

CHAPTER 38

UNDERSTANDING
REGIME CHANGE:
PUBLIC OPINION,
LEGITIMACY,
AND LEGAL
CONSCIOUSNESS

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ALMOST 40 years ago, Murphy and Tanenhaus (1968) argued that courts played an important role facilitating and legitimating regime change. By their willingness to revise existing constitutional definitions, courts help political institutions pursue popular policies. The idea of court-assisted regime change resonated within political science because it appeared consistent with contemporary policy controversies. In cases such as desegregation and interracial marriage, the U.S. Supreme Court appeared to be creating openings for state and local, as well as federal agencies, to incorporate popular demands for change. The idea appeared fairly simple.

Sometimes governmental officials can meet public demands only if certain changes are made in the rules under which politics is traditionally conducted. Furthermore, the

boundaries separating constitutionally permissible and impermissible behavior are typically vague. Thus, important and controversial government policies are likely to engender disputes not only about their merits but also about whether the government, or a particular set of officials can legitimately undertake a given course of action. . . . When it validates official decisions which may initially seem to many to violate the rules, a constitutional court thereby gives sanction to regime change. In refusing to validate such decisions, a court denies them its imprimatur of legitimacy. (Murphy and Tanenhaus 1968, 358–59)

The requirement necessary for constitutional courts to accomplish regime change was clear: a population sufficiently aware of the role of a constitutional court to permit such a court to review and legitimate changes in rules required for new policies. Yet, because of the low level of awareness within the general population of the institutional components of the relevant constitutional court (see Caldeira and Gibson 1992, fn. 5; cf. Mondak 1991, 1994), Murphy and Tanenhaus's attractive idea of court legitimated regime change nonetheless lacked an empirically functioning mechanism for change.

Here, we argue that contemporary research on legal consciousness offers a means to explain the role of courts in facilitating and legitimating regime changes that keep government policy consonant, to variable degrees, with transformations in material conditions and popular sentiment. The dynamic nature of legal consciousness allows courts to redefine the formal law and the fundamental rules that have previously governed social interactions without precipitously affecting the long-term legitimacy of the state or its political institutions. Further, popular legal consciousness allows this process to occur despite the lack of popular knowledge of the institutional components apparently required to achieve such regime change. In framing our argument, we adopt an unusual path through the literature on legal consciousness.¹ More often described as a development within sociolegal scholarship, the relevance of legal consciousness—as a concept and as a body of theoretically informed empirical research—for mainstream political science has been less often explored. The extraordinary power wielded by an unelected constitutional court within a democratic republic continues to vex political scientists and legal scholars. Recent literature on legal consciousness provides a multidisciplinary perspective that offers new resources for addressing this long-standing dilemma.

1 REGIME CHANGE

For our part, we reconceptualize regime change by beginning with an assumption of political dysfunction: an inability of the existing political system to translate

¹ For reviews of the literature on legal consciousness, see Albiston 2006; Engel 1998; Ewick 2003; Garcia-Villegas 2003; Hertogh 2004; Marshall and Barclay 2003; Silbey 2001, 2005.

a popular set of demands on a policy issue into political action (Easton 1965a, 1965b). This scenario presumes that the demand for policy change can arise independent of a commensurate shift in political power within a legislature.

Although legislators respond to the groups who exercise social influence, the legislature is not a perfect reflection of the social power exercised by these various groups at any moment in time. Once a group converts its social influence into institutionalized bases of power, these groups are able to utilize their legislative position, and the coercive power of law, to consolidate and maintain their existing political and social advantage. We propose that the sources of regime change lay in the potential difference between the power being exercised by a group in ongoing struggles for legislative influence and the institutionalized power exercised through established position, office, and administrative hierarchy.

Pressure for regime change occurs because the political power currently exercised by one group, and entrenched in existing laws, no longer correlates well with the current level of social influence that the group exercises in the larger society. The influence of particular social groups varies as their economic, social, or demographic resources shift. For example, by the early 1960s, white Southern Democrats exercised considerable power in the U.S. Congress and they dominated the state legislatures in the South. They also used their political power to effectively institutionalize their preferences within existing state and federal laws. This political power, however, bore little relationship to their declining legitimacy in the face of the expanding civil rights movement. Despite its declining legitimacy, the dominant position of this group within the existing political institutions made it difficult to dislodge them to a political status more commensurate with their social standing.

