Between Truth and Power (New York: Oxford Univ. Press, 2019)

Introduction:
Transforming Institutions

This book is a meditation on the future of law and legal institutions in the networked information age. Its central claims are that as our political economy transforms, our legal institutions too are undergoing transformation, and the two sets of processes are inextricably related.

Encounters between networked information technologies and law tend to be framed as examples of what happens when an irresistible force meets an immovable object. So, for example, some argue that networked information and communication technologies are technologies of freedom, able to help human civilizations solve all of our most pressing problems—if only the law, which cannot move at the speed of human thought, will stop undermining technology's potential and either get with the program or get out of the way. Others assert that it is information technology that fatally undermines the rule of law—that unbreakable encryption and untraceable alternative currencies will plunge society into chaos, or that unaccountable and fundamentally nonhuman artificial intelligences spell the end for slower and more humane traditions of governance.

Whether any of those inspiring or doom-laden predictions will come to pass is beyond my ability to know, but their premises are wrong. To begin with, technology is not a monolithic, irresistible force. Networked information technologies inevitably will alter, and are already altering, the future of law, but not because there is any single, inevitable arc of technological progress. The reason, rather, is very nearly the opposite: Information technologies are highly configurable, and their configurability offers multiple points of entry for interested and well-resourced parties to shape their development. To understand what technology signifies for the future of law, we must understand how the design of networked information technologies within business models reflects and reproduces economic and political power.

For similar reasons, law is not an immovable object. Legal scholars who work on information policy have been intensely concerned with questions about how existing doctrinal and regulatory frameworks should apply to information, algorithms, technical protocols, and online behavior, perhaps undergoing some changes in coverage or emphasis along the way. They have asked, in other words, *how law should respond* to the changes occurring all around it. For the most part, they have not asked the broader, reflexive questions about how core legal institutions *are already evolving* in response to the ongoing transformation in our political economy—questions, in other words, not about how law should apply to information-economy disputes, but rather about how both information-economy disputes and new informational capabilities are reshaping the

enterprise of law at the institutional level. That is a mistake. Law is one of the moving parts, and it is already responding.

Legal institutions too offer multiple points of entry for economic and political power, and as they are enlisted to help produce the profound economic and sociotechnical transformations that we see all around us, they too are being changed. Struggles to shape the patterns of information flow are seeking out new modes of recognition and accommodation within the legal system. Slowly but surely, that process is restructuring the legal system itself, altering the substance and interpretation of fundamental legal guarantees, the fora within which legal rights and obligations are defined, and the ways that they are enforced.

None of this should surprise us, because our current legal system is to a great extent the product of an earlier period of sociotechnical and economic transformation. From the late eighteenth century through the mid-twentieth century, as accountability for industrial-age harms became a pervasive source of conflict, legal systems in the industrializing world underwent profound, tectonic shifts. In the United States, important doctrinal, procedural, and institutional changes included the emergence and gradual refinement of the modern corporate form, standardized commercial laws, newly expansive conceptions of tort liability, new rules for exercising personal jurisdiction over faraway parties to civil disputes, liberalized pleading standards, the structure of the modern regulatory state, and new paradigms for understanding constitutional rights and their limits.

Today, ownership of information-age resources and accountability for information-age harms have become pervasive sources of conflict, and different kinds of change are emerging: new claims about entitlement and accountability; new procedural devices for vindicating (or declining to vindicate) those claims in litigation; new mechanisms for extrajudicial definition and enforcement of claimed legal rights; new obligations relating to financial stability, data protection, and network management; new regulatory mechanisms for defining and policing compliance with those obligations; and new transnational institutions for economic and network governance. In many cases, those changes are hotly contested. We are witnessing the emergence of legal institutions adapted to the information age, but their form and their substance remain undetermined.

This book interrogates the possible futures of a legal system that we have come to take for granted. Its premise is that when attempting to find one's way through the jungle, it is useful to consider paths of least resistance, but it is also essential to understand the overall topography, lest one inadvertently stumble into quicksand or wander over a cliff. Rather than offering specific prescriptions for legal reform, it simply seeks to help the reader understand and parse the profound, systemic changes that are already underway.

The balance of this introductory chapter lays some essential groundwork. It begins by situating networked information technologies and law in relation to economic and political power. It then briefly sketches the ongoing and interrelated transformations in political economy and political ideology (or governmentality) that are now underway. Finally, it returns to law, situating legal institutions within processes of economic and ideological transformation.

