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Law as Economy: Convention, Corporation, Currency

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Law as Economy: Convention, Corporation, Currency

Ritu Birla*

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We might say that today, especially in the United States, we are experiencing the painful effects of an orthodox faith in economy *as* universal law, that is, in the free market as the law of the universe, a cosmology so powerful that it claims authority over all forms of ethico-political agency, coding citizens as consumers, life as management, and children as investments. The success of neoliberal visions of law and economy, or more accurately, law and economics, rests in their coding of law as model for rational economic practice on the one hand, and on the other (rather more invisible) hand, the ability to institute that abstract, spectral thing that we call “the economy” as the natural origin of law itself. If the presupposition of such approaches to law and economy is that these are distinct spheres and systems, we might say their *telos* lies in the hope that one day they will merge and become one, thus offering a powerful messianic vision of the meeting of desire (which is thought to motivate all self-interested economic transactions) and law, or a collapse of choice and coercion, in everyday conventions.

This utopian market vision evokes the imperial prophecy of Thomas Babington Macaulay, the first law member of the Governor-General’s Council under the British East India Company and the motivating force for colonial India’s Law Commissions, which installed its Criminal and Civil Procedure codes. In an influential speech in Parliament on the Government of India Bill in 1833, Macaulay argued that it:

would be . . . far better for us that the people of India were well governed

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and independent of us, than ill governed and subject to us; that they were ruled by their own kings, but wearing our broadcloth, and working with our cutlery, than that they were performing their salaams to English magistrates . . . but were too ignorant to value, or too poor to buy, English manufactures. To trade with civilized men is infinitely more profitable than to govern savages.¹

For utilitarians like Macaulay, the market itself offered the most efficient form of governing. The colonial civilizing mission—a despotic project of improvement—would instill in colonial subjects an education in ethical valuation and the value of market values, the result of which would be that civilized natives would act out the script of supply and demand to the benefit of England. Seeking to replace political despotism with free market ethics, Macaulay envisioned a society made up of market actors whose political agency (being governed by “their own kings”) would be trumped by their economic instrumentality in favor of Britain’s profit. It is important here to remember that Macaulay’s vision provided the impetus for legal standardization in India, a program that sought at once to implement a rule of law and secure the free circulation of capital through the disciplines of contract.

A figuration of the continuum across ethics and politics, the colonial subject as economic agent calls us to unpack a range of questions about economy as a project of governing—both self and society—and so especially about the relationship of law and economy. Elaborating on my work on law, culture, and market governance in colonial India, I gesture here toward a genealogy from colonial liberalism to contemporary neoliberalism to offer one channel for a “law as” approach:² an attention, informed by colonial history and postcolonial studies, to the techniques of what Foucault has called “la gouvernementalité libérale” (liberal governmentality) which views “civil society [as] the concrete ensemble within which . . . abstract points, *economic men*, need to be positioned in order to be made adequately manageable.”³ Interested in the political rationalities that enforce

1. THOMAS BABINGTON MACAULAY, *Speech in Parliament on the Government of India Bill, 10 July 1833*, in PROSE AND POETRY 716–18 (G.M. Young ed., 1967). The Government of India Act of 1933 extended the authority of Governor-General of the East India Company from control over Company officials to control over British India.

2. RITU BIRLA, STAGES OF CAPITAL: LAW, CULTURE AND MARKET GOVERNANCE IN LATE COLONIAL INDIA (2009).

3. Michel Foucault, *Lecture at the Collège de France*, 4 April 1979, translated by and cited in Colin Gordon, *Governmental Rationality*, in THE FOUCAULT EFFECT, 23 (Graham Burchell et al. eds., 1991). The full text of this lecture can be found in MICHEL FOUCAULT, LA NAISSANCE DE LA BIOPOLITIQUE (Seuil 2004) and in English translation, MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978–79 (Picador 2010). The original French reads: “[L]a société civile, c’est l’ensemble concret à l’intérieur duquel il faut, pour pouvoir les gérer convenablement, replacer ces points idéaux que constituent les hommes économiques. Donc, *homo economicus* et société civile font du même ensemble, c’est l’ensemble de la technologie de la gouvernementalité libérale.” FOUCAULT, LA NAISSANCE DE LA BIOPOLITIQUE, *supra* at 300. Foucault draws attention to a genealogy of neoliberal governance that begins with German ordoliberalism and

the distinction between what Marx called the “celestial” abstraction of the citizen and the “terrestrial” self-interested economic subject, such a project begins by attending to slippages across the classic binaries of state/market, state/civil society, and public/private, and is informed by and elaborates a wide range of legal thought, from legal realism, to critical legal studies, to law and society frameworks.⁴ Many strands of these approaches have sought to map the dynamic relationship between law and economy, in the economic motives informing the workings of law, for example, or in law’s regulation of market imbalances.⁵ At the same time, even amid critical approaches, scholarly interest in thinking law and economy together can nevertheless address them as distinct spheres, operating broadly via a state/market binary. Such scripts also structure social science approaches to the study of political economy (that is, the study of the relationship of the state and market, both conceived as *a priori* arenas), as well as the field of law and economics.⁶ Said differently, in the “law and” formulation, law operates as

the Chicago School of Milton Friedman. A key feature of this genealogy is the shift in the very concept of the market and its relationship to governance. In the eighteenth century, the market was conceived as a natural force, constituted by natural principles of exchange, and so distinguished from the state and governmental intervention. But by the early twentieth century, Foucault argues, various forms of neoliberalism come to view the free market not as a system of exchange, but rather as a site of competition, an arena that demands constant governance: In this new vision, “[t]he government must accompany the market from start to finish. The market economy . . . constitutes the general index . . . for defining all governmental action.” FOUCAULT, *THE BIRTH OF BIOPOLITICS*, *supra* at 121. Contrary to popular discourses, neoliberalism develops not as an interest in “freeing an empty space” for the market to operate outside of governmental intervention, but rather in “taking the formal principles of a market economy and . . . projecting them on to a general art of government.” FOUCAULT, *THE BIRTH OF BIOPOLITICS*, *supra* at 131. Said differently, the “natural” free market could only be animated through active and masterful governance. Colonialism in India, with its implementation of “the market” as a distinct domain of governance, I argue, is a key part of this genealogy of neoliberalism. For a working definition of neoliberalism through Foucault’s writings in *The Birth of Biopolitics*, see Wendy Brown, *Neo-liberalism and the End of Liberal Democracy*, 7 *THEORY & EVENT* 1 (2003).

4. On the division of man into celestial and terrestrial being, see Karl Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER*, 34 (Robert C. Tucker ed., 1978).

5. Perhaps the most influential work in the legal realist mode is MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1979). It is important to note that there are aspects of Horwitz’s text that resonate for a Foucauldian reading of law, particularly Foucault’s critical reading of contract via a “noneconomic analysis of power,” as I discuss below. Christine Desan, for example, has highlighted Horwitz’s charting of the emergence of a universalized contract doctrine, or, as I see it, the making of a kind of general equivalence for adjudication. See Christine Desan, *Beyond Commodification: Contract and the Credit-Based World of Modern Capitalism*, in *TRANSFORMATIONS IN AMERICAN LEGAL HISTORY* 111–42 (D. W. Hamilton and A. L. Brophy eds., 2010).

6. Literature on law and economic justice, as well as law and development studies, presupposes the state/market binary—law’s role is to correct the discrepancies and unevenness produced by market forces—even as it launches activist, social justice-oriented critique. In a different vein, the now extensive and dominant field of law and economics also views the state’s legal authority and the market as distinct spheres and logics, but which can be made to work in sync by applying economic models to legal analysis. This would ensure that law operates on principles of market efficiency and incentive. The foundational text in this field remains RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (1973).

a system or logic, that is, as a *logos*, as does economy, each as an arena outside the other.

