did not wish to change their personal laws, and Hindus wanted to accommodate minority preferences. Professor Subramanian shows how this view misses much of what was happening in Indian politics, law, and society in the first post-colonial decade. In fact, many Muslims and a growing number of Christians were not only open to, but actively arguing for, legal reform. Again, why the INC's focus on Hindu law? One answer is that many in the INC saw the reform of Hindu laws as a foundation for a new Indian citizenship.

The reform of Hindu personal laws in the first decade was not a decisive step toward modernity—certainly not toward a Western version of modernity—for the impetus for much of legal change derived from a combination of colonial Hindu law, pre-colonial religious texts and practices, and an evolving image of a "reformed Hinduism" that was informed by a distinctly Indian modernity. And the need to preserve broad-based political alliances (i.e., the need to hold onto traditionalist allies) meant that modernists could not attack many lingering practices of patrilineage and patriarchy even if they had wanted to do so. Still, there was genuine reform, including the promotion of monogamy as an officially sanctioned marital form, greater economic independence for women, and increased respect for the "autonomous choices" of marital partners. To recognize these changes is not to suggest that policy elites were motivated by sympathy for an agenda of women's empowerment. They were moved instead by considerations of "national and community revitalization, legal rationalization, and democratization."

Beginning in the 1960s, things began to change more dramatically. There were two reasons. First, as Indian democracy took root and the authority of the post-colonial state became more firmly established, governing elites began to shift their attention from the consolidation of authority to "addressing demands pressed by a more mobilized civil society." This trend accelerated after the mid-1970s. Second, urbanization and industrialization reduced the importance of landed property, which in turn weakened the system of lineages and extended families that had excluded women from participating in ownership. All of this tended to reinforce the prominence of the nuclear family as the principal social unit. It also, predictably, had an impact on the dispositions of political elites and on the composition of governmental bureaucracies. We may add to this mix a newly expanded role for judges and the rise of interest groups that are part and parcel of political life in a complex democracy that includes space for civic association.

Beginning in the 1980s, the Congress's modernist-pluralists were challenged by a majoritarian strain of Hindu nationalism in the form of the Bharatiya Janata Party (BJP). In its early years, BJP advocated a general Uniform Civil Code designed to regulate family life along

https://doi.org/10.1017/S1537592716000335 Published online by Cambridge University Press

the lines of majoritarian Hindu norms and doctrines. But when it came time to govern—when BJP led coalition governments between 1998 and 2004—the Party's need to maintain its coalition (which included some religious minorities) prevented it from pressing for a UCC. And the rising influence of women's organizations and other rights organizations inhibited BJP from pursuing policies that would have antagonized those groups. In fact, although Hindu nationalists had vigorously opposed changes to Hindu personal laws in the first post-colonial decade, BJP began "to support certain initiatives to empower women."

Thus, as political elites gradually changed "their understanding of the forms of family life appropriate for India," Hindu women gained access to joint and family property, divorce became permitted for cause (though women's groups successfully opposed divorce for irretrievable breakdown), and courts increasingly protected women from domestic violence.

But how would the nation deal with change in familial norms specific to minority religions? Muslim organizations actively advocated change to Muslim personal laws. They did so in both legislative and judicial forums. They argued for invalidating polygamous marriages. They argued for extending inheritance rights in agricultural land to women. They argued for an increase in dower amounts and for giving women, rather than their husbands' families, control of their dower after marriage. They argued for abandoning the Sunni rule barring dower for women who petition for divorce in community courts. They argued for an expansion of women's access to divorce in community courts, even in the absence of their husbands' consent. They argued for inclusion of women in mosque councils.