Negotiations: Code and Law between Truth and Power

This book derives its title from that of a deceptively small pamphlet, titled "Speak Truth to Power" and circulated by intellectual leaders of the Quaker faith in 1955 as the Cold War military buildup gathered momentum.[1] The pamphlet opposed the buildup and advocated a peaceful resolution. Critically, it focused not only on the moral costs of militarization but also on the opportunity costs. Resources devoted to the production and strategic deployment of expensive weapons were resources that could not be devoted to improving standards of living for the world's neediest people. For the writers of the pamphlet, speaking truth to power meant confronting power with a fundamental choice between military domination and human wellbeing, a choice played out not only at the level of policy but also and more fundamentally at the level of political economy.

In the decades since the Cold War, the notion of speaking truth to power has become a familiar protest trope, deployed in a wide variety of contexts to signal both the power of the moral high ground and the necessity of resistance. Those themes reverberate through contemporary discussions of the nature and social impact of networked information and communications technologies. They are extraordinarily important but their expression is often extraordinarily naïve.

At its inception, the internet was conceived as the inevitable servant of truth —as a "technology of freedom" that would enable both political and economic self-determination.[2] We have known for some time now that this rather deterministic view is too simple. Scholarship in science and technology studies has shown that new technologies do not have predetermined, neutral trajectories, but rather evolve in ways that reflect the particular, situated values and priorities of both their developers and their users. The various technological layers and protocols that comprise the internet and the diverse array of devices that connect to it are no different. As already noted, networked information and communication technologies are highly configurable, and that characteristic inevitably draws attention to the behavioral changes that different configurations might produce. The plasticity of digital "code" affords points of regulatory leverage to both state and private actors.[3]

Contemporary legal and policy discussions about the internet and digital technologies, however, nonetheless have retained more than a little of their original idealism. Informed by characterizations of code as regulatory, deterministic claims about the way that code "is" have evolved into normative claims about the way that it should be. For the last two decades, a loose coalition of social movements, nongovernmental organizations (NGOs), and academics, joined at one time or another by various other actors, has promoted a vision of networked information and communication technologies as tools for advancing the goal of freedom from political oppression. In those efforts, a different kind of technological essentialism has persisted, which resides in the formulation of claims about the nature of fundamental rights to internet access and use. Such claims seem to presume that tools for censorship and surveillance of information flows are afterthoughts or hostile add-ons, and that market forces will route around them, incentivizing technological development that is connective and egalitarian.[4] As we will see throughout this book, that view is mistaken on a number of levels. Even the technologies in use in democratic societies increasingly incorporate, at their core, capabilities for differentiation, modulation, and interdiction of information flows.

Accounts of the political and cultural functions of law can be similarly idealistic. The law school where I teach takes as its motto the statement that "Law is but the means; justice is the end," and many law schools would describe their mission similarly. Lawyers understand themselves to be stewards of the principles and institutions that hold a society accountable to its citizens and take that mission seriously. But lawyers at work play many different roles in relationship to both state and private power. They serve as activists for legal modernization and as agents for the powerful interests that seek to alter existing principles and institutions to their own advantage. As we will see throughout this book, moreover, those two roles often converge; initiatives for legal modernization have a way of aligning with the efficiencies that powerful interests have identified and the rationalizations they advance to frame particular kinds of change as desirable.

By the same token, legal institutions are not fixed, Archimedean points around which modes of economic development shift and cohere. They are arenas in which interested parties struggle to define what constitutes "normal" economic or government activity and what qualifies as actual or potential harm, and they are also artifacts whose form and function are not preordained. We should not be surprised to see the tensions between these competing functions become particularly acute during periods of rapid sociotechnical and economic change. And we should not be surprised if, as a result, the institutions themselves begin to change, as well.

In short, networked digital media technologies and infrastructures are not—and never could be—simply instrumentalities of liberation, and law is not—and never could be—simply an instrumentality for the promotion of just outcomes, a neutral arbiter of disputes, or a disinterested agent of modernization. In their different ways, both networked media infrastructures and legal institutions sit between truth and power. They can be means for resisting domination or vehicles for embedding it, but even that formulation is too simple. Through their capacities to authorize, channel, and modulate information flows and behavior patterns, code and law *mediate* between truth and power. The terms of the dialogue are shaped by the technological and institutional settlements that emerge as struggles to shape the emerging networked world wind their way toward resolution.