In contrast, to pose law *as* economy, I want to emphasize their *embeddedness* within each other, reading both robustly through the concept of governing.⁷ Here, Foucault's lectures on liberal and neoliberal governmentality are of particular value. A term that places analytical focus on the mentalities and practices of governing, the directing or conducting of conduct, or what he calls the "conduct of conduct," governmentality as a historical formation refers specifically to the rationalities of governing that have developed since the late eighteenth-century emergence of the discipline of political economy. Attentive to its wide range of schools from the late eighteenth century, Foucault addresses political economy as a potent modern arrangement of power directed at managing political subjects as bodies and populations. Significantly, this vision of governing emerges just as juridical discourses of sovereignty begin to recode absolute sovereign right as social contract, that is, as the sovereignty of "the people" and citizenship rights are established and celebrated.⁸ Unfortunately, Foucault does not address colonial formations, especially the colonial liberalism manifest as the improving mission of British utilitarians, which lay bare political economy's modern political rationalities, instituting, as I will highlight here, the market as the name and stand-in for "the public," a site of modernity and space distinguished from the private realm of ancient and anachronistic "native culture."

This key feature of modern colonialism, the recoding of conquest as commerce, as opposed to the early modern or ancient territorial conquest *for* commerce, is especially important for unpacking the contemporary global coding of democracy as capitalism, and more broadly, the production of a neoliberal citizenry that is exactly not a "public," but as Macaulay envisioned, a mass of perfectly disciplined consumers.⁹ Mapping the world financially, such a process

7. Duncan Kennedy's classic critical-legal-studies mappings of law and economy, which assert the central place of law in the very conceptualizing of an economic world-view, inform my project of theorizing embeddedness here. Kennedy's keen attention to Marx's reading of the coercions of contract and Weber's sociology of law as grounds for critical legal studies is extended here in my reading of law and liberal/neoliberal governmentality. See Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities* 34 AM. U. L. REV. 939 (1984); see also Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031 (2004).

8. For the definition of governmentality as a historical formation, see Foucault, *Governmentality*, THE FOUCAULT EFFECT, *supra* note 3, at 87. This essay is one of Foucault's lectures at the Collège de France in 1978–1979. See the lectures in LA NAISSANCE DE LA BIOPOLITIQUE (THE BIRTH OF BIOPOLITICS), *supra* note 3, in which he elaborates on the conduct of conduct. For the definition of conduct, see *infra*, section on the non-economic analysis of power, and MICHEL FOUCAULT, SÉCURITÉ, TERRITOIRE, POPULATION: COURS AU COLLÈGE DE FRANCE, 1977–78, Lecture 1 March 1978, 196–97 (Seuil/Gallimard 2004). For the English translation, see FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 193 (Picador 2010).

9. Elaborating on Foucault, as well as Deleuze, Guattari, and others who are in the tradition of engaging Marx critically, a range of social theorists and philosophers are exploring the techniques

cuts across the credit-addicted subject of foreclosure in the United States and the credit-baited subaltern woman, the subject of gender- and development-based microcredit projects.¹⁰ Foucault's genealogy of governmentality enables textured readings of the legal dynamics that span such contemporary neoliberal formations and their precedents in colonial liberalism, even despite the fact that histories of colonialism constitute a notorious lacuna in Foucault's writings.¹¹ In this Essay, I read the nexus of law and governmentality through the lens of a colonial historical terrain in order to chart an approach to law *as* economy, one that grounds a critical postcolonial method for legal history. Such a method moves beyond the instrumentality of law for identity politics, entailing instead a rigorous attention to law's role in the political rationalities *and* codings of culture that produce and are legitimized by that modern abstraction we call "the economy." This approach demands that we read economic and political liberalism closely alongside each other, and not only in formerly colonized spaces. Said differently, to read law *as* economy brings a presentist method to the legal history of colonialism, one interested especially in the genealogies and contemporary dynamics of commerce and conquest. Moreover, such a presentist postcolonial analytic for legal history supplements important historical work that details the mechanics of law and its creative deployment by subjects in colonial contexts. Postcolonial scholars must grapple with the temporalities and spatialities of what Karl Polanyi called embeddedness, a term which points to socialities that are not fully captured by the modern abstraction of social relations as exchange-relations, or the recoding and flattening of deep layers of social meaning into exchange-values.¹² That is, a postcolonial analytic must engage with the embeddedness of law and economy, and more broadly, with embeddedness as a problem for the abstracting impetus of both modern law and economy, spheres which in their systematicity and logics of commensurability erase the densely and temporally situated operations of

and technologies of contemporary neoliberal culture. For a summary of the emergence of discourses of self-care/moral autonomy, and neoliberal evacuation of the public, see Brown, *supra* note 3.

10. For a critical reading of gender, development, and microcredit, see GAYATRI CHAKRAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON* 312–421 (1999).

11. On Foucault, Foucauldian analysis, and colonialism, see ANN LAURA STOLER, *CARNAL KNOWLEDGE AND IMPERIAL POWER: RACE AND THE INTIMATE IN COLONIAL RULE* (2002), especially chapter 6. See also ANN LAURA STOLER, *RACE AND THE EDUCATION OF DESIRE: FOUCAULT'S HISTORY OF SEXUALITY AND THE COLONIAL ORDER OF THINGS* (1995).

12. See generally KARL POLANYI, *THE GREAT TRANSFORMATION* (1957). To describe embedded social relations, Polanyi's reading evokes a nostalgia for a preindustrial *Gemeinschaft*, and deserves a critical eye on that account, for his temporal politics affirm master narratives of modernization (status to contract, *Gemeinschaft* to *Gesellschaft*) that have been successfully challenged by scholars working the economic history of global capitalism, as well as those addressing postcolonial capitalist modernities. See, e.g., DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2000); JOHN COMAROFF & JEAN COMAROFF, *ETHNICITY, INC.* (2009). Still, the term "embedding" does point to the multiplicities of negotiations that are hidden, if not erased, when the market, as an abstraction, monopolizes our conception of social.

subjectivity, agency and, sociality.¹³ Posed against the autonomous subject of rights of both natural and positive legal systems, embeddedness pushes a legal history that works within the folds of the double meaning of the subject, as in the term legal subject: the subject *with* agency, and the subject *of* (subjected to) authority.¹⁴

I. LAW AS ECONOMY: *NOMOS*, CONTEXT, AND LIMITS

A robust reading of economy in its classical sense promotes such a project by challenging the “law and its outside” logic of “law and economy” formulations. It is important to remember that economy, from the ancient Greek, *oikonomia*, or the law/convention (*nomos*) that distributes, arranges, and so regulates the household (*oikos*), is itself a concept of law. Indeed, here a concept of law is embedded *within* economy, rendering it a kind of governing indistinguishable from the inscription of community and sociality itself, and binding a notion of law to the idea of community making. Economy in this sense provides a lever to open legal history by foregrounding the concept of law as *nomos* or convention, which emphasizes the historicity and textured social habitus of law.¹⁵ At its radical ground, convention is constituted by practices that are temporally and spatially situated—it can be thought of, I want to argue, as the legal name for embeddedness—and so poses questions about law, temporality, and ethico-political agency that challenge projects of legal systematizing. Thinking law as economy in this way opens a robust engagement of the relationship between law as *nomos* or convention, that is, the situated, located historicity of conduct and practice and law as *logos*, that is, as sealed, scripted juridical logic and sovereign (even divine) performative, as standardizing Benthamite logic and the commands of sovereignty. To pose law as *nomos* also foregrounds the problem that conventions shift and change, marking a historicity that even the most systematic and totalizing positive law projects confront as an uncatchable currency. As such,

13. A rich historiography is developing on law in colonial contexts, detailing colonial subjects’ deployment of the wide range of legal domains. *See, e.g.*, LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES* (2010). For an influential text that elaborates the legal maneuvers and “jurisdictional jockeying” of colonial subjects, see LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY* (2002). For South Asian explorations in this vein, see 46 *INDIAN ECON. & SOC. HIST. REV.* 1 (2009).

