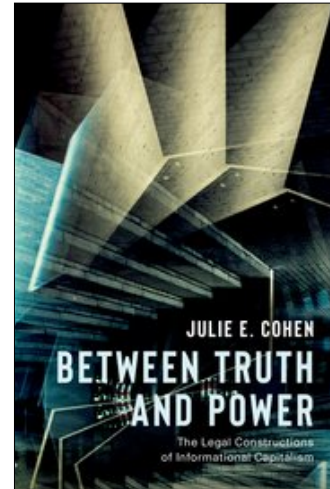


Julie E. Cohen, **Between Truth and Power: The Legal Constructions of Informational Capitalism**, New York, NY: Oxford University Press, 2019, 376 pp., \$34.95 (hardcover).

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Karl Polanyi described the evolution of what he called a “Market Society” as “The Great Transformation,” as land and labor were commercialized in conjunction with changing of cultural attitudes (Polanyi, 1944). Julie Cohen, a legal scholar, is the latest to undertake the challenge of charting that process for an information-driven culture. While Cohen’s book, **Between Truth and Power**, follows other ambitious, synthesizing work such as Shoshana Zuboff’s *The Age of Surveillance Capitalism* and Nicolas Suzor’s *Lawless*, it uniquely offers a detailed look at how the rise of powerful information intermediaries operates within and with the active assistance of legal, regulatory, and political systems.



For Cohen, propertized data is the new land, datified production (which enables the gig economy and labor precarity generally) is the new labor, and platformized transactions enable it all. We’re now living within informational capitalism, where we are no longer that old-fashioned liberal notion, the individual/consumer, but a resource. The driving ideology of this great transformation is neoliberalism, which asserts that not only should market-based forces replace government where possible but that efficiency and entrepreneurialism should be brought into government and especially law.

Other scholars have argued that the newly powerful in this emergent world have been lawless. Zuboff argues, for instance, that “lawlessness” (Zuboff, 2018, p. 104)—exempting themselves from the rule of law on the grounds of innovation, efficiency, and popularity—has worked for Google and Facebook. She argues that the “instrumentarian” power they accrue to control our choices occurs “outside of democracy” (p. 516). Suzor (2019) by contrast invokes the term “lawless” to mean simply that “so many of the decisions about what we can do and say online are made behind closed doors by private companies. This is the opposite of the standards we expect of legitimate, legal decision-making in a democratic society” (p. 8). He calls for a public recognition of the need for constitutional process, a kind of Magna Carta between citizens of an information society and the new lords, the technology companies.

Cohen isn’t arguing with the fact that we are ever more disempowered, or that previous mechanisms of public accountability have broken down. But she does argue that this process has not been lawless. Rather, it has leveraged both current legal structures and their informing ideology to rise to power. And, she argues, we won’t get out of this fix without confronting the contribution of neoliberal governmental institutions to the problem. (A short version of this argument is neatly put in her review of Zuboff’s book [Cohen, 2019].)

One of her striking contributions is the notion of a public domain in data, something that seems obvious—once she says it. All the companies hoovering up our data depend on the legal concept of the public domain to do it. In a clever comparison with the enclosure movement that drove the first great transformation in England, Cohen shows that companies, having discovered an ungoverned public resource—our personal data—then aggregate it and declare it their own intellectual property. They do so with the help of standards bodies, like the engineering task force that first standardized cookies, and the Federal Trade Commission, which addressed the privacy/ownership issue in data by simply requiring the bogus “privacy policies” that now force us to agree to our own surrender.

It seems to me the analogy isn’t perfect, though. Public domain in expression acts as a rich permanent resource for all of us into an indefinite future. No matter how many trademarked T-shirts, copyrighted memes, or action movies feature Felix the Cat, he’s still out there in the public domain for the next use. This public domain exists on a timeline. While anyone can grab it at the moment—and hundreds of companies do, off our phone apps—it’s not available to others without contracting for it, once it goes into the maw of the data processors. The moment has passed. This public domain is temporary.

The excesses and miseries of the early industrial revolution eventually led to what Polanyi called a “double movement,” resistance to oppression that led to social movements and legal reforms that we are now familiar with—such as labor unions, regulatory agencies, and legislation banning pollution and discrimination and harming consumers. But much of that work has been eroded, as politics is corrupted, agencies are captured, citizen and worker rights weakened.

Neoliberalism has gone on the offensive against those mechanisms, whether President Bill Clinton’s savaging of welfare policies or those executing Grover Norquist’s “drown government in the bathtub” plan, and information capitalists benefit. Cohen gets specific. In finance, the protections put in place after the Great Depression were eroded as finance was informationalized and politicians agreed that regulatory oversight could be light, with the 2008 financial crisis as a result. Gig economy labor practices make work ever more precarious, with labor’s powers structurally weakened by law and technology alike. The logic of managerialism—the prizing of efficiency over other values—spreads to the judiciary, with embrace of arbitration over court actions, of opaque consolidated multidistrict litigation (MDL) settlements substituting for class action, consent decrees burying the facts from public view. The potential losses to businesses—such as the cost of implementing a rule—become critical, while regulators decide it’s impossible to figure out what the cost of potential identity theft is to an individual.

Meanwhile, the business model evolves. Platforms begin to replace markets, while neoliberalized regulation has not developed a measure of “platform power” to parallel the “market power” measures that fuel anti-trust/competition regulation. Surveillance becomes the core of the business model, and democratic and authoritarian governments alike find a lot to like in it. As society grows what Cohen calls a “digital limbic system,” tech corporations and governments begin to evolve a joint sovereignty that depends on being able to control our access to information.