According to the conventions of many academic disciplines, at this point it would be appropriate to offer a theory of power in which to ground the inquiry we are about to undertake. The study of law and legal institutions, however, teaches both appreciation for power's resourcefulness and skepticism about the quest for a perfect theoretical construction capable of describing it. The essence of power lies precisely in its ability to shape-shift—to elude the perfect, crystalline characterizations with which scholars have attempted to both capture and cabin its methods of operation. Power in operation is pragmatic, seeking and finding paths of least resistance and mobilizing the practical and conceptual resources that appear ready to hand. The subject of this inquiry will not be power in the abstract, but rather power in legal-institutional context. That project calls for a different kind of table-setting.

Transformations: Political Economy as/and Governmentality

For some time now, political economies in the developed world have been undergoing a transformation from industrial to informational capitalism. That transformation in turn has begun to elicit new ways of framing and understanding the roles of government, and of systems for social ordering more broadly, in relation to private economic activity.

Following the sociologist and theorist of the information society Manuel Castells, I use "informational capitalism" to refer to the alignment of capitalism as a mode of production with informationalism as a mode of development. Capitalism "is oriented toward profit-maximizing, that is, toward increasing the amount of surplus appropriated by capital on the basis of the private control over the means of production and circulation," while informationalism "is oriented . . . toward the accumulation of knowledge and towards higher levels of complexity in information processing."[5] In a regime of informational capitalism, market actors use knowledge, culture, and networked information technologies as means of extracting and appropriating surplus value, including consumer surplus.

My intent in adopting that framing is not to suggest that regulation of industrial-era processes and markets is no longer important or that the corresponding regulatory constructs are necessarily obsolete. Institutional changes are slow and piecemeal, and shifts in political economy can span decades or even centuries. More generally, the relationship between industrialism and informationalism is not sequential, but rather cumulative. The emergence of informationalism as a mode of economic development also is powerfully shaped by its articulation within capitalist modes of production, with all of the economic, sociotechnical, organizational, and ideological baggage that that history entails.[6]

In referring to the shift from industrialism to informationalism, then, I do not mean to make rapturous (or apocalyptic) pronouncements about the end of industry but rather to indicate two kinds of fundamental transformation. First is a movement away from an economy oriented principally toward manufacturing and related activities toward one oriented principally toward the production, accumulation and processing of information. In an information economy, the mass model of production that emerged in the industrial era is itself increasingly redirected toward development of intellectual and informational goods and services, production and distribution of consumer information technologies, and ownership of service-delivery enterprises.[7] Second is a transformation in the conduct of even traditional industrial activity. In an information economy, information technology assumes an increasingly prominent role in the control of industrial production and in the management of all kinds of enterprises.[8]

Some academics and lay commentators who study the emerging networked information society identify additional, distinct phases of political economic transformation. Some of those phases—such as consumer capitalism, managerial capitalism, financial capitalism, and surveillance capitalism—involve changes in the means of surplus extraction.[9] Although there is much to learn from the details of such developments, in my view focusing first and foremost on such divisions threatens to diminish the underlying transformative importance of the socio-technical shift to

informationalism as a mode of development. Other formulations—including notably the "Fourth Industrial Revolution" framing popularized by the World Economic Forum—foreground the technological at the expense of the social.[10] It is important not to lose sight of the sociotechnical, and of the contingency and constructedness of the changes that powerful, self-interested actors have set in motion.

The continuing orientation toward capitalist production, surplus extraction, and accumulation points toward a second, related transformation, which concerns the ideological framework that serves to legitimate and facilitate economic activity and, therefore and relatedly, to underwrite processes of governmental and social reorganization. Following the tradition of critical social theory, I will refer to that framework together with its organizational and practical entailments as governmentality.[11]

The dominant forms of governmentality associated with industrial political economy were liberal, broadly speaking; the dominant forms of governmentality associated with informational capitalism are neoliberal. Relative to liberal governmentality, neoliberal governmentality represents both continuity and change. Liberal political philosophy radically decentered the sovereign state, positioning the sovereign individual as the ultimate source of political authority; liberal governmentality undertook a parallel decentering, positioning enlightened, self-interested rationality as the origin point for social ordering.[12] Neoliberal governmentality similarly emphasizes the primacy of private ordering, but both the scope that neoliberalism claims for private ordering and the role that it envisions for government are different.

