Supreme Court doctrine changes constantly: each year, a new set of legal rulings reshape existing precedent. Yet while change is constant, the dynamics of that change are less clear. In other political institutions both domestic and foreign, scholars have found increasingly robust evidence that policy change follows a pattern of punctuated equilibrium (PE) (Jones, et al. 2003, Pierson 2004, Baumgartner and Jones 2009). In PE distributions, a combination of limitations in information processing and “friction” caused by institutional design maintain the status quo. At infrequent intervals, however, shifts in issue salience, personnel, or policy-making venues lead to rapid policy change, or policy “punctuations” (Baumgartner and Jones 2009).

Yet while multiple studies have examined PE processes in the legislative and executive context, there has been little examination of how PE might apply to the legal policy change generated by the Supreme Court. There is no obvious theoretical reason for this exclusion, as Supreme Court doctrine is commonly understood to have undergone infrequent, revolutionary transformations, such as the move to support the administrative state in the 1940s or the incorporation of the Bill of Rights against the states in the 1960s. Moreover, the Court possesses institutional characteristics—such as a finite docket, effective life tenure, and adherence to *stare decisis*—that create limits on information processing and institutional friction similar to those that drive PE dynamics in other policy areas (Baumgartner and Jones 2009).

The lack of attention paid to legal policy change at the Supreme Court and other courts, then, is likely the result of poor proxies for measuring that change, rather than a poor theoretical fit between legal policy change and PE theory. This paper addresses that gap by providing systematic evidence that legal policy change—as gauged by a proxy measure which examines shifts in which precedents the Supreme Court most frequently uses to resolve legal disputes—contains PE dynamics. Specifically, I leverage James Fowler’s network rankings of Supreme
Court decisions (Fowler, et al. 2007) to develop a measure I call “precedential instability,” an annual, aggregate measure of the rank-change in the legal importance of all decisions in each term. I then apply a stochastic process analysis to 150 years of instability scores, finding strong evidence that the rank-changes at the center of the precedential network follow PE dynamics. Finally, I more closely examine the largest peaks in the instability scores, which take place during three periods: 1880-1900, 1930-1950, and 1960-1980. This examination uncovers three potential mechanisms for these punctuations. Two of the three punctuations are marked by significant changes in the issue area of the most cited cases, a finding emblematic of agenda changes noted elsewhere in PE scholarship (Baumgartner and Jones 2009). These peaks also follow changes in Supreme Court personnel which significantly shifted the ideological location of the median justice. Finally, I uncover evidence that these peaks may result from venue shifting (Pralle 2003). Specifically, I find that the changes in each peak can be characterized by the dominant political party’s attempt to constitutionalize policy—such as the Republican Party’s attempt to support economic nationalism in the 1880s (Gillman 2002) or the Warren Court’s use of legal policy changes to bring state outliers into line with liberal constitutional norms. Taken together, these findings suggest that legal policy generated by the Supreme Court is indeed subject to PE dynamics, and point towards fruitful avenues for future research.

**Punctuated Equilibrium and Supreme Court Decisions**

PE, speaking broadly, describes a process where most changes are incremental but some are dramatic (Jones, et al. 2003). In evolutionary biology, PE theory was developed to supplant a theory of gradual evolution among species, which scientists increasingly felt did not adequately fit the fossil record and other empirical evidence. Instead, Eldredge and Gould argued that a
theory which held that change was generally slow but sometimes rapid better fit the data (Eldredge and Gould 1972).\(^1\) As is often the case, this theory was appropriated by political science and policy studies and translated into social science terms—initially by Baumgartner and Jones—as a theory where public policy changes are normally incremental, occasionally large, and rarely mid-level (Baumgartner and Jones 2009). PE theory has proven to be broadly applicable, with empirical investigations uncovering leptokurtic distributions for multiple measures of policy change in multiple policy areas. Aside from numerous studies of policy subsystems, such as the rapid fall of the Atomic Energy Coalition’s ability to control nuclear policy (Baumgartner and Jones 1991), PE theory is also consonant with the rate of change in institutional outputs such as state budget outlays, the rate of executive orders, and the annual number of statutes passed (Jones, et al. 2003, Breunig and Koski 2006, Baumgartner and Jones 2009).

However, there has been little application of PE theory to the legal policy created by the courts. Are the dynamics of legal policy change subject to PE? I believe so, and in this paper I make both a theoretical and empirical case that such dynamics are in play for the legal policy change generated by the Supreme Court. While legal policy change at the Court may not be perfectly representative of other federal or state courts, it remains a logical place to start given its substantive importance and superiority in terms of prior scholarly attention and data collection.