In the late 1970s, Christians, too, began increasingly to advocate change to the personal laws pertaining to them. They wanted liberalization of the grounds on which divorce might be granted and the equalization of grounds between husbands and wives. They wanted the right to adopt children. (Indian law had prohibited adoption by Christians out of fear that allowing adoption would substantially increase the Christian population—and therefore dilute the Hindu majority.) And they wanted ministers of all sects—not merely Anglicans, Scottish Presbyterians, and Catholics—to be governmentally authorized to solemnize marriages. They wanted to equalize shares in marital property, between husbands and wives. They wanted to end the doctrine that a spouse (typically the husband) had a right to the other spouse's (typically the wife's) "conjugal company." They wanted to eliminate categorically the practice of child marriage. They wanted to give widows priority over other kin in inheriting the deceased husband's property, even if there were no children. They wanted to invalidate prenuptial agreements "that deprived widows of their husbands' property."

It is notable just how modernist were these religiously motivated claims—both Muslim and Christian—more modernist even than parallel provisions of secular law. Still, Professor Subramanian observes that many of the claims by both Muslims and Christians found a receptive audience among legislators, judges, and bureaucrats. The reasons were twofold. Relevant elites came to be more familiar with minority cultures and traditions, including the norms of family life that minorities valued. And the views of policy elites themselves were liberalizing over time, making modernist policies less threatening.

The rise of interest groups in litigation (and other forums) after the 1960s and the increasing involvement of courts as makers and changers of policy appear to be consistent with the increasing visibility of courts in other nations—including the United States—around the same time. Despite these similarities, one difference is striking: Although much family law in the United States has been steadily "consitutionalized" in the past century, the story of change in the family law of India has had very little to do with the Indian Constitution or with constitutional law. What accounts for this difference? The answer to this question rests on the many and varied aspects of cultural experience that help to explain how polities can move in different directions. In demonstrating how this is so, Professor Subramanian has provided a splendid piece of scholarship.

Response to Mark E. Brandon's Review of *Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India*
doi:10.1017/S1537592716000335

— Narendra Subramanian

I greatly appreciate Professor Mark Brandon's enthusiastic engagement with my book. He effectively highlights the variety of agents and outlooks that, in my view, influenced Indian personal law.

I wish to clarify certain arguments of mine. Professor Brandon underlines the Indian constitution's limited role in the development of family law in India unlike in the United States, and understands me to attribute this to "aspects of cultural experience." I do not offer a cultural explanation of political and legal change. Among societies in which public religion was important and religious norms were central to family law until the twentieth century, constitutional law was given more influence over family law after new regimes assumed power in Turkey, Morocco, Tunisia, and Egypt, than it was in India. Thus, prior cultural experience did not determine the extent of constitutionalization, as well as other aspects of family law development such as the promotion of women's rights, individual autonomy, and cultural pluralism. What mattered was how crucial public actors engaged with earlier experiences to devise ideas of the nation and the traditions that merit recognition, and how such notions interacted with projects to shape state-society relations.

The constitutionalization of family law had different implications for the recognition of religious norms,

https://doi.org/10.1017/S1537592716000335 Published online by Cambridge University Press

individual autonomy, and women's rights. While both the constitution and family law were secularized in Turkey, Islamic law continued to govern most citizens in Egypt, Morocco, and Tunisia, and this was underwritten by giving *shari'a* or particular Islamic texts constitutional status. Individual autonomy and women's rights were increased in Turkey and Tunisia as in the United States, but not much in Egypt and hardly at all in Morocco until the past decade. Two features of the Indian constitution were relevant to family law—the fundamental rights to equality, equal protection, non-discrimination, and personal liberty, and the call for a Uniform Civil Code. Legislators and judges justified certain personal law reforms in terms of these fundamental rights and as steps toward a uniform code, but they did not systematically change family law on these bases because they prioritized broad regime support over the democratization of the family, and sought to change personal law with reference to group norms rather than to the constitution's egalitarian liberal principles alone. Certain other redistributive policies (e.g., lower caste preferences) were given a stronger constitutional foundation because political elites sensed that they enjoyed greater support.