In a representative democracy, the disjuncture between institutionalized power and sociocultural status occurs predominantly in those cases where there is some systemic failure in the mechanisms for coordinating levels of social power with levels of political power. For example, the purposeful electoral disenfranchisement of African Americans in most Southern states certainly precluded the effective political representation of the interests of these groups and is the most evident example of a purposive failure in the representative mechanisms. A similar phenomenon occurred in the case of lesbians and gays although no specific law proscribed their electoral involvement. As Justice Brennan noted, 'because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena' (in *Rowland v. Mad River*, 470 U.S. 1009, at 1014, 1985).

A constitutional court, we argue, may be able to redefine the existing rules in order to facilitate the policies necessary to effect regime change. Courts can recognize the claims and interests voiced by the less politically powerful group while simultaneously withdrawing institutional resources from the politically entrenched group. Constitutional courts can achieve regime change because, using

law as a basis, they are able to engage the claims of the less politically powerful when other institutions are constrained by their affiliation with the politically entrenched.

Our revised version, however, does not resolve the fundamental difficulty associated with the idea of court-sanctioned regime change: according to public opinion surveys, the level of apprehension in the general population of the Court's role is apparently insufficient to drive this process. In the next sections, we suggest that the use of public opinion data as the basis for considering the nature of regime change is flawed to the extent that it relies on individualistic conceptions of social action and static measures of change in policy positions to explain shifts in the legitimacy provided by the court. Clearly, there are serious flaws in public opinion measures as indicators of general support for regime change at any point in time (Althaus 2003; Zaller 1991; Zaller and Feldman 1992; Bennett 1988; Pierce and Rose 1974; Converse 1974, 1962). The greater problem, we claim, derives from the inability of standard public opinion measures to capture the dynamic cultural processes that underwrite institutional power, legitimacy and durability, or to explain the relationship among popular opinion, policy initiatives and regime change. We turn to the notion of legal consciousness not only to explain the processes involved in these transitions, but also to reintroduce the fundamental role of legal norms as a catalyst in this process. Rather than simply relying on court action and the general level of legitimacy enjoyed by the court as an institution, we will focus on the understandings and uses of law circulating in American popular culture to explain both regime change and continuity.

2 THE MECHANISM OF CHANGE AND THE MECHANISM OF LEGITIMATION:

In their construction of regime change, Murphy and Tanenhaus (1968) divided the mechanism that precipitated the *need* for regime change, a change in popular opinion, from the mechanism used to *legitimate* the action, a change in the fundamental legal rules. Their sole focus was on the latter action of legitimation. How the population comes to the position of desiring a policy change requiring a fundamental change in the current rules is an issue Murphy and Tanenhaus never explicitly address. We deal with both.

Murphy and Tanenhaus used measures of popular opinion on the assumption that only a population that understood and embraced the rule-changing role of a constitutional court would accord sufficient legitimacy to the subsequent change in

rules by a constitutional court to successfully institutionalize regime change. The legitimacy bestowed on the constitutional court as an institution also attaches to the decisions, including the rule changes, issued by the court. Thus, Murphy and Tanenhaus focused on measures of support for the court and measures of popular understanding of the court's role in the political system.

Yet, for Murphy and Tanenhaus, the use of public opinion data to capture the citizenry's knowledge and understanding of the constitutional court itself was problematic. For example, they note that in 1949 only 17 percent of Americans could correctly offer the name of 'the highest court of law in the United States' (Murphy and Tanenhaus 1968, fn. 2). While the level of information about the highest court has presumably increased in recent years, the problem remains; a large enough cohort of individuals do not seem to possess sufficient information of the role of the constitutional court to facilitate agreement to a change in the previously accepted rules.