14. BIRLA, *supra* note 2, at 6.

15. For the foundational theorizing of habitus, see PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (1979). My definition of *nomos* as convention emphasizes the historicity and shifting temporalities of the lived worlds of law. I supplement a classic text that foregrounds the concept of law as *nomos* and is an early foundation for critical legal studies: Robert Cover, *The Supreme Court 1984 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983). For Cover, the concept of law as *nomos* highlights the robust making of normative worlds, and the “force of normative commitments,” a reading that opens the analysis of law and power. *Id.* at 7. Elaborating, I emphasize the temporal and spatial situatedness of convention to pose an analysis of law from its limits.

convention carves historical context, and also points to the theoretical impossibility of context itself. As an ever-present currency that slips codification and temporizing, *nomos* marks the limits of law and history, posing the impossibility of context, even as it marks context through the very inscription (however ephemeral) of a legal coinage. (Indeed, *nomos* bears an etymological relation to the ancient Greek for monetary currency, *nomisma*.)¹⁶

Nomos as an entry point for analysis also revisits an old-fashioned Weberian formulation directed at problematizing law and agency: *economy as a problem of law*. That is, not “the economy” as a problem *for* law, not economics as a problem *for* law, but economy, in its classical sense as practice of arranging, managing, and governing, as a problem of the relationship of conduct, convention, custom, and juridical code. Weber’s formal definition of convention—conduct without any coercion—posits an elusive theoretical limit and so poses questions about formal legal translations of the norms and currencies of conduct, and more specifically for our investigations here, about the mechanics of ethico-political agency within systems of valuation, and forms of community, group, or corporate life not fully appropriated by the value system of the free market.¹⁷ With these challenges in mind, one obvious task for the “law as” legal historian is to examine law from its limits, thus investigating its voice of sovereignty through its context-producing techniques. Here, these are addressed via the techniques by which law disembeds “the economy” from broader webs of social relations. At the same time, attuned to these Weberian resonances in Foucault’s analysis of governmentality, and especially in his call to explore the “conduct of conduct,” the critical legal historian must seek to situate the agency of the legal subject, moving beyond identifying legal agency as historical agency *tout court*.¹⁸ The challenge of writing the legal history of market practice telescopes the broader challenge of how to narrate

16. For the foundational analysis of *oikonomia*, see ARISTOTLE, *THE POLITICS* (T.A. Sinclair trans., Penguin Books rev. ed. 1983).

17. For Weber’s definition of convention, see MAX WEBER, *ECONOMY AND SOCIETY*, 319 (Guenther Roth & Claus Wittich eds., 1978). If Weber imagines convention as a ground without coercion in order to explore the coercive character of law, Foucault elaborates via a “noneconomic analysis of power” by unpacking liberal governmentality’s directing of conduct, and the slippery relationship between agency and instrumentality that must attend analyses of law and power. See *infra*, Part III.

18. Weber is generally understood as contradictory on law, at once mapping the coercive force of law, and at the same time, recoding this coercive force as the agency of the economic subject, by coding modern market ethics as the very site where self-interest and the force of law meet. For Weber, the modern self-interested market actor engages in contractual legal relations exactly because the protection of property and the regularity of market exchange serves self-interest. See WEBER, *supra* note 17, at 336–37. This figuration of the self-interested market actor as the site of law and its undoing evokes Macaulay, and is further problematized by Foucault in *THE BIRTH OF BIOPOLITICS*, *supra* note 3, through a distinction between the subject of interest and the subject of law/right. For a reading of Weber and Foucault on the economic subject in this vein, see Ritu Birla, *Vernacular Capitalists and the Modern Subject in India: Law, Cultural Politics and Market Ethics*, in *ETHICAL LIFE IN SOUTH ASIA*, 83–100 (Anand Pandian & Daud Ali eds., 2010).

conduct and when it channels the force of law, a problem exposed by the centuries-long history of discourse on the *lex mercatoria* or mercantile law, an elusive legal domain that has recently drawn renewed attention, especially in the realm of international law.¹⁹

In the following sections, I weave three themes that mark the spatial and temporal dynamics of law as economy: convention, corporation, and currency. First, I place a summary of the historical context of market governance in late colonial India alongside Foucault's call to a "noneconomic analysis" of power to elaborate a "law as economy" approach and its postcolonial method. Then, I bring such a reading to two key moments from the codification of market practice in colonial India—the Indian Companies Act of 1882 and the Negotiable Instruments Act of 1881, highlighting the production of the market as site for the social, and the concomitant legal coding of culture; the agency and instrumentality of the legal subject; law's temporal politics; and the limits of law itself.²⁰

II. LAW AND THE TEXT/CONTEXT OF COLONIAL LIBERALISM

The text and context I offer through which to address these themes is the legal regime of British India in the late nineteenth and early twentieth centuries, a period in which, much like today, a concentrated genesis of legal fictions enabled an extensive globalization of capital, especially new forms of finance capital. At this time, colonial legislators and jurists sought to standardize market practice and installed a new object of sovereign management, that thing called "the market." This was an abstract, supralocal space that stood in for "the public" in an arena of political subjects, rather than citizens; at the same time, its installation negotiated the situated conventions and practices that structured indigenous, or what I call vernacular capitalism, that operated through norms of kinship, extended family, clan, and caste. I present this Indian context not as just as an empirical case study, as an exotic outside if you will, but rather as a site and citation of the genealogy of capitalist modernity itself.²¹

As I've argued more extensively elsewhere, the legal history of colonial India

19. For the recent revitalization of discourse on the *lex mercatoria*, see Ralph Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447 (2007), and Peter Mazzacano, *The Lex Mercatoria as Autonomous Law*, 4 COMP. LAW & POL'Y ECON. RESEARCH PAPER 29/2008, 1 (2008), available at <http://ssrn.com/abstract=1137629>, and Nikitas Emmanuel Hatzimihail, *The Many Lives—and Faces—of Lex Mercatoria: History as Genealogy in International Business Law*, 71 LAW & CONTEMP. PROBS. 169 (2008), available at <http://ssrn.com/abstract=1222865>.

20. Scholars in postcolonial studies have drawn attention to the limits of law by considering its gendered/affective limits, and the limits of rights discourses for minority and subaltern subjects. See, e.g., Dipesh Chakrabarty, *The Subject of Law and the Subject of Narrative*, in HABITATIONS OF MODERNITY: ESSAYS IN THE WAKE OF SUBALTERN STUDIES, 101–14 (2002); see also NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW (2004); Upendra Baxi, *The State's Emissary: The Place of Law in Subaltern Studies*, in SUBALTERN STUDIES VII (Partha Chatterjee & Gyanendra Pandley eds., 1992).