In this section, I argue that there are good reasons to expect legal policy change generated by courts to contain PE dynamics. To begin, there are well-known mechanisms thought to drive PE outcomes that could reasonably apply to legal policy change on the Court. The first mechanism involves shifts in attention that lead to agenda change and thus changes in policy

\(^1\) Clearly, this brief description papers over a complex literature.
outcomes. In their more recent scholarship, Baumgartner and Jones have argued that such shifts are the result of disproportionate information-processing, in which bounded rationality and an inability to deal with issues in parallel rather than serial fashion means that problems do not always receive the attention they merit (Jones and Baumgartner 2005). When these problems are addressed, the prior under-reaction to the severity of the problem may then be replaced by overreaction. The PE literature refers to these rarer periods as cascades, contagion, positive feedback, or increasing returns (Hathaway 2001, Johnson 2003, True, et al. 2007). In contrast to the standard understanding of equilibria, in which additional change faces negative feedback, positive feedback describes a period where future significant changes become temporarily more, rather than less, likely.

While the information processing theory suggests PE processes are endemic to policymaking, the depth and frequency of punctuation can be exacerbated by institutional design. Institutions make policy-making “sticky” by requiring additional coordination and bargaining among policy-makers, by raising the likelihood of shirking or principal-agent problems that create compliance costs, and even by creating cognitive costs, in which members of the institution are focused on the status quo and have a harder time “knowing what they need to know” (Jones and Baumgartner 2005). Baumgartner and Jones refer to the tendency of institutions to exacerbate PE dynamics as “friction,” in the sense that they make it harder to translate problem signals, or policy inputs, into proportionate outputs, or policy responses. (145) PE scholars sometimes analogize such friction to plate tectonics, where pressure builds as large portions of the earth’s crust push against one another until they “slip,” creating an earthquake (Jones, et al. 2003). Institutional friction can also generate positive feedback: once political actors overcome critical thresholds (such as a filibuster-proof Senate majority), or perhaps
change the institution itself, additional punctuations become likely. To use one nicely coined phrase, such periods are when “the contagion of urgency overcomes the friction of order [emphasis original] (Jones, et al. 2009).”

A closer examination of the Supreme Court’s design illustrates the applicability of both agenda-setting and overcoming friction as sources of punctuation. In what follows, I address aspects of the Court that support the application of each, as well as factors that suggest legal policy change is governed by positive feedback.

Agenda Change and Attention Shifts

Like most policymaking institutions, the Supreme Court possesses significant agenda-setting powers. Since the Judiciary Act of 1925—and to a much lesser extent since the Supreme Court Cases Selection Act of 1988—Congress has given the Court effective control over which cases it places on its docket. This autonomy is enhanced by the Court’s insulation from electoral pressures, making it relatively easier for it to ignore demands from interested parties that specific issues be addressed.

However, the Court’s agenda-setting powers remain subject to factors that focus attention on the status quo. First, the Court’s agenda-setting votes require support from four or more justices. This creates a threshold effect where legal problems which three or fewer justices wish to address are ignored. Second, the Court can only hear so many disputes and write so many opinions before its output begins to suffer in quality. Though the range of cases the Court takes in a given year has fluctuated over time, there is a fairly low hard limit of legal policy problems it can address in a given term. Such constraints likely limit the Court’s attention. Third, while granting that the Court has the autonomy to hear or refuse to hear any case in its universe of
appeals, studies show that the justices act as if they believe there are certain problems—such conflicts among the different federal appellate circuits—in which their legal obligation to take certain cases trumps their policy preferences (Black and Owens 2009). This obligation recreates a loose “mandatory appeals” dynamic that may limit the attention of a Court which might otherwise construct its docket differently (though as I will note later, this expectation may actually encourage punctuation if extraordinary public pressure to address a new issue arises).

Fourth, the Court remains a reactive institution, one that has autonomy over the cases it chooses but little power over the creation of the larger pool of decisions from which it selects. Federal courts are limited by Article III’s requirement that the judicial power be limited to “cases and controversies,” or the confines of a concrete legal dispute. By refusing to grant the federal courts a wide-ranging ability to issue opinions on the controversies of the day—a power currently held by the Constitutional Courts of some other nations—the Founding Fathers limited the scope of the Court’s agenda-setting powers. Instead, the Court depends on other actors to bring cases before it. The fact that a locality violates the 14th Amendment’s Equal Protection Clause matters little unless someone directly affected by that violation chooses to bring forward a lawsuit. Unlike Congress, the Court cannot hold hearings or quickly move to a legal policy problem simply because it wishes to do so. At best, it can signal to interest groups and other parties that it might rule in their favor should they bring forward a particular legal conflict (Baird 2007). Given its passive status, the Court is encouraged to focus its attention on the issues before it. This too contributes to stasis.