In one frequently cited formulation, the political philosophy of neoliberalism "propos[es] that human well-being can best be advanced by the maximization of entrepreneurial freedoms within an institutional framework characterized by private property rights, individual liberty, unencumbered markets, and free trade."[13] Notably, however, the neoliberal political orientation emphasizes not only market liberties but also a market-based approach to structuring political and social participation. Viewed through the prism of neoliberal governmentality, the most virtuous and effective forms of social ordering are mimetic, incorporating and responding to marketized feedback about efficacy and value.[14]

Neoliberal governmentality does not simply elevate processes of private economic ordering; it also works to reshape government processes in their image. As many have remarked, liberal governmentality contained an embedded contradiction. Markets are not self-sustaining; left entirely to their own devices, they tend toward monopoly, destructive extraction, and rent-seeking. Therefore, they require vigilant stewardship precisely to ensure they remain sufficiently marketlike. Neoliberal governmentality resolves that embedded contradiction by bringing market dynamics and associated managerial techniques into government, infusing processes of legal and regulatory oversight with a competitive and capitalist ethos.[15] Transforming government in the image of markets is not an abstract exercise. It requires changes in the nature and operation of the institutions and practices that comprise government, including not only the faceless bureaucracies typically demonized within contemporary morality tales about the primacy of markets but also legislatures, courts, and legal doctrines. The story of

neoliberalization, in other words, is also and unavoidably a story about the institutional transformation of law.

Institutions: Mapping the Interplay between Power and Constraint

Law's *facilitative* role in these processes of economic and ideological transformation is foundational and generally unremarked. Scholars who study the relationship between law and political economy have begun to argue that law is not simply superstructure but rather the means through which expressions of economic rationality and governmentality become specific, detailed, and actionable.[16] This book brings that perspective to bear on the intertwined processes of informationalization and neoliberalization. Both processes have mobilized the institutional resources afforded by legal systems worldwide. At the same time, however, those processes also are transforming legal institutions, gradually optimizing them for the new roles they are called upon to play.

Consider first two examples from earlier moments in Anglo-American legal history. In his influential account of the "great transformation" in British political economy, Karl Polanyi interrogated Britain's centuries-long transition from an agrarian system of political economy to an industrial and capitalist system, identifying the mismatches between the demands of the emerging market system and those of human wellbeing and tracing the gradual emergence of a protective countermovement that included distinctively legal components.[17] The initial movement to industrial capitalism, however, also entailed both reliance on and restructuring of legal institutions. Processes of enclosure of common lands, appropriation of other natural resources, displacement of populations from farms to cities, construction of factories for extraction of the value of commodity inputs (including wage labor), and trade in the resulting products all required enabling legal constructs in order to work. A series of gradual, ineluctable changes in the British legal system worked to facilitate each of those developments, providing the frameworks within with enclosure, appropriation, extraction, and accumulation could proceed.

A century later, the American political economic landscape underwent a parallel transformation. The part of that story with which contemporary lawyers and legal scholars are most familiar involves the American version of the protective countermovement—the creation of the modern administrative state during the first half of the twentieth century and the bitter disputes about constitutional law that accompanied it. As legal historian Morton Horwitz has shown, however, those disputes were themselves shaped by earlier doctrinal and conceptual realignments that privileged rising industrial and commercial interests. The development of private and commercial law during both the antebellum period and the post-Civil War years, and critically the emergence of an instrumental, rationalist view of the common law's purpose, established the distributive backdrop for the disputes about public law that unfolded later.[18]

Today, as accountability for information-age harms has become a pervasive source of conflict, different kinds of change are on the table. Once again, powerful interests have a stake in the outcome, and once again, they are enlisting law to produce new institutional settlements that alter the horizon of possibility for protective

countermovements. And once again, critics of law's neoliberalization have focused principally on a set of burgeoning crises for public law but have largely neglected to ask a set of more fundamental questions about implicit distributional and institutional predicates.[19] Law for the information economy is emerging not via discrete, purposive changes, but rather via the ordinary, uncoordinated but self-interested efforts of information-economy participants and the lawyers and lobbyists they employ. Slowly but surely, those efforts are rearranging the legal landscape, producing results that reflect intertwined processes of conceptual and practical neoliberalization at work.

At the same time, however, the story of the complex and richly productive relationships among political economy, neoliberal governmentality, and legal institutions is a story about power both asserted and constrained. Legal institutions are the mechanisms through which changes in governmentality assume concrete forms that shape the options available to social and economic participants, and those forms also impose limitations. Some limitations reflect historical and sociotechnical contingency; the previous era's institutional settlements become the residue with which the next era's institutional entrepreneurs must contend. Other limitations are more durable and demanding. In societies with stable rule-of-law traditions, power confronts principles and commitments that must be honored. Legal institutions therefore are much more than simply substrates to be made and remade according to perceived economic and political imperatives; they are also the sites at which the project of mediation between truth and power unfolds.