21. See BIRLA, *supra* note 2.

exposes the role of law in the historical production of that thing we now call “the economy,” so natural and so real today that we listen for its health every morning on the news. More specifically, I emphasize that colonial legislation and jurisprudence installed “the market” as abstract model for all social relations and as terrain for the making of modern subjects: my term “market governance” refers to both the production of “the economy” as an object of governance, as well as the enforcement of “the market” as an ethico-political sovereign with a monopoly over the very imagining of the social.²² A torrent of new measures directed at the free circulation of capital emerged in the period immediately after formal legal codification, especially from about 1880 to 1930, measures that ranged from law on companies, to negotiable instruments, to income tax, trusts, and charitable endowments, as well as futures trading and government securities, among others. A key story in the broader global standardization of contract law in the nineteenth century, this accelerated colonial process installed new forms of group association grounded in contractual relations of individual subjects. Reflecting a broader discussion on corporate or group life as well as the investment in narrating modernity as a shift from status to contract among legal thinkers of the nineteenth and twentieth centuries, most famously, Henry Sumner Maine, but also others like Otto Von Gierke and F.W. Maitland, legislators and judges grappled with forms of “embedded” social life, perhaps no more exhaustively than in the discourse on indigenous mercantile norms emerging as colonialism’s economic development regime took shape.²³

Vernacular practitioners of capitalism, who operated through norms of kinship, and were universally acknowledged engines of credit, production, and consumption, confronted the establishment of contract as universal instrument for market exchange. The confrontation exposes the difficulties in translating the spatial and temporal habitus of market conventions, the ways of organizing exchange, production, kinship, and trust that sustained the hegemony of vernacular capitalists, and that British authorities sought to appropriate in the name of a civilizing mission of “moral and material improvement.” These were characterized by what I call an *extensive negotiability* between the symbolic capital of kinship and the capital flows of commerce and finance; this worldview sat uncomfortably with that of colonial jurists and legislators, for whom legitimate market exchange was distinguished by legal procedures of contract and the ubiquitously reiterated criterion of “general public utility.” Indeed, all new

22. *Id.* at 22–23.

23. The late nineteenth-century discussion on the status/contract distinction was articulated most influentially by Henry Sumner Maine in *ANCIENT LAW* 170 (Oxford Univ. Press, 1931 ed.), but its resonances can be found more broadly in the discussions about *Gemeinschaft* and *Gesellschaft* in thinkers such as Karl Marx, Ferdinand Tönnies, who coined the distinction, Max Weber, and F.W. Maitland. See FERDINAND TÖNNIES, *COMMUNITY AND CIVIL SOCIETY* (1887); WEBER, *supra* note 17; F.W. MAITLAND, *STATE, TRUST AND CORPORATION* (David Runicman & Magnus Ryan, eds., 2003).

measures were enacted with this call.

The categories of political liberalism, that is, the distinction between public and private, infiltrated commercial and financial law in India in the nineteenth century, distinguishing between two general forms of group life, a public of market actors, and a so-called “private” world of indigenous culture and religion, which was to be regulated by the Hindu or Muslim personal law that had also been largely standardized by the 1860s. It is important to remember here that in 1858, after being shaken by the rebellions of 1857, the British Crown officially replaced the East India Company, pronouncing a policy of noninterference with indigenous culture, a project enforced through an investment in legal pluralism with the codification and strict application of the regime of personal law.

As such, the public/private distinction, I have argued, was mapped as an economy/culture distinction, and sat asymmetrically over local socialities, including the embedded world of the bazaar, run by vernacular firms whose extensive kinship networks were as public in their import as they were private in their selective constitution. I highlight this awkward legal framing not to celebrate a “native” worldview, but rather to chart the temporal and spatial politics of a modernizing legal regime. It is important to emphasize here that vernacular capitalism’s market practices were exploitative, producing debt servitude among lower castes, and fortified by uncompromising patriarchy and strict gender codes; colonial law translated them as *cultural* practices first and foremost, a process that reinforced and reproduced their hegemonies in the name of cultural protection.²⁴ Indeed, the emergence of discourses of culture as politicized scripts, an effect of the abstracting of the economy, reflects a historical situation in which law as *logos*—the rule of law manifest in an obsessive Benthamite standardization of market practice—confronted law as *nomos*, in its most situated sense as shifting customary practices (practices that Hindu and Muslim legal traditions had adjudicated with attention to the specificity of context). As many postcolonial scholars have highlighted, the colonial legal regime codified shifting, locally situated customary conventions into scripted logics of religious personal laws, thus rendering formerly negotiable hierarchies and differences—themselves oppressive, and so not to be celebrated—as rigid and fixed.²⁵ In other words, colonial legal pluralism evinced governmental imperatives to locate and classify communities, rather than any benign interest in “noninterference” or promoting arenas of self-

24. These arguments are elaborated in detail across the two parts of BIRLA, *supra* note 2. Part One maps law and jurisprudence, and Part Two focuses on vernacular capitalists subject-formation in relation to legal regulation. For an overview of the theoretical and historiographical framework, see that book’s introduction, BIRLA, *supra* note 2; see also RITU BIRLA, *Capitalist Subjects in Transition, in FROM THE COLONIAL TO THE POSTCOLONIAL* 241–60 (Dipesh Chakrabarty et al. eds., 2007).

25. For foundational analyses of colonial law in India, see Bernard Cohn, *Law and the Colonial State, in COLONIALISM AND ITS FORMS OF KNOWLEDGE* 57–75 (1996); see also Bernard Cohn, *From Indian Status to British Contract, in AN ANTHROPOLOGIST AMONG HISTORIANS AND OTHER ESSAYS* 463–82 (1990).

governance, as official policy would claim.²⁶ My postcolonial analysis of market governance highlights that the homogenization of localized conventions into politicized scripts of “culture” was tied intimately to rewriting of the social as market.²⁷

To summarize, the history of colonial market governance illustrates many key modern sovereign performatives of law.²⁸ Law’s generative capacities to produce temporal and social contexts through both sovereign commands and citationality, its *a posteriori* production of origins as precedent, structure the colonial story of the “disembedding” of the market. Again, coined in Polanyi’s canonical text of economic sociology, the term “disembedding” marks the abstracting of the “self-regulating market” from the density of social meanings, a process that rendered “the market” a model for all social relations.²⁹ At the same time, through a postcolonial attention to the limits of law, I want to emphasize that the legal acrobatics of market governance in India also evince the *impossibility* of such a complete disembedding. In the following examples of colonial market governance, the themes of convention, corporation, and currency mark such tensions between forms of “embedded” social life in the discussion about vernacular kinship-based mercantile conventions, and the modernizing impetus that abstracts the public project of economy from the private realm of indigenous “culture.”

III. THE NONECONOMIC ANALYSIS OF POWER: LAW AND GOVERNMENTALITY

Foucault’s now well-known call for a “noneconomic analysis of power,” which grounds his genealogy of governmentality, furthers the project of reading the legal archive as problem of embeddedness, for it situates political liberalism’s parameters of legal subjecthood and agency.³⁰ Interested in exposing the monopoly of an idea of exchange, contract, reciprocity, and remedy over the concept of law, the “noneconomic analysis of power” informs the analytics of law as economy and it is therefore worthwhile to draw the broad connections here.

In his *Collège de France* lectures that precede his theorizing of governmentality, Foucault exposes two established scripts for the way power is configured, both of

26. The classic study of British colonial legal pluralism in this vein is MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* (1996). On technologies of classification of communities and castes, see NICHOLAS DIRKS, *CASTES OF MIND* (2001).

27. As such, colonial legal pluralism cannot be read as just the exercise of agency on the part of colonized subjects; a postcolonial approach would promote problematizing their agency alongside instrumentality in affirming new orderings of power.