Finally, the Court’s agenda is constrained by shared understandings of the prior scope of legal traditions and norms regarding its proper role, as well as Constitutional and statutory text. In contrast with Congress, the Court plays a limited role in whether the nation should go to war,
how it should set tax or interest rates, craft environmental policy, trade with other nations, and so on. During the Warren Court, for example, liberal justices rejected calls to create a right to a minimum income, both because such a policy would be far outside the constitutional text and because it was too stark a departure from Anglo-American legal traditions (Bussiere 1999).

None of these forces are insuperable. The size of the docket, standards for justiciability, the understanding of what constitutes an appropriate problem for the Court to address, and what cases the Court is “expected” to take are “sticky” guidelines that can be overcome with sufficient changes in attention or personnel, or in the wake of determined efforts by outside forces to shift a policy venue to a sympathetic Court. All of them, however, contribute to stasis by encouraging the Court to focus its attention on a commonly accepted domain of problems, discouraging broad shifts to new legal policy issue areas.

*Institutional Friction*

PE scholars have also noted how institutions raise the costs of policy-making—sometimes being designed to do so—and make it more difficult to act on perceived policy needs. Essentially, as institutions become “stickier” and create more friction, the PE dynamic deepens, with punctuations becoming both rarer and more significant when they occur. A political system marked by checks and balances and federalism, then, would have more friction than a simple majoritarian democracy (Jones, et al. 2003). Comparing the friction generated by specific courts and court systems with other political institutions is difficult, given that they have different roles and norms, solve different problems, and do not share common metrics of policy production (e.g. budget outlays). However, it is a straightforward task to identify features of the Supreme Court’s institutional design that might lead to friction, standing alone.
First, the creation of binding precedent requires support from a minimum winning coalition (MWC) of justices, normally five out of nine. This requirement creates a threshold model where significant legal change becomes possible only when such a coalition coalesces. Second and relatedly, Supreme Court justices serve for life (assuming good behavior). If one assumes that personnel change drives policy change, we would expect the relatively low turnover on the Court to create friction. A particular MWC might continue for years after the president who created it is gone, or even after the party or partisan regime whose ideas it supports has been sent into the political wilderness. The very concept of “entrenchment”—in which political parties use the Court to remove policy debates from the electoral arena (Gillman 2002)—demonstrates that the Court is not a place for the efficient translation of pluralist inputs into doctrinal change. Justices, of course, may change their minds over time (Epstein, et al. 2007), but most remain fairly stable in their legal policy preferences over the years. The stability of those coalitions may frustrate those who would engage in venue-switching, as there is little point, for example, in a liberal interest group attempting to use the current Supreme Court to strengthen campaign finance laws.

Additionally, the need to maintain a MWC also means that justices must sometimes engage in extensive bargaining in order to build a majority, leading to strategic costs (Maltzman and Wahlbeck 1996, Wahlbeck, et al. 1998). Similarly, the need to build a MWC may dilute and complicate the legal rules and tests the Court creates to ensure compliance (Schwartz 1992). If Justice Roberts wishes to gain the vote of Justice Kennedy, for example, he may need to write a more ambiguous legal rule to secure that support. This practice can reduce the legal importance and impact of court decisions in the future (Staudt, et al. 2007), and increase compliance costs by creating uncertainty about what the Court actually requires.
The Supreme Court also lacks sufficient institutional capacity to ensure compliance with its rulings. As famously noted by Alexander Hamilton in “Federalist #78,” “The judiciary… has no influence over either the sword or the purse; [i]t may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments” (Hamilton 1966). This constraint leads to two results. First, even if a majority of the Court desires to make significant legal policy changes, their decision may have a more limited impact when they are opposed by the executive or legislative branches, or states and localities (Rosenberg 1993), leading to stasis. Second, in some cases, fear of compliance may cause the Court to dilute its rulings, such as in Brown v. Board of Education II (1955), when the Court adopted “with all deliberate speed” as its timeline for the implementation of desegregation rather than a more forceful standard.

Next, the process by which the Court incorporates evidence—particularly empirical evidence—into its decisions is both haphazard and highly dependent on the litigants or amicus briefs (Faigman 1999), raising information costs. As Faigman writes, the Constitution in particular can be viewed as a framework of principles and aspirations that are “filled in” by contemporary knowledge. When considering whether to overturn a prior ruling, for example, the Court might want to know what the empirical consequences of that precedent have been (e.g. Casey v. Planned Parenthood, 1992). Unlike most other institutions, however, the Court lacks substantial capacity to seek out or summon additional information that might help it resolve legal problems before it. As a result, new information about the world that has relevance for adjudication—what some legal scholars call social facts (Kahn 2006)—might be incorporated into decision-making much more slowly and unevenly than the severity of the problem would dictate. Not all issues before the Court require outside information, of course, but for those that
do, the cost of comprehending empirical knowledge about legal policy, of learning what one needs to know, may contribute to friction.