For their part, political scientists have largely abandoned the search for a direct link between institutional legitimacy and the legitimation function raised by the idea of regime change (Caldeira and Gibson 1992, fn. 5). Social psychological and experimental results on courts and legitimacy (e.g. Gibson 1989; Mondak 1991, 1994; Tyler and Rasinski 1991; Tyler and Mitchell 1994; Baird 2001; see also Murphy, Tanenhaus, and Kastner 1973; Tanenhaus and Murphy 1981) raise the tantalizing possibility of such a link although political scientists have refocused their efforts on measures of diffuse support to consider how the general population views constitutional courts (e.g. Caldeira 1986; Caldeira and Gibson 1992, 1995; Gibson, Caldeira, and Baird 1998). According to Easton (1965*a*, 273; see Caldeira and Gibson 1992, 637), diffuse support can be characterized as a 'reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants.' Such support is more amorphous; for empirical research, it has often been translated and operationalized as 'trust' (e.g. Tyler 1998), 'satisfaction' (e.g. Tyler and Mitchell 1994), or 'institutional commitment' (e.g. Caldeira and Gibson 1992, 638). Interestingly, these measures of diffuse support often implicitly or explicitly conflate it with legitimacy. Nonetheless, the idea of court-sanctioned regime change is also not well supported by this more capacious notion of diffuse support. For example, Caldeira and Gibson (1992, 636) 'find no connection between support for specific policies and diffuse support for the Supreme Court. Instead, broad political values—commitment to social order and support for democratic norms—do a good job of predicting attitudes toward the Supreme Court.'

As it currently stands, we are left with the fact that public opinion data appears either unable to support the idea of court-sanctioned regime change or, more likely, unable to measure effectively the complex individual and social mechanisms the concept is meant to capture (e.g. Bourdieu 1990, 125). Contemporary

research has addressed some of these persistent dilemmas by shifting the conceptual framing. In this work, the importance of the constitutional court in regime change, and in general, is explored through studies of the role of law and courts in daily lives of ordinary citizens rather than surveys of support for particular policies or institutions at specific times. Recent scholarship also shows that the public's apprehension and evaluation of issues and institutions can be, and often is, shaped by circulating cultural tropes and metaphors, as well as popular media and 'opinion leaders.' From more recent studies of the role of law in everyday life, we can begin to craft an alternative construction of regime change based upon legal consciousness. This concept offers the means to recognize the relationship among and shifts within popular understandings of law, courts, and regime change.

3 LEGAL CONSCIOUSNESS: DIFFUSE, DYNAMIC, AND SUBVERSIVE

The phrase, legal consciousness, is in many ways a misnomer because it mistakenly suggests that the concept concerns individuals and individual minds. Unlike research on persons' attitudes about partisan choices, policy issues, or other political preferences, research on legal consciousness does not document primarily what people think about the law 'but rather *how what they think and do coalesces* into a recognizable, durable phenomena and institution we recognize as the law' (Silbey 2005, 347 *our emphasis*). Studies of legal consciousness seek to trace the meaning and power of law, not in the acts and decisions of constitutional courts, but in the acts and decisions of ordinary citizens and official legal agents as they go about their work and lives. Ewick and Silbey argue that the rule of law is 'an emergent feature of social relations rather than an external apparatus acting upon social life. As a constituent of social interactions, the law—or what [they] call legality—embodies the diversity of the situations out of which it emerges and that it helps structure' (1998, 17). Thus legality, as a structure of social action, includes decisions to drive on the right side of the road in the U.S. but on the left in Australia and Japan, to threaten litigation when a neighbor's dog overturns one's garbage, to file workmen's compensation and disability claims when injured on the job, to exchange drivers' licenses and auto registration documents when in an accident, to seek a patent for an invention, to write a will in order to transfer property to charities after death, to complain about litigious citizens, to watch Court TV, as well as myriad decisions by administrative agencies, local magistrates, state or federal legislatures and the U.S. Supreme Court.

In studies of legal consciousness, individuals and their varied social interactions are key elements constituting the power and legitimacy of legal institutions. Persons are not, however, conceived of as carriers of specifically targeted opinions and political directives for representative government, but rather as agents of legal continuity, change, and legitimacy as they perpetuate, invent, or resist cultural tropes, concepts, and interpretations that invoke political and legal associations. In every social interaction, individuals are behavioral and cognitive participants in the social production (and reproduction) of cultural schemas; people's verbal and corporeal expressions reinforce incrementally, transform existing, or begin the process of inventing and accepting new schema. In concert with others, people implicitly construct or reconstruct everyday in multiple arenas and in multiple, often contradictory, forms the meanings we attribute to law, rules, power, and authority. Yet, few of these transactions or meanings are exclusively legal, or political.

In this account, 'legal consciousness... consists of mobilizing, inventing, and amending pieces of these schemas' that refer to law and legality (Silbey 2005, 349). Since the construction and transmission of legal consciousness occur through myriad social transactions, many of which may not appear at first to have anything to do with law, individuals' thoughts and behavior are relevant only when aggregated and circulated through common or shared social meanings. 'Law and legality achieve their recognizable character as 'the rule of law', despite the diversity of constituent actions and experiences... because individual transactions are crafted out of a limited array of generally available cultural schemas. These few but generally circulating schemas are not themselves fixed or immutable, but are also constantly in the making through local invocations and inventions' (Silbey 2005, 347 referencing Ewick and Silbey 1998).