28. For a discussion on performativity (rather than performance) and law, see Ritu Birla, *Performativity Between Logos and Nomos: Law, Temporality, and the ‘Non-Economic Analysis of Power’*, 21 COLUM. J. GENDER & L. 492 (2011).

29. See generally POLANYI, *supra* note 12.

30. Michel Foucault, *Two Lectures*, in POWER/KNOWLEDGE 89 (Colin Gordon ed., 1980); Foucault, *Governmentality*, *supra* note 8 and FOUCAULT, THE BIRTH OF BIOPOLITICS, *supra* note 3.

which he states suffer from an “economism in the theory of power.”³¹ In the first, the juridical or liberal conception of political power, the model of sovereignty codified by the *philosophes* of the eighteenth century:

[P]ower is taken to be a right, which one is able to possess like a commodity, and which one can . . . transfer or alienate . . . through a legal act or some act that establishes a right, such as takes place through cession or contract This theoretical construction is essentially based on the idea that the constitution of political power obeys the model of a legal transaction involving a contractual type of exchange.³²

The point here is that liberal democratic legal systems operate reductively by posing power as a form of contractual exchange, enacted by an abstract legal subject, rather than as a broad nexus running through the layers of subjectivity and sociality. If the first script of economism focuses on exchange and circulation, the second is also reductive, for it operates as a material-determinist Marxism, or an “economic functionality of power” in which “the historical *raison d’être* of political power and the principle of its concrete forms and actual functioning, is located in the economy.”³³ That is, “the economy,” understood and naturalized as an already established thing, becomes the origin and explanation of all relations of power.

Law structures juridical notions of sovereignty in the first economistic model, and is an instrument of economic functionality in the second. A postcolonial approach to law *as* economy elaborates this critique of reductionist accounts of power by thinking law in its wide range from convention, to custom, to sovereign logic, and as site of subject-formation and subjection, thus mapping both the installation of the absolute authority of legal and political models of contract as well as their limits.³⁴ At the same time, such an approach requires problematizing the *a priori* status of “the economy” that Foucault, despite the historicizing impetus of his analysis, seems to presuppose, and reproduce here. A law-as-economy project would detail the relationship between law, rights, and social relations of contract, and the production of “the economy” that law is either meant to reflect (as in the “free market of ideas,” a term ubiquitous in the majority opinion of the recent Supreme Court decision in *Citizens United v. Federal Election Commission*³⁵) or to protect us from (as in labor law).

Foucault’s 1978–79 lectures, one of which is the well-known essay “Governmentality,” open such a project, for they elaborate and detail the ways in

31. Foucault, *Two Lectures*, *supra* note 30, at 88.

32. *Id.* I would note here that cession and contract are both addressed through the concept of economy; conquest and contract, appropriation and exchange are posed along a continuum, a point that would not have been lost on Macaulay.

33. *Id.* at 89.

34. Such project reads law on a register beyond the state, pushing the important empirical work on “the contested historical movement from truly plural legal orders to state-dominated legal orders. . . .” BENTON, *supra* note 13, at 28.

35. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 50 (2010).

which “economy” comes to dominate as a discourse of governing, especially with the modern emergence of political economy. Tracing the many meanings of “government” in western tracts, the lectures address it not simply as the administration of state, but as techniques of controlling the self, guiding the family, managing the household (*oikonomia*), and as the art of governing political subjects.³⁶ For Foucault, modern liberal forms of governance have a strong relation to the idea of economy in its most formal definition, rooted in the Greek term *oikonomia*.³⁷ This idea of economy as arranging and managing is revitalized with the emergence of political economy as a knowledge form, which marks a shift from “imposing law on men” to “disposing things” and using “laws themselves as tactics to arrange things in such a way that . . . such and such ends may be achieved.”³⁸ As I mentioned earlier, “governmentality” is often used loosely as a term for the nexus of knowledge/power, but here refers specifically to the forms of governing introduced by political economy, a discourse that isolates “the economy as a specific sector of reality” and also becomes the “science and the technique of intervention . . . in that field of reality.”³⁹

In particular, Foucault’s theorizing of conduct, the ground of law as *nomos*, is relevant for a reading of the installation of principles of contract so ubiquitous in the history of the colonial rule of law, for it presents a critique of the autonomous, intending legal subject. In the 1978 Collège de France lectures, government is analyzed as direction, arrangement, management (*gérer*), and as “*conduite*,” meaning not only:

[T]he activity of directing, conducting, if you will, but equally the manner in which one conducts oneself, the manner in which one lets oneself be directed, the manner in which one is directed, and finally how one comports oneself [*on se trouve se comporter*] under the effect of a directing or conducting, which would be the acting out of the direction, or conduct.⁴⁰

These slippages across the exercise of agency and ventriloquized instrumentality—to direct, to let oneself be directed, to be directed and comport oneself accordingly in the proper conduct—in sum, the “conduct of conduct,” are pursued in a variety of historical contexts, from the Greek *oikonomia* to *laissez-*

36. See FOUCAULT, LA NAISSANCE DE LA BIOPOLITIQUE, *supra* note 3; FOUCAULT, SÉCURITÉ, TERRITOIRE, POPULATION, *supra* note 8. The English translations are FOUCAULT, THE BIRTH OF BIOPOLITICS, *supra* note 3, and FOUCAULT, SECURITY, TERRITORY, POPULATION, *supra* note 8.

37. See Aristotle, *supra* note 16 book I, for the definition of *oikonomia*.

38. Foucault, *supra* note 8, at 95.

39. *Id.* at 102.

40. Translation mine. See FOUCAULT, SÉCURITÉ, TERRITOIRE, POPULATION, *supra* note 8, at 196–97, for the definition of conduct: “[C]e mot ‘conduite’ se réfère a deux choses. La conduite, c’est bien l’activité qui consiste à conduire, la conduction si vous voulez, mais c’est également la manière dont on se conduit, la manière dont on se laisse conduire, la manière dont on est conduit et dont, finalement, on se trouve se comporter sous l’effet d’une conduite qui serait acte de conduite ou de conduction.”

faire's manipulating, facilitating, enabling, and managing.⁴¹ It is in this vein that Foucault contemplates "civil society as an arrangement of economic men," or what he calls "*la technologie de la gouvernementalité libérale* [the technology of liberal governmentality]."⁴² In this formulation, economic man marks the site where agency and instrumentality slip into each other, and where therefore one can neither locate an autonomous subject with agency nor the stable a priori intentionality that grounds the contractual principles and procedures of the legal subject.

In India, colonial legal anxieties about vernacular capitalism exposed such an interest in making such a civil society, composed of "economic men," that is, modern subjects whose agency is so directed or managed that there is no distinction between being governed and exercising agency, evoking Macaulay's dreams. But the historical context of colonial liberalism, with which Foucault unfortunately does not engage, also charts a different genealogy. Foucault offers a rigorous critique of the a priori, intending individual subject, which is important for thinking a colonial genealogy of liberal governmentality. At the same time, the critique falls short, for the subjects of colonial market governance were cast legally as both individual contracting actors and as anachronistic collective/cultural agents.