Finally, *stare decisis* itself is a source of institutional friction. Precedent creates path-dependencies that shape what questions litigants bring forward, and serves as a legitimizing force that limits unfettered ideological behavior by the justices (Hansford and Spriggs II 2006). Even though precedent rarely “constrains” judicial decisions in the sorts of contested and complex cases that reach the Supreme Court, it may tell the justices how much weight to assign to particular facts (Richards and Kritzer 2002) or structure legal analysis and weaken the impact of individual policy preferences (Bartels 2009). Reliance on precedent also decreases legal uncertainty for litigants and reduces judicial workload, which would be unmanageable if every decision of the Supreme Court was *sui generis* (Hathaway 2001). Though even landmark precedents can be overcome at the hands of a determined MWC, *stare decisis* does exert a gravitational pull on the process of legal policy change, contributing to stasis.

*Positive Feedback*

The Court thus has institutional features which increase the likelihood of stasis and incremental change. Does it also have features that might contribute to positive feedback? Here I reference three such factors. First, the same MWC requirement which limits significant legal policy shifts can encourage dramatic doctrinal change once a like-minded majority is in place. To be more precise, judicial replacements that lead to significant shifts in the ideological location of the median justice may upset the status quo favored by the prior MWC. This theory of “critical nominations” echoes the well-known observation by Justice Brennan that “with five
votes you can do anything around here” (Hentoff 1990), and serves as the judicial analog to the landmark election results sometimes thought to drive policy punctuation in Congress.

A second institutional feature which may lead to positive feedback is the interconnectedness of precedent. A single landmark decision may have downstream effects on legal issues well beyond the case at hand, its legal rules fitting uneasily with prior decisions and creating a dissonance that requires additional decisions to resolve. For example, in Romer v. Evans (1996) the Court ruled that animus against an unprotected class (here homosexuals) was an unconstitutional legislative justification, even under the normally deferential test of rational basis review. This reasoning did not fit easily with prior decisions regarding the criminalization of sodomy, and thus became a central component of the Court’s decision to strike down anti-sodomy laws and overturn prior precedent in Lawrence v. Texas (2003).

Third, legal policy punctuations may lead to venue shopping by interest groups who seek to expand the new doctrine (Tushnet 1999), bringing appropriate cases before the Court to do so. Given how ideology can structure legal policy preferences along common lines, interest groups might reasonably assume that a Supreme Court suddenly willing to issue a liberal landmark decision in one legal area might do so in other, related areas. Such a decision may also signal that a previously nonjusticiable legal problem is now appropriate for judicial determination, creating additional opportunities for venue shopping by interest groups who have struggled to succeed elsewhere. If they are correct, additional legal policy punctuations may create a cascade effect. Once the period of positive feedback subsides, of course, these same interest groups will work to defend these changes, contributing to future stasis (Tushnet 1999.)

Given these considerations, I believe there is ample reason to support a prima facie case that legal policy change created by the Supreme Court is subject to PE. I now turn to the
empirical case, examining whether the distribution of legal policy change fits what we would expect to find if PE dynamics were present.

**Conceptualizing and Measuring Legal Policy Change**

Stochastic process analyses allow scholars to examine the moments of particular distributions as a way of better understanding the data and the processes that might generate that data. Such analyses, however, require valid and reliable measures of policy change. Changes in the budget priorities of legislative bodies, for example, can be measured by examining budget allocations. Assessing aggregate changes in the Supreme Court’s legal policy, by contrast, is considerably more difficult. We cannot yet systematically measure the text of the opinions themselves.\(^2\) Similarly, direct assessments of the rate of legal policy change in the wider world across time and multiple policy areas is implausible, given the immense amount of data and the difficulties in measurement.