The concept of legal consciousness offers conceptual and theoretical advantages to the analysis of the relationships among regime change, public opinion and legitimacy. Unlike surveys of public opinion surveys, studies of legal consciousness do not focus on exclusively legal or political expression to understand legal authority and legitimacy. In other words, they do not focus so closely to the surface of what is to be explained, or rely entirely on what is explicitly articulated and self-conscious. Instead, research on legal consciousness (e.g., Bumiller 1988; Fleury-Steiner 2003; Fleury-Steiner and Nielsen 2006; Greenhouse 1986; Hoffman, 2003, 2005; Hull 2003; Larson 2004; Marshall 2003, 2005; McCann 1994; Merry 1990; Nielsen 2000, 2002, 2004; Pelisse 2004; Sarat 1990; Yngvesson 1993) proposes that propagation and perpetuation of cultural schemas are so embedded in everyday social transactions that individuals often fail to appreciate the normally seamless diffusion through each and every social exchange. 'Law is powerful, and rules everyday life because its constructions are uncontroversial and have become normalized and habitual. Law's mediations have been sedimented throughout the routines of daily living, helping to make things move around in more or less

clear ways, without having to invoke, display, or wield its elaborate and intricate procedures, especially its ultimate, physical force' (Silbey 2005). Thus, we defer to traffic lights, wear seat belts, read warning labels on appliances, and follow instructions on pharmaceutical products. These legally-mandated communications are so routinized that we no longer recall the struggles that produced the specific legal regulations and the required language. Although there are may be some who still see each one of these as a sign of a continuing political battle, the legal content is usually buried within concerns about health, safety, or prudence.

The gradual or incremental transformation of meanings and the status associated with an activity, such as where or how to drive a car, or a group, such as lesbians or African Americans, may occur without individual or collective awareness of the scope of the transition until after new signs and new norms have overtly emerged and are openly contested culturally and politically. The slow emergence of modifications in cultural schemas through everyday social exchange may help to explain why it is often impossible for survey research that asks a direct question about support for specific policies to effectively capture the comprehensive nature of a transition in an individual's understanding. Individuals may not recognize the extent to which their interpretive schemas have been reconfigured because the shifts occur through myriad conventional, unusually unproblematic and unreflective transactions. The taken-for-granted norms of everyday transactions reinforce the correctness and legitimacy of the new position at each stage of the process and, as individuals engage in social exchange, they are complicitous, without planning or intention, in fostering sociocultural changes. Because law's 'meanings and uses echo and resonate with other common phenomena' (Ewick and Silbey 1998, 17) through shared words and metaphors (Lakoff and Johnson 1980), legality is often only one among many institutional beneficiaries of the schema that comprise social transactions, making it particularly difficult to recognize gradual transitions in interpretations relevant to assessments of a specific institution or policy or law. Thus, the survey researchers' efforts to locate specific and measurable attitudes about particular issues fail to capture the extent to which individuals may have collectively transformed their understanding of the acceptability of the current rules.

This disjuncture between articulated opinions of individuals and collective cultural shifts may explain why some social movements often appear to burst onto the public scene without any apparent prelude. For their part, surveys usually begin to record the articulated attitudes of individuals only when policy issues are already politically contested or, even at the time when constitutional courts are already engaged in regime change. For example, the Gallup poll did not ask a question about the legalization of same-sex marriage until March 1996, when a state court ruling in Hawaii was imminent (*Baehr v. Miike*, 1996 WL 694235, 1996)—five years after the case was filed (Eskridge 2002), three years after the Hawaii Supreme Court first commented on the issue (in *Baehr v. Lewin*, 852 P.2d 44,

1993), and twenty-five years after the first cases were filed on this same issue in state courts (Barclay and Fisher 2006). In this example, the circulation and aggregation of the new interlaced meanings of marriage, romantic commitment, sex, sexuality, state action, and privacy seemed to have long preceded the recognition of these transformations in survey measures of public attitudes. This is evidenced in the fact that lesbian and gay relationships began to be socially acknowledged prior to any changes in legal status of these relationships (e.g. Hull 2003).