IV. COMPANIES AND THE MONOPOLIZATION OF CORPORATE LIFE

As we know from Henry Sumner Maine's *Ancient Law*, the problem of corporate life—forms of collective association or what Weber called "consociation"—dominated nineteenth- and early twentieth-century legal thinking and was rooted in a colonial sociology of knowledge.⁴³ *Ancient Law*, which announced the master narrative of legal modernity as the shift from "status to contract," marked the kind of temporizing that enforced the modern authority of contract, and the standardization of the distinction between public and private law, both of which presuppose the individual person as a priori legal subject.⁴⁴ Influenced by Maine, colonial jurists understood joint family organization in nineteenth-century India as an ancient form of corporation.⁴⁵ The difficulty with the joint family, as with other such ancient forms in medieval Europe, was that, in Maine's words, "corporations never die": they have a perpetual life, an extensive

41. See FOUCAULT, SÉCURITÉ, TERRITOIRE, POPULATION, *supra* note 8, at 360–61, on the emergence of political economy and a new governmentality: "Il va falloir manipuler, il va falloir susciter, il va falloir faciliter, il va falloir laisser faire, il va falloir autrement dit, gérer et non plus réglementer." See also Gordon, *Governmental Rationality*, *supra* note 3, at 17–20.

42. *Id.* at 23; MICHEL FOUCAULT, Lecture, 1 April 1979, in LA NAISSANCE DE LA BIOPOLITIQUE, *supra* note 3, at 300.

43. MAITLAND, *supra* note 23.

44. *Id.* at 164.

45. The joint family form in India was a collective association that did not presuppose individual shares of property, but that was nevertheless translated legally as a "coparcenary."

temporal negotiability that renders it impossible to know when they begin and when they end.⁴⁶ The commercial joint family firm in India, known in colonial law by the term “Hindu Undivided Family,” challenged British legislators and jurists in this way, posing a problem of extensive temporal negotiability, and indeed an extensive negotiability between the symbolic value of kinship, caste and lineage, and the arrangements and capital flows of commerce and finance.

The majority of vernacular firms were regulated by the Hindu Law of *Mitakshara*, the personal law system which gave sons rights in the family property, including the capital of the firm, at birth.⁴⁷ Moreover, credit and what economic historians have called “commercial trust” could be extended to kinship relations that could be linked back through a common male ancestor as many as seven generations. Connections across time were complemented by connections across space: the vernacular notion of “family” extended beyond just the household and encompassed a variety of patriarchal relations. The commercial joint family household—father, wife, sons and their wives, and unmarried daughters—existed within a much broader context, the nexus of extended relations harnessed by the firm. These networks were constituted spatially, across villages, bazaars, and even global regions. Lines of descent called *gotres* arranged exogamous clans within a particular endogamous caste, and constituted yet another barometer for degrees of affinity.⁴⁸ This extensive negotiability was a marker of forms and conventions of “embedded” social life that we can only understand as *Gemeinschaft* (community), after *Gesellschaft* (society grounded in contract), and law’s processes of “disembedding” have been initiated. I draw attention to Maine’s central place in colonial knowledge on India to highlight the role of legal thought and its forms of temporizing in the modern monopoly of the very idea of the corporate, which understands it through contractual models and as either market-based (as in the limited liability corporation, and even more colloquially, via the logo “inc.”) or state-based (as in municipal corporation).

The story of the establishment of The Indian Companies Act of 1882 is a strong example of this process. Establishing the limited liability joint-stock as the model for commercial organization, the act was a fine-tuning of an earlier statute of 1866 and was instituted after the boom and bust of the cotton market in western India in the 1870s, following the U.S. Civil War. In this volatile market climate, British merchants launched new companies at an accelerated rate, drew investments from native shareholders, and then defrauded them, absconding with their investments. The hundreds of pages of debates surrounding the act evince a

46. *Id.* at 135.

47. For the most influential British translation of the *Mitakshara*, see H.T. COLEBROOKE, *THE LAW OF INHERITANCE ACCORDING TO THE MITAKSHARA* (Thacker Spink & Co. 1869).

48. For more on kinship arrangements of commerce, see BIRLA, *supra* note 2, Introduction. See also C.A. BAYLY, *RULERS, TOWNSMEN AND BAZAARS* (1983) and DAVID RUDNER, *CASTE AND CAPITALISM IN COLONIAL INDIA: THE NATTUKOTTAI CHETTIARS* (1994).

public discrediting of British-run joint-stocks, and an extensive public discussion of corruption, a genealogy that we might date back to the trial of Warren Hastings, the first Governor-General of the East India Company. As one officially solicited “native” opinion asserted, these newly hatched joint-stocks were “huge superstructures of fraud, erected to inveigle the unwary and imprudent.”⁴⁹ And despite this exposé of limited liability as a masquerade for corrupt practices, the debate resulted in new legislation, offering a pumped-up version of limited liability, with strict codes for memoranda of association, official registration, and the regulation of bankruptcy. It replicated earlier British statutes and enforced the corporation as a public legal person, a contractual model for what was called the “the healthy and useful employment of capital” and equally as significantly, for civic association.

The intensity of the discussion over principles of corporate association reflects the extent to which forms of capitalist economic organization informed visions of modern social association in this period. The Acting Registrar of Joint-Stock Companies at Bombay, the eye of the storm, for example, insisted that:

[T]he evils incidental to limited liability have been exaggerated in Bombay by peculiarities in Native character. . . . The mass of Native shareholders, profoundly ignorant, and placing blind confidence in the new discovery in “finance” placed no watch on their Directors and Managers. The latter only wanted to profit from the sale of shares, and cared nothing for the regular transaction of business. The shareholders have now changed the blindness of confidence for the blindness of terror, and it appears that they are generally quite ready to get out of the concern at any cost without calling the responsible parties to account.⁵⁰

Reiterating long-held tropes about the submissive nature of the native population, the Registrar’s opinion posed habits of public civic association—the responsibility of exercising rights, rather than obeying a despot or director—as necessary conventions for the “healthy and useful employment of capital.” An economic organization of the social, in other words, was to convey modern habits of rights, part of a civilizing mission’s mantra of “moral and material progress.”

At the same time, the affirmation of limited liability threw the organization and practices of kinship-based commerce into question. The figure of the indigenous merchant loomed large in the debates, strangely not as facilitator of capital, but as a serious problem, a problem of personalized exchange antithetical to new legal procedures. The major issue was whether the standardized procedures of the Act applied at all to indigenous kinship-based firms: could these even be conceived as public corporations, or at the very least as contractual partnerships? If so, it was argued, the firm should come under the purview of the Act. Or was the firm first and foremost a family? In this case, it would have to be

49. BIRLA, *supra* note 2, at 45.

50. BIRLA, *supra* note 2, at 42–43.

regulated by the Hindu or Muslim personal law that governed the so-called private realm of indigenous “culture”—matters of caste, inheritance, and religion. Again, it is important to remember here that by this time, the project of “cultural preservation” was official policy, enforced through the codification and application of the personal law.

The Companies Act did not, as might be expected in an easy reading of colonial disciplinary practices, make indigenous firms directly subject to its regulations. Rather, it demanded that they be regulated by the Hindu or Muslim personal law governing families and religio-cultural practice. In short, vernacular capitalism was governed first and foremost as *cultural*, rather than as economic mechanism. That is, despite the universally acknowledged role of vernacular capitalists as key economic middlemen, colonial law institutionalized a disjuncture between economy, a public and ethical project, and culture, a private one. The Companies Act thus exposes a key technique of colonial liberal governmentality—the production of economy and culture as distinct and separate spheres—one I argue ultimately espoused by indigenous capitalists themselves. This was manifest especially by the 1920s, when capitalist groups who had previously referred to their practices as a kind of *lex mercatoria*, a *nomos* or way of conducting business, began to recode them as legally protected cultural customs, entering for example heated public discussions on protecting the ancient authority of the Hindu joint family.⁵¹ New discourses on the market coded the embedded practices of local capitalisms as cultural formations, bound to age-old tradition. The colonial legal installation of the social as market, through a contractual politics of *Gesellschaft*, produced a world of *Gemeinschaft* as its effect, promoted by colonial legal pluralism’s culturalist scripts.

