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## Part II Patterns of Institutional Change

The chapters in this part of the book are about the processes that are reshaping the structure and operation of legal institutions. They highlight three sets of effects that together are shaping emerging institutional settlements.

To begin with, legal institutions are backward-looking, or artefactual, in two different senses. First and most obviously, they are creatures of procedure. Courts and regulatory bureaucracies follow jurisdictional and procedural rules that define the kinds of matters they can entertain and the kinds of actions they can take. More generally, the legal institutions that evolved during the industrial era reflect certain basic presumptions about constraints on institutional design and action that are artefactual in the ideological sense—that are intertwined with distinctively liberal governmentalities and reflect corresponding ideas about the rule of law. Presumptions dictating, for example, that courts cannot investigate complaints or render advisory opinions and that administrative agencies can wield discretion only pursuant to a formal delegation of executive authority and only subject to judicial oversight are artefactual in the second, ideological sense. Procedural rules and animating ideologies generate powerful path dependencies that shape both the horizons of possibility for institutional change and *perceptions* about where those horizons are located.

A second set of structuring effects is political and economic. Patterns of institutional change are not neutral. To use Marc Galanter's memorable phrase, in institutional processes structured by procedural rules, the "haves" tend to come out ahead because, as repeat players with disposable resources to spare, they can play for rules in addition to results.<sup>1</sup> To a far greater extent than other parties, repeat players can both choose their battles and determine how they will be fought. The chapters in this Part highlight constellations of rules and practices that have begun to emerge as the informational economy's powerful repeat players—platform firms, data brokers, financial firms, owners of large intellectual property portfolios, and others—have developed, iterated, and refined their litigation, regulatory, and government relations strategies.

Relatedly, processes of institutional realignment also tend to reflect background allocations of rights, privileges, and other entitlements. So, for example, as Morton Horwitz demonstrated in his classic study of the evolution of private and commercial law prior to the constitutional battles of the *Lochner* era, during the nineteenth century, economic regulation developed in ways that reinforced emerging concentrations of industrial power, and judges came to understand the common law as a tool for promoting commerce and economic development. Those relatively recent developments established the distributive backdrop against which the high-profile constitutional disputes of the *Lochner* and New Deal eras were litigated.<sup>2</sup> Similarly, we will see in this part of the book

that the patterns of entitlement and disentitlement described in Part I—and the accompanying logics of performative enclosure, productive appropriation, innovative and expressive immunity, and fiat interdiction—produce powerful normative force fields, inclining courts, regulators, and policymakers toward particular views about which private-sector actions merit responses and what those responses ought to be.

A final set of structuring effects is sociotechnical. Technological capabilities originally envisioned as facilitating the activities of existing institutions have begun to catalyze deeper institutional transformations. Here I mean not only to refer to the general proposition that networked information and communications technologies and infrastructures alter the background conditions for having and exercising power, but also to argue that those technologies' capabilities and affordances have more concrete procedural and institutional entailments. The same sociotechnical shifts that have enabled more fine-grained control of economic and communicative activities are also producing complementary patterns of legal-institutional evolution and change. Those patterns, moreover, are not necessarily neutral. Recall that the core strategy of neoliberal governmentality involves bringing market techniques and methods into government, infusing processes of legal and regulatory oversight with a competitive and capitalist ethos.<sup>3</sup> Patterns of institutional change in the networked information era reflect beliefs and unquestioned assumptions about the best uses of new technological capabilities to *manage* legal and regulatory processes. Often (though not always), those beliefs emanate from an ideology—managerialism—that is closely entwined with neoliberal governmentality. The melding of new technical capabilities with neoliberal ideologies and the deployment of those capabilities toward managerialist ends have both accelerated and altered the trajectories of institutional evolution.

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<sup>1</sup> Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9 no. 1 (1974): 95-160.

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<sup>3</sup> Nicholas Gane, "The Governmentalities of Neoliberalism: Panopticism, Post-Panopticism, and Beyond," *The Sociological Review* 60 no. 4 (2012): 611, 627-29.