Faced with these obstacles, scholars have understandably focused on proxy measures of legal policy change, such as the rate at which the Court exercises judicial review or overturns its own precedents. In recent years, the rise of the attitudinal model (Segal and Spaeth 2002) and the creation of the Supreme Court Database (Spaeth, et al. 2012) have also permitted scholars to employ ideological changes in decision patterns as proxy measures of legal policy change. Each of these three measures, however, contains limitations that question its suitability for a stochastic

\(^2\) One promising study along these lines places the opinion text itself in ideological space, using the ideological position of the cases it cites to do so (Clark and Lauderdale 2010). At present, however, this measure has only been developed for two legal areas, does not well track non-ideological change, and is left-censored at the start of the Warren Court era.
process analysis. First, periods of rapid legal policy change may indeed correlate with higher rates of judicial review. However, the frequency of overruled statutes may relate as much to the growth of judicial supremacy and the absolute number of statutes passed as it does to the rate of legal change per se. Moreover, this measure assumes comparability for any particular act of judicial review, which seems dubious given that laws differ considerably in their importance. Overturning precedent is a better proxy measure, given that change in what precedents and rules the Court itself deems valid is a primary mechanism by which legal policy is shaped. Importantly, however, the Court often chooses to limit or qualify previous cases rather than overturn them, meaning that measuring only formal alterations of precedent would ignore a great deal of information. Moreover, overturning precedent is a rare event, making analysis of its distribution difficult.

Using changes in the ideological direction of decision outcomes is the best of the three, as these shifts clearly capture some important dimension of legal policy change. Still, this measure is too limited. First, it treats ideological labels as constants, rather than markers whose content may change over time. While there is good evidence that post-New Deal Court decisions can be aligned along a single ideological preference dimension (Poole 2003), there is no reason to expect this holds true for earlier eras. Second, variables based on decision direction rely on the Supreme Court Database, which at present goes no further back in history than the 1840s. Third, though legal policy change is almost certainly affected by ideological shifts, ideological change remains only one aspect of such change. In particular, ideological measures might miss agenda shifts that take place within a period of liberal or conservative dominance. Fourth and finally, using the direction of judicial votes as a proxy for content again violates comparability, as some
votes—and the changes in doctrine or issues they represent—are clearly more important than others.

In this paper, I employ a new proxy measure of legal policy change, one capable of capturing both ideological and agenda shifts. Specifically, I create an aggregate, annual measure of changes in what precedents the Supreme Court is most likely to cite. While we cannot systematically measure legal policy changes that occur as a result of Supreme Court opinions, we can use citation patterns to measure changes in the relative importance accorded to particular precedents. In the United States, judge-made rules and opinions play a predominant role in shaping legal policy. In these opinions, Supreme Court justices rely in great part upon the citation of precedent to legitimate their decisions (Hansford and Spriggs II 2006, Cross, et al. 2010) and indicate the contours of legal policy to interested policy actors. Given that Supreme Court decisions are normally classified under a single issue area (Spaeth, et al. 2012), punctuated shifts in citation patterns would demonstrate that the Court is paying attention to a new set of salient issues, has embarked on a new ideological course within a particular doctrinal area, or both. This ability to approximate shifts in both agenda and ideology is one of the measure’s strengths.

If punctuated dynamics are in effect, the precedential network should be relatively stable in most terms, with roughly the same cases or issue areas garnering the greatest share of citations in each term. Changes in citation patterns would be incremental, shifting slightly to account for

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3 To be sure, there is a gap between doctrinal change and actual policy change (Rosenberg 1993); citations remain a proxy, rather than a direct measure of legal change. More recent work on the impact of legal decisions, however, suggests that this gap is overstated (Keck 2009, Swedlow 2009, Hall 2010).
the specific issues on the docket. However, PE theory also predicts periods of time when dramatic changes occur, with significant shifts in which cases are most often cited. This may occur either because older precedents become newly salient to contemporary legal disputes, or because recent landmark decisions become established as central components in a new legal regime. Punctuations in citation patterns should therefore mirror legal policy punctuations, albeit with some variable degree of lag.

To generate a measure of changes in citation patterns, I rely on a recently completed network analysis of Supreme Court decisions (Fowler, et al. 2007, Fowler and Jeon 2008). Fowler’s metrics treat Supreme Court decisions as nodes in a network, and case citations as links between those nodes. Using simultaneous estimation, Fowler and his co-authors generate outward and inward relevance scores for each Supreme Court case in each term between 1791 and 2005. Outward relevance ranks cases according to how many other cases they themselves cite (while accounting for the inward relevance of the cases cited), while inward relevance ranks cases according to how many future cases cite them (while accounting for the outward relevance of the citing cases). Fowler’s inward relevance scores are thus well suited to assessing the legal relevance of particular precedents over time.

Both articles use the same method for creating their rankings, but they use different sets of Supreme Court rulings to construct their networks. Given that the 2008 data contains many citations that one would not commonly regard as “cases,” I rely on data from Fowler et al. (2007).