V. CONVENTION, NEGOTIABLE INSTRUMENTS, AND THE *LEX MERCATORIA*

There are many rich stories that I could offer that further demonstrate the coding of the joint family firm as an ancient form of corporation, lost in tradition and regulated by custom, that is, the static norms of religio-cultural ritual. The jurisprudential acrobatics that instituted the law against perpetuities and mortmain in India is such a story. Another is the story of criminal law and its new forms of economic surveillance, manifest in the coding of kinship-based speculative and futures trading practices as gambling at a time when similar practices were being legitimized in stock and commodities exchanges in Britain and the United States especially.⁵² To summarize, the legal installation of “the economy” produced a distinction between economy, a public project, and culture, the realm of “ancient” and customary forms corporate life like the “Hindu Undivided Family.” To read law as economy, I want to emphasize, would require attention to the relationship

51. See BIRLA, *supra* note 2, at Part II, “Negotiating Subjects.”

52. See BIRLA, *supra* note 2, at ch. 2–4.

between the economic coding of the social and production of “culture” as its effect, as a politicized name for difference, and site for commodification. The colonial rewriting of the social as market and its culturalist effects—the writing over of the vast range of corporate life and socialities in this moment of colonial liberalism—also opens a law as economy approach to contemporary neoliberal governmentalities, which demand, for example, reading new configurations of the legal domain: law on finance alongside international law, copyright law and cultural rights, and corporate law alongside constitutional issues of free speech.

At the same time, another important moment in this period of commercial and financial standardization challenged the temporizing of the joint family firm as an instrument of ancient custom, of an irrational “habituation to a regularity of life that has engraved itself as custom,” to borrow a phrase from Weber’s *Economy and Society*.⁵³ Almost contemporaneous with the Indian Companies Act, the Negotiable Instruments Act of 1881 grappled with what colonial jurists had begun to call the “native” *lex mercatoria*. I will only be able to gesture here to how a fuller analysis of the discourse on the *lex mercatoria* in India would elaborate some of the more recent interest in this liminal legal realm, which in its critical gestures seeks to chart a genealogy that “transcends the distinction between state and non-state laws” to conceptualize new legal fields in globalization.⁵⁴ But for the moment, I would like to foreground a key feature of the debates around the Indian Negotiable Instruments Act, once again, the problem of the joint family firm, and discourses on the temporality of vernacular conventions.

Indigenous or vernacular systems of credit in particular drew legislators’ attention as British joint-stock banks flourished beginning in the mid-nineteenth century, marking the institutionalization of the British banking sector in the subcontinent. British banks depended on vernacular merchants and their vast access to credit in the bazaars across India, and vernacular capitalism’s investment in the financing of colonial commodity production tied them to sources of British financing. The indigenous “unorganized” banking sector had varied “personalized” and multiregional conventions for borrowing, lending, and investing, secured by extended ties of kinship, in which negotiable instruments could be endorsed and reendorsed many times; they sustained a very extensive negotiability. These conventions, and their variability, posed problems for legislation aimed at rationalizing and facilitating flows of credit and forms of paper currency.⁵⁵ As early as 1866, the first Indian Law Commission, guided by Henry Sumner Maine and James Fitzjames Stephen, had introduced the question of standardized rules for negotiable instruments. Intended to be one of the chapters of the Indian Civil Code, an inaugural bill on the subject was introduced in 1867,

53. WEBER, *supra* note 17, at 312.

54. Michaels, *supra* note 19, at 468.

55. On the “unorganized” banking sector, see Amiya K. Bagchi, *Transition from Indian to British Indian Systems*, 3 MODERN ASIAN STUDIES, 501, 501–19 (1985).

and referred to a Select Committee. The mercantile members of the Legislative Council, all representatives of British trading interests, had unanimously objected to the bill because of its numerous deviations from English law. On the other hand, other members had strongly criticized it for not including a clause saving the customs of native merchants. From the bill's inception, then, the question of preserving indigenous customs, and so sustaining the official policy of "noninterference" in native culture, conflicted with arguments for their assimilation into British legal models.⁵⁶

The debate, which continued for over a decade, was driven by the ambiguous place within the Anglo-Indian legal system of what jurists called the "native law merchant," for this legal arena did not fall under the purview of personal law. The final act of 1881 did include a "local usages" exception, but one that ingeniously opened a space for their assimilation to models of contract already codified by the Indian Contract Act of 1872. It stated that in order to "facilitate the assimilation of the practice of Native shroffs [bankers] to that of European merchants," the act would extend:

[T]o the whole of British India; but nothing herein . . . affects any local usage relating to any instrument in an oriental language: Provided that such usage may be excluded by any words in the body of the instrument which indicate an intention that the legal relations of the parties thereto shall be governed by this Act.⁵⁷

Local usages could thus be overruled if vernacular negotiable instruments were written to accommodate the practices of British bankers and merchants. While in theory not directly affecting relations among indigenous merchants, this provision reflected the de facto governmental installation of a new market terrain, the concomitant delegitimizing of bazaar practices and the accelerated and more extensive transactions between British and indigenous commerce conducted through joint-stock banks. The Select Committee on the bill in 1879 defended the new provision as one which would not "stereotype and perpetuate these [indigenous] usages," but rather "induce the Native mercantile community gradually to discard them for the corresponding rules contained in the Bill." Seeking to transform mercantile convention while dissimulating *laissez-faire*, the Committee argued that "the desirable uniformity of mercantile usage will thus be brought about without any risk of causing hardship to Native bankers and merchants." It delivered evidence offered by the British joint-stock Bank of

56. It is important to note that a wide range of literature in colonial and South Asian studies has emphasized that this official policy of "noninterference" was grounded on a very substantive interference: the selective translation and construction of personal law as code for managing native customs and practices. For a foundational text in this vein, see Bernard Cohn, *Law and the Colonial State*, *supra* note 25.

57. KRISHNAMACHARI BHASHYAM & KAKKUNJE YEGNANARAYANA ADIGA, *THE NEGOTIABLE INSTRUMENTS ACT 10* (Bharat Law House 16th ed. 1997); *see also* BIRLA, *supra* note 2, at ch. 1.

Bengal, “that the native usages as to negotiable paper have of recent years been greatly changing, and that the tendency is to assimilate them more and more to the European custom.”⁵⁸