Mobilization for social and family reform was vigorous among Muslims mainly in the last colonial decades, but not stronger than among Hindus. Muslim law was changed more than Hindu law from the 1910s to the 1930s because Muslim mobilizers built greater community consensus over personal law. Reform initiatives were framed differently—while Hindus presented themselves as modernizing social norms, Muslims often justified change with reference to earlier religious sources. Governing political elites misunderstood Muslim allusions to religious norms as resistance to reform and did not change minority laws after independence. By claiming that the choice to reform Hindu law alone reflected group opinion, policy makers provided support for the Hindu nationalist portrayal of Muslims as averse to development, and limited the public recognition that widespread discrimination was the main cause of postcolonial Muslim socio-economic decline. Even when they changed minority laws from the 1970s, they resisted reforms that they feared might reduce Hindu preeminence—e.g., extending Christians the adoption rights they had been denied in the colonial era to limit the access of children of Indian ancestry to property in Britain.

States of Union: Family and Change in the American Constitutional Order. By Mark E. Brandon. Lawrence: The University Press of Kansas, 2013. 352p. $37.50.
doi:10.1017/S1537592716000347

— Narendra Subramanian, *McGill University*

The sharp conflicts of the past two decades over same-sex marriage are but the latest chapter in a long narrative of contention over the forms of family to be promoted or accepted in the United States. Understandings of appropriate ways to build family life have developed in close interaction with views about desirable forms of political authority, obligation, political community, and the nation around the world for over two centuries. In *States of Union,* Mark Brandon uses the analyses emerging from the family values movement as a foil for a compelling historical account of the reciprocal formation of the constitutional order and American families since colonial times.

Proponents of the family values movement (e.g., Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe*, 1989, and various public figures) have argued that the traditional and natural form of the family was heterosexual, monogamous, permanent, and reproductive at least in the West, and that the American Supreme Court's elevation of the family to a quasi-constitutional institution through the doctrine of privacy in the 1960s changed the regulation of the family in ways that undermined these long-lasting and valuable social and legal norms. Brandon corrects this understanding by examining the varied forms of family life that emerged in the United States in different contexts, and the different ways in which the American constitutional order engaged with these family forms. Specifically, he highlights the alternatives to heterosexual marital monogamy that were salient among certain groups, in some cases for long periods, and the courts' toleration of certain of these alternatives and embrace of at least one with reference to the constitution. The courts acted thus although they upheld the monogamous and reproductive nuclear family when they explicitly gave the family a constitutional status in crucial decisions of the 1920s.

Scholars have understood that the historical analyses of the family values movement are seriously flawed. While these limitations are nevertheless worth highlighting in view of the movement's political influence, Brandon's account does not stop there. Rather, it also provides a valuable alternative to more nuanced understandings of the development of family life and state regulation of family practices in the United States, such as those of Nancy F. Cott (*Public Vows: A History of Marriage and the Nation,* 2000) and Lawrence M. Friedman (*Private Lives: Families, Individuals, and the Law*, 2005, and *A History of American Law*, 1985). The contrast is particularly striking with Cott's influential understanding that American political and legal authorities attempted to promote the permanent, reproductive, and patriarchal nuclear family, which they associated with republican ideals, since the founding of the republic. While the primary focus of Brandon's account is the engagement of the constitutional order with diverse family forms, it also addresses the increased recognition since the 1960s of women as having independent, full, and equal legal personalities and familial

https://doi.org/10.1017/S1537592716000335 Published online by Cambridge University Press

and social roles. The latter set of changes and their causes could have been discussed at greater length.