The focus on institutions dictates a certain amount of geographic and cultural specificity. This project focuses principally on the legal-institutional trajectories that have emerged in the United States That focus, I think, is also defensible for another reason: The United States is where many (though not all) of the major global information businesses now reshaping the political economic landscape are headquartered. The institutional settlements now emerging within the U.S. legal system are therefore relevant both domestically and globally. My hope is that scholars more familiar with other legal systems will undertake similar projects.

Plan of the Book

The chapters that follow map processes of legal-institutional transformation on two complementary and mutually reinforcing levels.

The first level on which legal-institutional transformation is occurring involves baseline understandings of legal entitlement and disentitlement. In the emerging information economy, the understandings that characterized the industrial economy are shifting in ways that extend across preexisting doctrinal boundaries and that challenge the distinctions such boundaries attempt to impose. Chapter 1 describes the increasing virtualization and datafication of important economic resources and traces the emergence of the platform as the core organizational logic of the informational economy. Chapter 2 identifies the enabling legal construct that underwrites new techniques of personal data harvesting and processing and explores its doctrinal, architectural, and policy entailments. Chapters 3 and 4 move beyond appropriation of resources to consider other patterns of entitlement and disentitlement that involve accountability, immunity,

authority, and obligation. Chapter 3 explores the affordances of contemporary, platform-based, massively-intermediated information environments and traces the emergence of a constellation of powerful de jure and de facto legal immunities that insulate their architects and operators from accountability for a wide and growing variety of harms. Chapter 4 interrogates the evolving debates about interdiction of information flows, framing those debates as three-way struggles between nation-states, global entertainment businesses, and information platforms and identifying several more durable changes that those struggles are producing.

The second level on which legal-institutional transformation is occurring involves the structure and operation of regulatory and governance institutions. Chapter 5 considers patterns of change in legal processes for dispute resolution, including both the evolution of conceptions of justiciable injury and the emergence of new, explicitly managerial conventions for routing different kinds of disputes for different kinds of processing. Chapter 6 shifts the focus to the regulatory state, exploring the ways that informationalization of economic activity has both disrupted long-established regulatory constructs and elicited new, neoliberalized mechanisms for regulatory oversight. Chapters 7 and 8 adopt a more explicitly transnational and experimental focus. Chapter 7 investigates the emergence of network-and-standard-based legal-institutional arrangements for transnational governance, parsing the mechanisms through which neoliberalized agendas for the management of economic and network processes have begun to "route around" the disruptions imposed by older, less adaptable legal forms. Chapter 8 explores the widening mismatch between information-economy threats to fundamental human rights and institutions dedicated to protecting and preserving those rights.

In interrogating the relationships between political economy and the structure of legal entitlements and institutions, I hope also to prompt reflection on the ways that transformations in political economy shape the horizons of possibility for protective countermovements. The book therefore concludes with a brief meditation on that question.

Notes for Introduction

[1] American Friends Service Committee, "Speak Truth to Power: A Quaker Search for an Alternative to Violence," Mar. 2, 1955, https://perma.cc/T7ER-L4LX.

[2] The terminology derives from Ithiel De Sola Pool, *Technologies of Freedom* (Cambridge, Mass.: Harvard University Press, 1984). Influential statements of this view include John Perry Barlow, "A Declaration of the Independence of Cyberspace," Electronic Frontier Foundation (1996), https://perma.cc/GL7C-A3HB; David R. Johnson & David G. Post, "And How Shall the Net Be Governed?: A Meditation on the Relative Virtues of Decentralized, Emergent Law," in *Coordinating the Internet*, eds. Brian Kahin & James H. Keller (Cambridge, Mass.: MIT Press, 1997), 62–91; Philip Elmer-Dewitt, "First Nation in Cyberspace," *Time* (Dec. 6, 1993), 62 ("[A]s Internet pioneer John Gilmore puts it, 'The Net interprets censorship as damage and routes around it.'").

[3] Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1998).