The method of cognitive/cultural diffusion inherent in legal consciousness—through ordinary, everyday social transactions—also allows us to understand the means by which the status and legitimacy of an idea can be transformed while the political power of an opposing group may remain dominant and effective. The transformation of old narratives and the invention of new schema through everyday transactions undermines the social power of some groups, and supports the growing power of challenging groups. Eventually, the growing influence of the challenging group may aggregate at the cultural level to underwrite a transition in the current rules. Very importantly, the process of inventing and accepting new schema incrementally through ordinary exchange, media, and habit means that social norms and expectations may be transformed even as rules, formal laws, and officers continue to support exercises of power in a contrary direction. Legality as enacted and propagated through social transaction need only be loosely tied to the position of formal law and it may directly challenge it (Ewick and Silbey 1998, 2003). In fact, the strongest statements of formal law may occur at points where there is overt contestation over the existing policy because social norms and legal rules are no longer consonant. The decay in norms, and the failure of formerly accepted actions and ideas to be conventionally reproduced brings into prominence the power inherent in legal authority and action. As the current political configuration tries to reassert the authority of these decaying norms, the disjuncture among political, legal authority and cultural norms becomes explicit.

This scenario is the setting for regime change: a portion of the population no longer enacts the current rules even as the current political configuration presses for enforcement of those rules. The subsequent change in rules in a regime change is an indication or prediction of the impending transition in political power to a new configuration representing the emerging social consensus. Similarly, the push for change in a few key policy areas is just one means of signaling that the transition is underway to new social understanding of a previously outlawed activity or previously marginalized group. Desegregation of educational facilities and the prohibition of laws restricting interracial marriage, for example, represented a recognition that a new approach to race had already catalyzed in popular legal consciousness.

Once we conceptualize legal consciousness as participation in the construction of schemas concerning law and legal institutions, we can also understand what has often been interpreted in survey research as inconsistent and contradictory among

the mass populace and between mass and elite public opinion. Consider for example Caldeira and Gibson's (1992) study in which they note a divergence between members of the general public and 'opinion leaders' in the etiology of support for the Supreme Court. The mass public does not condition its support, Caldeira and Gibson suggest, on the Court's satisfaction of their policy or ideological preferences; but opinion leaders' support seems to rest on congruence in policy and principle. In their data, one is more likely to find that mass opinion may not be aligned with a regime change while the populace still voices support for the Court: elite support is conditioned on the extent of ideological agreement, eliminating the vexing disjuncture between the regime changes and mass public opinion.

The discussion of hegemony in the research on legal consciousness also helps explain Caldeira and Gibson's findings that elite opinion leaders have more informed, consistent, and ideologically nuanced understandings of institutions and issues and condition their support on the basis of these views, while the mass public does not condition its support for the court on the basis of policy agreements. The concept of hegemony is, Silbey (1998, 287) writes, 'to refer to those circumstances where representations and social constructions are so embedded' in normal social transactions and culture 'as to be almost invisible.' Research on legal consciousness emerged in the 1980s and 1990s specifically to explain the willingness of citizens in representative democracies to support legal institutions that did not seem to live up to their announced ambitions of equal justice, nor reliably support the self-articulated interests of the mass public, just those dilemmas Caldeira and Gibson's research identified. The analytic concept of hegemony helps scholars to describe the ways in which popular and elite opinion may vary, and the mechanisms in popular culture that sustain these systematic differences.

In the legal consciousness literature, the term hegemony is used to refer to situations where 'both the sources of power and the forms of subordination are buried. In these transactions, no one seems to be demanding obedience, and subordinate parties appear to be normally socialized rather than compliant. . . . Social actors are thus constrained without knowing from where or whom the constraint derives' (Ewick and Silbey 2003; cf. Ewick and Silbey 1995; Silbey 1998; Haltom and McCann 2004; Silbey 2005). In this research, power is enacted when some actors are able to shape the schemas and narratives that relatively powerless individuals subsequently help to perpetuate. The degree of power that can be exercised in the construction and diffusion of narratives within cultural schema is rarely total and most often contested, but it may nevertheless extend to the potential for cultural hegemony. In the literature on legal consciousness, hegemony is evidenced in an absence: in 'struggles that are no longer active, where power is dispersed through social structures and meanings are so embedded that representational and institutional struggles are no longer visible' (Silbey 2005, 333).