These statements, expressing an interest in not causing hardship and in simply enabling new options, seem to resonate with the legally disciplined managerial language ubiquitous in colloquial forms of neoliberal governing today: rules are instituted, they draw boundaries and delineate terrains of agency, but are sold as simply opening a new kind of choice. To give a familiar example, an airline that no longer provides meal service will tell its travelers they have a range of choices for onboard snacks (at a small cost). (That we choose to buy a packet of trail mix cannot be celebrated as unmediated agency.) Coding “European custom” as standard and current, these strategies also evoke Macaulay’s vision of well-governed subjects whose located agency slips into instrumentality for a larger agency, the market. Said differently, the standardization represented by the Negotiable Instruments Act presented itself as the logical extension of indigenous mercantile conventions, even as it reflected the very institutionalization of a new terrain—the public space of economy, inscribed by the new and *restricted* spatial and temporal negotiability of contract law. Here, colonial legislators reproduced romanticism about the medieval and early modern *lex mercatoria* as an autonomous space, even as they inscribed the very rules for its legibility. Moreover, the act temporized indigenous convention in a radically new way. The juridical criterion for defining an indigenous customary convention, in line with the colonial liberal project of cultural preservation, was its *ancient* status and operation since “time immemorial.” But in the case of negotiable instruments, mercantile convention was recognized to be the most current practice. Citing a 1902 judgment, a canonical twentieth-century Indian legal digest thus explained that in adjudicating negotiable instruments cases, the ancient status of a custom would not have to be “insisted upon with the same strictness as in other cases, for the very fact that the ways of commerce have so widened . . . has led inevitably to new customs and usages being more speedily devised, more speedily adopted, and more speedily recognized, than in the past.”⁵⁹ If in other cases, vernacular conventions were coded as ancient custom, here, in the name of formalizing currency, they were read literally, as what is current, and so, performing a perfect meeting of temporality and embodiment, as *currency* itself. Said differently, the statute and jurisprudence on negotiable instruments here expose the sovereign performatives of law as economy: the ways in which modern economic visions organize the social and its temporalities, colonizing the present and coding the past as “culture.” The opposing temporalities ascribed to vernacular mercantile practice—

58. See Report of the Select Committee on the Negotiable Instruments Act, published in the Gazette of India, 1879, v. 75, cited in THE NEGOTIABLE INSTRUMENTS ACT 1881, 17–18.

59. BHASHYAM & ADIGA, *supra* note 57, at 19. The case referred to here is *Edelstein v. Shuler and Co.* (1902) 2 Kings Bench 144.

ancientness and ever-present currency—also indicate both the outside limits of law *and* its very inside. Law in its juristic form, as a self-referential system and logic, or *logos*, cannot catch either that which comes from “time immemorial” or that which is ever-shifting. These categories, both ancient custom and uncatchable currency, mark the range of law as *nomos*.

VI. LAW INSIDE/OUTSIDE ECONOMY

Reading law as economy recodes the project of time management espoused by the modern discipline of economics; it does so by turning to the temporalities of governing and managing. Attention to the problem of embeddedness, or the limits of law, opens a postcolonial project of mapping the temporal politics of legal systems: there are spaces and practices that law’s sovereignty, whether articulated as imperial dictum or as the procedures of civil law, cannot catch. Thus for example, as I’ve pointed to here, the logic of British colonial liberalism, which sought to demarcate realms for the autonomy of native culture as ancient authority, can be rethought as part of a new mapping of community, corporate life, and the social itself. The range of temporal plays manifest in the colonial legal dynamics I’ve addressed here points to the insides that are the outsides of formal legal systems.

The formulation “law as economy” pushes the legal historian to attend to law at once as an inside and an outside, for as I mentioned earlier, law is at the heart of economy as *nomos*, and economy therefore is itself a concept of law. Economy as an idea conveys law’s performativity, for the practice of economy *enacts* law through arranging, managing, and governing. As *nomos* or convention, economy marks a set of actions that speak, as distinct from the more familiar speech that acts, or the speech-act, the *logos* (the word and system) that marks the autonomous performatives of sovereignty, ethical or political. A significant task of legal history and theory together is to detail, as I’ve highlighted through some examples from the colonial legal terrain in India, the workings of the context and system-producing incarnation of law (*logos*), alongside those of *nomos* or convention, the sign of an always-already context, and so its impossibility.

Such moves also pose questions for historically narrating law and its contexts. If the work of legal history, particularly in the social history of law, has been directed fruitfully at destabilizing legal navel-gazing by weaving the mechanics of law into empirical historical contexts, it may also try to push legal history beyond this important role as empirical mapping of the circuits of law’s agency and the legal agency of subjects, into critical practice itself.⁶⁰ In the historical moment I’ve addressed in this essay, the question in this vein would be: how can we unpack *both* the idea of the self-regulating power of law and the free

60. Such a critical practice evokes Gayatri Spivak’s approach to history and alterity in SPIVAK, *supra* note 10, as well as a Nietzschean approach to critical history.

market? That is, a critical analysis of colonial market governance does not *just* mean mapping law's sites of regulation and demonstrating the ways in which vernacular capitalists resisted new legal measures, or deployed them, but also addressing the historical production of the market as ethical and political model for self-regulation, that is auto-*nomos*, or autonomy, and its appearance and abstraction as an a priori *logos*. Calling legal history to attend to historicity, and so to embodied and situated practices, such a method details the legal translation and mistranslation of their sites of agency, translations into forms of legal incorporation and instruments of a disembodied invisible hand.

Moving beyond the logics of law, and the ways in which those logics are contested and deployed by legal actors, legal history as critical practice would thus confront the problem of the autonomous subject exercising intentioned agency. To elaborate briefly in closing on the examples given earlier, the colonial legal discourse on kinship-based mercantile organization poses this challenge saliently. One key example is nineteenth-century colonial jurisprudence on indigenous endowments gifted for social welfare.⁶¹ Vernacular capitalists would establish institutions for social welfare such as temples, schools, rest houses for travelers, all of which were consecrated to deities. These were organizations that produced social capital and affirmed the respectability, and so the credit, of kinship-based firms. The difficulty for jurists was that in vernacular conventions, income derived from such properties could revert back to the firm, to defray debt, or to provide for the welfare of aging family members for example. Income regained in time would then be redirected to the endowment. Such oscillations performed the *extensive* negotiability across social capital and the material flows of credit, as well as across time itself, and across the colonial categories of public and private, that characterized vernacular commercial practices. Anglo-Indian jurisprudence on trusts sought to restrict this negotiability, and sought to establish an a priori intentionality for the purpose of such endowments, one that would regulate the endowment as a contract made in perpetuity, and so confirm the principle of mortmain as grounding legal category for charitable trusts. These concerns were manifest in a series of late nineteenth-century Bombay and Calcutta High Court cases on religious endowments, in which judges interpreted case law on temple management to argue that *the deity was a legal subject*. Extending this logic to case law on endowments for social welfare that were consecrated to deities, new precedents established that these were gifts given to the deity as legal beneficiary, so that no income could revert back to families, as the rights of the beneficiary confirmed that the purpose of the endowment was to exist in perpetuity. This fantastic turn of legal idolatry, which ushered in the sovereign translation of customary endowment as legal trust, exposes modern law's investment in an autonomous subject: the legal rights of the deity overrode the situated contexts of gift giving,

61. For a detailed reading of this jurisprudence with case law, see BIRLA, *supra* note 2, at ch. 2.

now to be unmediated by social negotiations.

Reflecting a rewriting of the social as an arrangement of a priori individuals, the deity as legal subject is a potent figuration of the divine performative of sovereignty on the one hand, and on the other, the ventriloquism of “speaking” subjects that is now a well-established intervention of postcolonial theory.⁶² Such stories of the power of legal fictions push legal history to move beyond the recounting of legal orders, however plural, to the mechanics of law as ground for subjectivity and agency, the slippery relationship of agency and instrumentality, and the dissimulation of ethico-political autonomy. “Law as economy” is just one formulation in such a project, though perhaps one of the most potent given the history and contemporary ubiquity of the economic subject staged globally as agent of unmediated choice, and to echo Macaulay, civilization.

62. Gayatri Spivak’s theorizing of subjectivity and agency remains the critical model here. See especially her revision of her famous essay *Can the Subaltern Speak* in SPIVAK, *supra* note 10, at 312–421. For a recent volume elaborating the implications of her intervention, see GAYATRI CHAKRAVORTY SPIVAK, *CAN THE SUBALTERN SPEAK: REFLECTIONS ON THE HISTORY OF AN IDEA* (Rosalind Morris ed., 2010).