[4] For examples, see Anupam Chander & Uyen Le, "*Free* Speech," *Iowa Law Review* 100 no. 2 (2015): 501-549; Eric Goldman, "Search Engine Bias and the Demise of Search Engine Utopianism," *Yale Journal of Law and Technology* 8 (2005): 188-200; Adi Kamdar, "EFF's Guide to CDA 230: The Most Important Law Protecting Online Speech" (Dec. 6, 2012), https://perma.cc/5Q9W-VCE8; Daphne Keller & Lee

Rowland, "Private Companies, Public Squares," Panel at the Internet Summit (Sep. 14, 2017), https://perma.cc/Y8PY-5H6L; Daphne Keller, "Making Google the Censor," *New York Times* (June 12, 2017), https://perma.cc/ZP2J-867Z.

[5] Manuel Castells, *The Information Age, vol 1: The Rise of the Network Society* (Cambridge, Mass.: Blackwell, 1996), 14-18; see also Dan Schiller, *How to Think about Information* (Champaign, Ill.: University of Illinois Press, 2007), 3-35.

[6] Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge, Mass.: Belknap Press, 2014); Schiller, *How to Think About Information*. 3-35.

[7] Daniel Bell, *The Coming of Post-industrial Society: A Venture in Social Forecasting* (New York: Basic Books, 1973); Schiller, *How to Think About Information*. 3-35.

[8] James R. Beniger, *The Control Revolution: Technological and Economic Origins of the Information Society* (Cambridge, Mass.: Harvard University Press, 1986).

[9] See, for example, Frederic Gros, "Is There a Biopolitical Subject? Foucault and the Birth of Biopolitics," in *Biopower: Foucault and Beyond*, eds. Vernon W. Cisney & Nicolae Morar (Chicago: University of Chicago Press, 2016), 259-273; Shoshana Zuboff, "Big Other: Surveillance Capitalism and the Prospects of an Information Civilization," *Journal of Information Technology*, 30 (2015): 75-89.

[10] Klaus Schwab, *The Fourth Industrial Revolution* (New York: Crown Business, 2017).

[11] Michel Foucault, *Security, Territory, Population: Lectures at the College de France 1977-78*, trans. Graham Burchell (New York: Picador, 2007), 108-10; Nikolas Rose, Pat O'Malley, & Mariana Valverde, "Governmentality," *Annual Review of Law and Social Science* 2006 no. 2 (2006): 83-104.

[12] On liberal governmentality, see Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978—1979*, trans. Graham Burchell (New York: Picador, 2008), 65-69, 280-85; Peter Miller & Nikolas Rose, "Governing Economic Life," in *Foucault's New Domains*, eds. Mike Gane & Terry Johnson (New York: Routledge, 1993), 75-105, 78-81.

[13] David Harvey, "Neoliberalism as Creative Destruction," *Annals of American Political and Social Science* 610 no. 1 (2007): 22-44, 22.

[14] Wendy Brown, "Neo-liberalism and the End of Liberal Democracy," *Theory & Event* 7 no. 1 (2003): 15, http://muse.jhu.edu/journals/theory_&_event/; Thomas Lemke, "'The Birth of Bio-politics': Michel Foucault's Lecture at the College de France on Neo-liberal Governmentality," *Economy & Society* 30 no. 2 (2001): 190-207; Nikolas Rose & Peter Miller, "Political Power Beyond the State: Problematics of Government," *British Journal of Sociology* 43 no. 2 (1992): 173-205, 198-201; see also Miller & Rose, "Governing Economic Life," 97-101; Philip Mirowski & Dieter Plehwe, eds., *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective* (Cambridge, Mass.: Harvard University Press, 2009).

[15] Nicholas Gane, "The Governmentalities of Neoliberalism: Panopticism, Post-Panopticism, and Beyond," *The Sociological Review* 60 no. 4 (2012): 611-634, 625-29.

[16] Simon Deakin, et al., "Legal Institutionalism: Capitalism and the Constitutive Role of Law," *Journal of Comparative Economics* 45 no. 1 (2017): 188-200; David Singh Grewal, Amy Kapczynski, & Jedediah Purdy, "Law and Political Economy: Toward a Manifesto," *Law and Political Economy* (Nov. 16, 2017), https://perma.cc/NG8L-WDAB.

[17] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1957).

[18] Morton J. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977); Morton J. Horwitz, *The Transformation of American Law, 1870-1960* (Cambridge, Mass.: Harvard University Press, 1992).

[19] For an overview, see David Singh Grewal & Jedediah Purdy, "Introduction: Law and Neoliberalism," *Law & Contemporary Problems*, 77 no. 4 (2014): 1-23, and the symposium issue to which it pertains.