The alternatives to heterosexual, nuclear, and reproductive marital monogamy that Brandon demonstrates to have been important through the nineteenth and early twentieth centuries are: the slaveholding household, which was not necessarily monogamous or nuclear; the agrarian white nuclear families of the frontier, in which the roles of men and women varied and often overlapped, and marriages were less often solemnized and could be more easily dissolved due to the needs of frontier production and the limited reach of the law; the consanguine and matrilineal kinship practices of indigenous groups associated with collective property control; and the communalist and polygamous or polyamorous practices of various Protestant offshoot sects. State responses to these forms of family life were not consistently driven by a specific vision of a normative family. Rather, Brandon highlights the diverse family models that the founders upheld, all of which were compatible with the nature of the polity: the Jeffersonian self-sufficient agrarian family, the urban and liberal-individualist Hamiltonian family tied to commercial capitalism, and the slaveholding household (pp. 263–4). Of these, he arrestingly claims, the antebellum constitution offered the slaveholding family the greatest support, especially once *Dred Scott* gave such families the right to settle in any state, although the prevalence of such families was in tension with aspects of republicanism as well as with the founders' concerns to limit aristocratic estates and other dynastic families. It did so because slaveholding households were compatible with other constitutional values—patriarchy, the view of the family as the basic unit of economic production, and the racial social order. Brandon shows that the state did not however promote the slaveholding household at the expense of either the monogamous nuclear families predominant in the Northeast or the more varied forms of family among frontier whites. Nevertheless, the state limited two other kinds of families—indigenous families, through the allocation of individual titles to formerly tribally controlled land, the forced transfer of tribes to reservations, and the grant of authority over indigenous education to common schools or parochial schools; and the "uncommon families" of Protestant offshoot sects through the increasingly coercive imposition of marital monogamy. It however tolerated certain uncommon white family practices, such as those of the Shakers.

Brandon fully establishes the importance of alternatives to reproductive marital monogamy, and his discussion of the unconventional practices of Protestant offshoots is particularly attentive to actor mentalities. But, he does not as clearly demonstrate that the state tolerated many of these alternatives before the 1960s. His discussion suggests that the constitutional order accepted only the slaveholding household (and that only until emancipation, of course). His illustration of its embrace of this institution is an important contribution to the literature. So is his argument that the racially homogeneous nuclear family was consolidated after emancipation as a distinctly American family through the recognition of earlier African-American conjugal bonds as common-law marriages, the adoption of anti-miscegenation laws in many former slave states and Western states, and the imposition of more fine-grained racial restrictions on immigration (pp. 81–107). Brandon's own narrative shows that the state restricted the other alternatives. The restrictions were most binding over polygamy and indigenous consanguine and matrilineal kinship practices. While certain other alternative family forms were tolerated, such tolerance seems to have been premised on a commitment to a norm of reproductive monogamy. The practices tolerated either did not involve extensive sexual activity with many partners or for non-reproductive purposes, as was the case with those of the Shakers, or seemed safely marginal. When the rapid growth of certain unconventional family forms, such as Mormon polygamy, was seen to challenge the above norm, the state responded with stringent restriction.

The discussion could have benefitted from a consideration of certain other reasons why the judiciary and the legislature may have responded differently to particular forms of conjugality, and why their approaches to the regulation of family life changed at particular points as they did. For instance, if these institutions accepted alternatives to monogamy mainly in slaveholding households in the antebellum period, might this have been because policy-makers considered monogamy relevant only among those that they took to have full ownership of their reproductive capacities? This interpretation would be compatible with the shift Brandon outlines on the part of state elites from either a refusal to recognize African-American marriage or an inattentive tolerance of this institution during the times of slavery, to the promotion of African-American marriage after emancipation. Moreover, readers may wonder why the space for alternatives to reproductive marital monogamy shrank from the late nineteenth to the mid-twentieth centuries, only to expand again from the 1960s. Was this only because the abolition of slavery made the main alternative that legislators and judges had embraced until then irrelevant? Or was it also because other alternatives to reproductive monogamy had by then grown to an extent that rendered the nature of the normative family uncertain? Was the increased attention to family regulation an aspect of the greater attention to state centralization after the Civil War? If so, why was reproductive monogamy promoted in similar ways throughout the country although federalism was structured to provide space for varied rules in other respects, most notably regarding race relations? While the courts and legislators

https://doi.org/10.1017/S1537592716000335 Published online by Cambridge University Press

accepted varied family practices at different points, did the changes from the 1960s nevertheless mark a significant shift in so far as they were less contingent on a valuation of reproductive heterosexuality? How did prior changes in family practices, cultural debate, and political and legal mobilization influence how the courts developed a privacy doctrine that governed their approaches to the family from the 1960s? Fuller answers to some of these questions would have made Brandon's provocative and wide-ranging analysis that much more valuable.