Tech corporations have learned the value of neoliberal governance. They have weaponized freedom of expression, including making the marketplace of ideas all about supply and demand. Like other thinkers

including lawyer-journalist Sarah Jeong (2018), Cohen notes that they argue for their own right to expression while also passing responsibility for it to third parties on their platforms. They make virtue claims for innovation, which appeal to neoliberal regulators for whom innovation is a god term. They make backdoor deals with governments (the "secret handshake"). Citizens, whether they are leakers, people employing fair use, or right-to-repair activists, are easily ignored or suppressed.

Neoliberal regulation, even before this great transformation, was already looking managerial, and information capitalists exploit it. Old liberal values such as fair competition and public health and safety are being overridden for the goals of efficiency and innovation. Old-fashioned regulation's competition calculations don't fit the complexities of multisided markets, but regulators don't work to develop a measure of "platform power" that could replace "market power." The Federal Communications Commission has a 1930s-era structure divided between mass media and telecom, with the Internet left floating; previous attempts under Chairman Tom Wheeler to fix that were sabotaged in the courts, with help from corporate lobbyists. Monopoly is justified at the altar of innovation. Regulators listen to corporations' complaints of the costs of compliance but throw up their hands at the problem of calculating costs of problems such as data breaches for consumers, and they just skip the question of social harm. And of course they are not demanding transparency.

These are not just problems about tech companies, even if they now share sovereignty with governments. They are also problems at the core of what we as citizens expect of governments and governance. And because this is information capitalism, not just platforms or even tech companies, it affects everything from pharma to big ag to Facebook.

Emergent governance venues, Cohen points out, have their own problems. Multilateral treaty sites, such as the World Trade Organization; standards bodies such as the Internet Engineering Task Force; and multistakeholder structures such as Internet Corporation on Assigned Names and Numbers all expand participation in a certain sense. But they all leave corporate stakeholders in a lead position, often in combination with governments openly or covertly wielding authoritarian power. They don't solve the basic problem of having no accountability for the social harms created by informational capitalism.

Meanwhile, some governments have made some attempts to claw back accountability. The European Union's General Data Protection Regulation is a closely-watched first experiment. We've also seen human rights activists seize the affordances of digital communication to demand accountability. But those same affordances are available to the bad guys, and they're all vulnerable to the ability of platforms and governments to opaquely choke discourse.

Where's the double movement? Not here. This is a book whose deep understanding of legal, political, and economic process is matched by its bleak portrait of disenfranchisement. That is a feature of the current academic discourse around Internet governance. As Paul Starr (2019) noted in a *Foreign Affairs* article focused on Zuboff's analysis of surveillance capitalism, it's easy when looking at the alarming trends to ignore the fact that we still have political levers to pull and ways to assert agency. As well, I would note that the uneven history of success in turning surveillance into actionable data; the slow evolution of deep learning AI; the fact that China's censorship remains, despite the integration of the Red Stack, spotty in

execution and often dependent on ground-level reporting; and the daily evidence of bad ad matches in our online searches are just some of the evidence that there are still plenty of weak points in the machinery of power.

For Cohen, the way forward is through social movements. She argues that we need to, in what I would think of as a public (following Dewey [1927]), demand governance that honors collective rights. In this, she aligns with Suzor (2019), who argues in *Lawless* in some detail that we need a new “digital constitutionalism,” developing new guiding principles that address the sovereign-like nature of the new information capitalists. Like him, she sees the place to start as human rights, already articulated through the United Nations. (Since human rights are still articulated as individual rights, however, it’s still a step away from asserting collective rights or social good.)

Unlike him, and like Zuboff, she leaves the specifics vague. Indeed, not just that—she is careful to say that whatever countermovements develop will inevitably be compromised, although they are both necessary and important. That seems like an abundance of academic caution, perhaps a protective measure to avoid the kind of snarky charges of political naïveté that are routine in Cohen’s Washington, DC, environs.

Suzor (2019), by contrast, charts a course. He believes that the first steps must be to demand new norms and expectations from tech companies and especially platforms, as they are prime actors in establishing our new reality. He lays out an agenda to protect fundamental rights, develop expectations, and leverage political structures for enforcement. You can agree or disagree, but it’s refreshing to see some concrete proposals that fall between fussing over how to fix Section 230 (aka Section V of the Telecommunications Act of 1996) and apocalyptic analysis.

Cohen throughout draws on an extraordinary range of theoretical literature, from political science, economics, and communications. This is rare among legal scholars, who typically venture beyond legal scholarship for a reference or two. Also, she doesn’t just invoke them but puts their ideas to work. Her discussion of sovereignty, for instance, is usefully and chillingly grounded in the perceptions of Carl Schmitt, an intellectual architect of Nazi Germany. Her understanding of an Internet organized around control rather than access, and of the limits of current forms of Internet governance, draws from the precedential work of Laura DeNardis (2014).¹

Like other scholars who can grasp enormous complexities, Cohen sometimes struggles to make them easily accessible. Her writing is abstract and dense, if perfectly logical: “Tension between persuasion and informational opacity is an endemic feature of many information-economy markets” (p. 21); “modulation of surveillant attention is both a mode of privacy invasion and a mode of social control” (p. 66); “securing the predicate conditions for human flourishing requires development discourses that are context-sensitive and methodologically diverse” (p. 267). Reading this book requires your full attention, after a strong cup of coffee. On the other hand, there are some quite wonderful phrases, such as the “post-colonial two-step,” “data doubles,” and “digital limbic system.”

¹ DeNardis’s forthcoming work (DeNardis, 2020) focuses centrally on access and control issues, and is a critical contribution to this literature on Internet governance under informational capitalism.

This is an important advance in our understanding both of how we got here, with tech companies in a position of unprecedented control over ordinary reality in all its aspects. If we want to figure out how to go forward, understanding the implications of neoliberalist governance, even before the rise of big tech, will be central.

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