What Pierson (2000, 252) calls path dependence, 'the causal relevance of preceding stages in a temporal sequence,' may also help us to understand the

hegemonic potential of common cultural schemas and legal narratives. The framing, invocation, and alteration of narratives and cultural schemas are shaped by prior social understandings and currently accepted norms. Opinion leaders adjust their actions, representations, and metaphors to fit within recognized cultural schema and diffuse new narratives in response to old criteria (see Strathern 2005, Lakoff and Johnson 1980).² These paths allow the purposeful reproduction of political and cultural frames over extended periods, which marginalize certain groups and/or denigrate certain ideas to the advantage of others. But, those same invocations also structure resistance to this marginalization. 'Since power is exercised through the patterned distribution of resources and schemas, if there is resistance to this power it must also operate through the appropriation of these selfsame structures' (Ewick and Silbey 2003, 1335; 1995).

Finally, adopting the lens of legal consciousness to understand regime change unites the mechanisms of change and legitimacy, the critical link lacking in public opinion survey measures of popular legal knowledge and institutional legitimacy. That legal consciousness is embedded in and reproduced by everyday social interactions—many of which have nothing to do with law or political institutions—is an important source of its ability to legitimate news stories and other political reports, especially those consistent with existing cultural schema. As noted, the correctness or rightness of a view is reaffirmed with every repetition in each new social interaction. But, recognizing the pervasive, overlapping, non-exclusive content of commonplace cultural schemas in legal consciousness should not lead us to discount the role of the law and legality in processes of legitimation. The privileged role of law and legality in constructing social meaning (Smart 1989; Comaroff and Comaroff 1991; Ewick and Silbey 1995) and its implicit or explicit structuring of so many of social interactions, enables legal institutions to use rules, laws, and social norms to move between old and new political configurations.

4 CONCLUSION

Beginning with a classic account of the role of the Supreme Court in American politics, we have tried to show how the institutional authority of the Court is better understood when approached through a theory of legal consciousness. This effort to synthesize heretofore divergent literatures—models of court-legitimated regime change, surveys of public opinion, empirical studies of legal consciousness—suggests theoretical and empirical routes for future research.

² As Strathern (2005: 67) writes, analogies are not relations of cause and effect. Concepts do not procreate. People carry them across domains, often because there is some argument to pursue.

We urge greater attention to pragmatism's theories of action and what sometimes is called theories of practice (Dewey 1957 [1922], 1929; Goffman 1967; Bourdieu 1977; Giddens 1979, 1986; Connell 1987; Sewell 1992; Emirbayer 1997, 287). For nearly two centuries, social theorists have debated the mechanisms of social cohesion and change. Too often the discussion has focused on methodological techniques, mistakenly dividing scholars by mode of data collection (quantitative versus qualitative; surveys versus interviews or observation), slighting both important theoretical distinctions and the grounds of conceptual convergence. The desire to collect reliable and valid information about human action may have too quickly sacrificed the essential question: what constitutes the social (Latour 2005). Research on legal consciousness has attempted to contribute to these fundamental questions by focusing on the mechanisms by which action is always transactional, never the possession, product, or indicator of an individual alone, and always part of an ongoing assembly, of slow accretion, sedimentation, and institutionalization of memes, transactional practices, and organizational forms experienced collectively as social institutions, such as the family, a court, or the rule of law. Importantly, the mechanisms of aggregation, coagulation, or what Latour (2005) calls reassembling, are neither simply additive nor multiplicative. These mechanisms do not impose an intellectual's model of mind where command of information creates status and contradiction is discrediting, and where being human is understood primarily in intellectuals' terms. Research on legal consciousness neither assumes a rational actor nor sets it as a standard. Nor does the literature we have been reviewing assume the premises and virtues of representative democracy as institutionalized within a particular governmental structure or regime. Rather, we understand action as part of temporally unfolding sequences of perception and impulse, mediated by habit and yet enabling imaginative revision or intelligence. As Dewey wrote, 'present' activity is not a sharp knife-blade in time. The present is complex, containing within itself a multitude of habits and impulses' (Dewey 1957 [1922], 281). More productive analyses of the citizen's participation in constructing institutional legitimacy and regime change would draw from this rich pool of theoretical insight, eschewing the narrowly conceived models of mind and action that have proved less than fruitful in advancing institutional understanding and have been so difficult to reconcile theoretically. Instead, we should build our analyses of law and legal institutions with the recognition that they are forever in the making, using what is at hand, revisable and sometimes unexpected, yet also comfortably familiar and habituated.

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