The careful elaboration of American experiences is not placed in a comparative perspective much, although some accounts that the author disputes drew such comparisons —e.g., Glendon did so with developments in Western Europe. Such comparisons are especially relevant as, even while certain state elites withdrew from the promotion of reproductive heterosexual monogamy in North America and Western and Central Europe, modernist reformers in various developing societies exerted increased efforts to promote these norms, particularly monogamy. In doing so, these actors often drew on rhetorical associations developed earlier in the West of alternative conjugal practices with despotism, backwardness, and resistance to state regulation and state-driven nationalism, as well as with anarchy and patriarchy. For all their empirical inaccuracies and analytical weaknesses, the discourses that inspired the promotion of reproductive heterosexual monogamy were not only revitalized in the United States by the family values movement, but also effectively transported to other locales in various forms. Scholars of comparative family and social regulation could understand such transports better by drawing from Brandon's analysis, as well as from accounts that more fully consider why proponents of reproductive heterosexual monogamy gained significant political influence, despite the many shortcomings of their arguments. Such understandings could help develop better strategies to foster more democratic and diverse forms of family and social organization around the world.

Response to Narendra Subramanian's Review of *States of Union: Family and Change in the American Constitutional Order*

doi:10.1017/S1537592716000359

— Mark E. Brandon

I am grateful to Professor Subramanian for his review of *States of Union*. The Supreme Court of the United States has built a substantial body of doctrine, central to which is the notion that family possesses a constitutional status. This creates a puzzle: If family is "in" the Constitution, how did it get there? The story of how it got there is the project of the book. The process by which it got there demonstrates that constitutional history is never simply a history of law, but unavoidably incorporates institutional, political, and social history too. That process has not been a smooth and seamless arc. It has grown out of conflict animated by competing understandings of family. It has been a process of relentless change.

Several types of family have been players in the constitutionalization of family in the United States, including types that deviated from heterosexual reproductive marital monogamy. But Professor Subramanian is worried (if I read him correctly) that I do not "clearly demonstrate that the state tolerated many of these alternatives before the 1960s." Even if it makes sense to reify the state in this way, the state's acquiescence is not a prerequisite to finding that alternative forms were constitutionally salient.

Institutions, values, and practices are subject to continual contestation, sometimes publicly, sometimes less so. Thus, even as the Supreme Court entrenched the constitutional status of monogamous marriage by the end of the nineteenth century, it did so in a way that signaled that even women might be entitled to enjoy the benefits of liberty and equality. Not that patriarchy died in the late nineteenth century, of course. But as early as 1845, Margaret Fuller eloquently understood the connection of constitutional values of liberty and equality to women, and much of the ensuing struggle over the constitutionalization of family has been about women's role and status.

Professor Subramanian raises good questions, most of which the book addresses, though not always systematically. I'll consider two of his questions here. First, why did elites accept slaveholding households as an alternative form of family? Assumptions about "full ownership of . . . reproductive capacities" may take us part of the way toward an answer. Additional elements may be that national elites believed that compromise with slaveholding interests was essential to creating and maintaining the constitutional order, and proslavery elites believed that controlling the familial lives of slaves was essential to maintaining slavery. These explanations are not exhaustive.

Second, why did the space for alternative familial forms shrink after 1865 and expand in the mid-twentieth century? The explanation for contraction is complex—rooted in the domestication of communal families, the regulation of families by race, the closing of the frontier, the subjugation of the tribes, and the legal abolition of polygamy. The strand that weaves through all of these trends was the victory of nationalism. For a time, this nationalism reinforced monogamy (often tied to reproduction), but nationalism eventually gave rise to constitutionalization, which, animated by values of liberty and equality, overturned patriarchy and reproduction, even as it has held fast (for now) to monogamy.

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