Inward relevance scores, which the authors refer to as measures of legal importance or legal relevance, strongly correlate with other measures of importance (such as Epstein and Segal’s New York Times measure of salience (Epstein and Segal 2000)), and outperform them in
However, the raw Fowler scores for individual cases cannot easily be aggregated into an annual measure. Moreover, the authors report that the raw scores may not be substantively meaningful, as “the distance between these values is arbitrary … the only invariant information in the raw scores is their ranks, not their values, and the rank order of each case represents the most meaningful way to measure its importance” (Fowler et al. 2007, 331). Given this, I rely on the degree of movement within the legal relevance ranks in a given term. The insight here is straightforward—incremental shifts in legal policy should lead to incremental shifts in the rankings of what cases the Court cites, while terms with legal policy punctuations should lead to a great deal of “churn” within the legal relevance ranks soon after.

I refer to the degree of annual rank-change in legal relevance scores as “precedential instability,” as the scores captures the degree to which the network is stable or fluid in a given term. If legal policy change generated by the Court follows punctuated dynamics, annual changes in aggregate instability should be to be low to moderate in most Court terms, but occasionally high. The generation of precedential instability scores is straightforward. First, I use Fowler’s annual inward relevance scores to generate inward relevance ranks for each case in each year between 1850 and 2005. Second, for each case in each year, I subtract the case’s predicting the likelihood that a case will be cited by lower courts in a given year (Fowler, et al. 2007).

6 I use 1850 as my starting point, as several scholars believe this to be a conservative estimate for when stare decisis was established on the Supreme Court (Caminker 1993, Healy 2001).
current rank from its rank in the preceding year, taking the absolute value of that difference.\(^7\) After generating rank-change scores for each case in each year, I take both the annual median and mean of these changes to create aggregate measures for each term.\(^8\)

Admittedly, changes in citation patterns may not always correlate with changes in legal policy or doctrinal rules. Moreover, using the entire Supreme Court network to generate precedential instability scores assumes that rank changes are comparable. As prior research on networks has indicated, however, a small number of cases in the Supreme Court network have many links and garner the overwhelming majority of citations, while the many cases at the outskirts of the network may receive one or no citations (Cross, et al. 2007). In substantive terms, we are concerned with changes in the center of the network, rather than movement among the outside. To address this concern, I create two alternate instability measures. The first alternate measure aggregates the rank-changes within the top twenty percent of cases in each year (as ranked by Fowler’s inward relevance), or what I label important cases, while the second measure assesses rank-change only within the top five percent, or landmark cases. The rank-change scores for each case in each year remain unchanged—the difference lies solely in the universe of scores chosen for aggregation. Given that it should be more difficult for cases to penetrate the important and landmark subsets than for them to move up and down the bottom

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\(^7\) For example, in 1979, *Chaplinsky v. New Hampshire* (1942) had the fourteenth highest inward relevance score in the overall network; in 1980, its rank rose to ten. The rank-change score for *Chaplinsky* in 1980 would thus be four.

\(^8\) I have no strong *a priori* reason to expect either measure of central tendency to better capture the underlying dynamic, so I employ both.
half of the network, I expect the characteristics of punctuated equilibrium to be present in the set of important cases and even more pronounced in the landmark case group.

In Figure 1, I present the raw data for the four variants of instability scores, namely the mean and median of the rank-change scores in each year between 1850 and 2005 for both the landmark (top five percent) and important (top twenty percent) case sets.

[FIGURE 1 ABOUT HERE]

At least three inferences can be drawn from the raw scores. First and as expected, there are clear peaks in these figures, historical periods where the relevant network was marked by significantly more change in the precedential ranks. As the loess lines suggest, years with high fluidity tend to be clustered together chronologically, suggesting positive feedback effects. Second, despite the differences in both the networks examined and the measures used, the graphs present similar periods of network instability. Third, the landmark and important case networks differ in expected ways, as the landmark cases present a more punctuated dynamic, with more observations clustered at low values than the set of important cases.

**Diagnosing PE in Precedential Instability Scores**

Armed with this proxy measure for legal policy change, I now conduct a stochastic process analysis in order to ascertain “what kinds of probability distributions could have accounted for an observed frequency distribution of outcomes” (Jones, et al. 2003). Distributions characterized by punctuated processes are leptokurtic, possessing “a large, slender, central peak (representing a stability logic), weak shoulders (representing the difficulty in making moderate changes), and big tails (representing episodic punctuations) (True, et al. 2007, 168).” If legal policy change is subject to PE dynamics, we would expect it to fit such a
distribution. I also test for PE patterns in four other commonly employed measures of legal change: the annual number of decisions in which the Court strikes down state or federal laws, the annual number of decisions in which the Court overturns its own precedent, and the annual change in the percentage of decisions the Supreme Court decides as liberal during a given term (at least since 1947, the first year for which this data is available).  

There are many different methods one could employ to examine these distributions. Here I draw on three of several tests suggested by Breunig and Jones (2011), who compile a list of diagnostics to employ in stochastic process analyses. First, I examine both the kurtosis and L-kurtosis of the aggregate instability scores. The kurtosis statistic, which attempts to measure the “peakedness” of a distribution, provides a reasonable way to assess whether a particular distribution is leptokurtic. However, as Breunig and Jones note, kurtosis can be overly sensitive to extreme values. L-kurtosis, by contrast, is less sensitive to outliers and more appropriate for small samples (Breunig and Jones 2011). In Table 1 I present two sets of comparisons. First, I examine both the kurtosis and the L-kurtosis for four different slices of the Fowler network data, examining the mean instability scores for all cases, the top 50% of the network, and the important and landmark network slices discussed above. Second, I examine the kurtosis and L- 

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9 Data on the exercise of judicial review and the overturning of precedent is drawn from the Supreme Court Compendium (Epstein, et al. 2006), while the annual change in the percent of decisions decided in a liberal direction was calculated using the U.S. Supreme Court Database (Spaeth, et al. 2012).

10 Hosking defines L-moments as “expectations of certain linear combinations of order statistics” (Hosking 1990). L-moments are theoretically comparable to normal moments; the difference lies primarily in improved robustness and applicability for smaller samples.
kurtosis for the median of the important and landmark case sets, as well as for the other four proxies for legal policy change.

TABLE ONE ABOUT HERE

The top half of Table 1 shows that both the kurtosis and L-kurtosis measures rise as one restricts the scope of the rank-change measure to the top of the network, including particularly high kurtosis when examining only changes within the top 5%. As for the other proxies, all measures rest above three (the score for a normal distribution in Pearson kurtosis), suggesting they are leptokurtic. This matches what we would expect to see if legal policy change was punctuated. For example, the aggregate median-rank change within landmark cases has a kurtosis of over seven, while the kurtosis of the median rank-change within the top twenty percent sits just over five. While neither figure is extremely high, they are comparable with the kurtosis of other processes thought to have PE dynamics, such as changes in the Dow Jones, the rate at which presidents issue executive orders, and changes in the two-party vote share for Senate and Presidential elections (Jones, et al. 2003). That only the mean instability scores for the landmark cases possess high kurtosis scores is unsurprising; few policy processes have the high kurtosis that characterizes changes in budget policy, for example.

Under the L-kurtosis statistic, however, only the landmark instability scores can be clearly labeled as leptokurtic, with both the mean and the median instability scores resting above .12, the L-kurtosis cut point for a normal distribution. Changes in the top 20%, by contrast, as well as the other proxy measures, sit below this line. This finding suggests that the Pearson kurtosis figures may be driven by outliers that make the distributions appear more leptokurtic than they actually are. Still, the finding that the landmark instability scores are clearly leptokurtic is important, as it both confirms the broad expectation of the study as well as clarifies
that changes in citation patterns become increasingly leptokurtic as one moves to examine
changes at the center of the precedential network. Changes among the outskirts of the network,
by contrast, do not have a leptokurtic distribution.

Another diagnostic test suggested by Breunig and Jones involves creating histograms of
the measures in question to visually assess their distributions. In Figure 2, I present histograms
for each of the eight measures examined in the prior table, using the Freedman–Diaconis rule to
automatically generate the size of bins and avoid bias that might arise from hand-selection of the
bin size.

[FIGURE 2 ABOUT HERE]

Histograms marked by PE have high peaks, weak shoulders, and long tails. In short, the pictures
in Figure 2 largely mirror the kurtosis figures in Table 1. Both the median and mean instability
scores for the landmark cases fit the PE pattern; a large majority of the median rank-changes for
the top five percent, for example, fall in the first three bins, and its graphs possess the expected
“weak shoulders.” The other figures vary as expected, as proxy measures with higher kurtosis
figures—such as the frequency with which the Court overturns its own precedent—also present
more leptokurtic histograms.

Kurtosis tests and histograms provide good evidence that a particular distribution is
leptokurtic and thus is more likely to be generated by a punctuated process. They do not,
however, shed much light on which specific distribution the data might fit. While there is no
easy way to test “all possible types of probability distributions by directly estimating
parameters,” (Jones et al. 2003, 158), Breunig and Jones demonstrate that one “may transform
the formula for a particular class of probability density distributions such that the probability is a
linear function of the variable of interest (2011, 111).” Plotting the transformed variable of
interest against the cumulative distribution function permits the visual and statistical assessment of whether the data’s probability density function matches a specific distribution function. The authors note that it should be common practice in stochastic process models to create both a log-log and a semi-log plot (where only the cumulative probability function is transformed) to assess the fit with a Paretian and exponential distribution, respectively (111). I do so here, plotting the midpoints of the histogram bins for the mean and median instability scores for the landmark case set against the number of observations within each bin, transforming the data as warranted.

[FIGURE 3 ABOUT HERE]

Given the prior tests, we would expect the mean rank-change measure for landmark cases to fit a more punctuated distribution than the median, and Figure 3 confirms this expectation. The median rank-change measure fits both the Paretian and exponential plots fairly well, with similar R² figures. This may indicate that the median measure matches a “stretched exponential” distribution that lies in between these two (Breunig and Jones 2011, 111). The mean rank-change measure, by contrast, is clearly a poor fit for the semi-log plot, but a reasonably good fit for the log-log plot, with an R² of .87, what Breunig and Jones refer to as a “moderate” goodness-of-fit.

When the kurtosis and L-kurtosis figures, histograms, and parameter estimate graphs are considered together, they provide strong evidence that legal policy change created at the Supreme Court is subject to punctuated dynamics, regardless of which measure of central tendency is used to aggregate the instability scores. The degree to which these changes are

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11 Of course, in this one-tailed distribution, the number of observations in a bin cannot be less than one, which creates an artificial lower bound of 10^0 for the transformed variables. However, the poorness of the fit can be seen throughout, and is not merely an artifact of left-censoring.
punctuated, importantly, depends on what slice of the case citation network ones finds relevant for shaping policy change. The closer to the center the examination goes, the more punctuated the distribution of rank-change. This finding—which simply restates that precedents at the center of the network are dislodged from the ranks much less frequently than those at its periphery—is intuitive.

**Exploring the Instability Peaks**

Having established general support for the existence of PE dynamics in the aggregate instability scores, I now examine the specific historical peaks found in Figure 1. Do these particular peaks match existing accounts of legal policy change in the historical-legal literature? Do the standard mechanisms for punctuation, such as agenda change or personnel replacement that overcomes institutional friction, credibly explain the citation shifts found in the data?

Here I examine the viability of different mechanisms for these legal policy punctuations. To be clear, I aim to establish the plausibility of particular mechanisms here, rather than formally test different hypotheses. There is a good reason for this. A thorough analysis of agenda shifts, for example, requires data on issue areas of Supreme Court decisions over time. However, both of the major Supreme Court databases one might employ for such an analysis—the Supreme Court Database (Spaeth, et al. 2012) and the Policy Agendas Project ("Policy Agendas Project" 2012)—do not contain cases prior to the mid-1940s. Given the nature of the network measure, the lack of issue coding for several thousand decisions is extremely limiting. Given this problem, I adopt a second-best strategy of hand-coding a workable (and hopefully valid) slice of the data: the top 100 decisions in each term as ranked by the Fowler legal relevance measure. Cases decided after 1947 are already coded by issue area in the Supreme Court Database; I
extend the existing issue coding back in time by using the criteria for the VALUE variable (Spaeth, et al. 2012). This smaller slice can be examined qualitatively to see which cases, doctrine, and issue areas rise and fall within the very heart of the precedential network, permitting some tentative assessments about the viability of particular mechanisms for legal policy punctuation.

Returning to Figure 1, three similar peaks emerge for each of the four variants of the instability measure. Ascertaining a clear and common starting and ending point for the three punctuations is challenging, but for the sake of consistency, I will refer to them as peaks occurring from 1880 to 1900, 1930 to 1950, and 1960 to 1980. I examine each in turn.

The 1880-1900 Peak

First, I collapse the Supreme Court Database’s thirteen categories for the VALUE variable into five: rights and liberties (including criminal law and procedure), economic activity, federalism, judicial power, and other. If a significant change in the issue composition of the top 100 cases occurs at the same time as one of the instability peaks, then agenda shifts could be a plausible mechanism for legal policy punctuation. Figure 4 presents a trellis graph illustrating the annual share of the top 100 cases for these five categories, ranging from 1850 to 2005.

[FIGURE 4 ABOUT HERE]

Figure 4 shows a modest agenda shift for the 1880-1900 peak, illustrating a slight increase in the share of the top 100 cases accorded to the citation of economic issues and a concurrent decrease in the share accorded to judicial powers decisions. A qualitative examination of which cases rose and fell within the top 100 decisions during this era, however, suggests a much more meaningful shift than Figure 4 alone. The rising cases are united by a
single agenda—the Court’s promotion of economic nationalism. Specifically, the cases which entered the top of the network or rose in its ranks addressed so-called “Dormant Commerce Clause” disputes. A few older cases such as Wilson v. Black Bird Creek Marsh Co. (1829) rose quickly to the top of the ranks during this time period, joined by newer cases such as Crandall v. Nevada (1868), Robbins v. Shelby County Taxing District (1887), Welton v. Missouri (1875), Case of the State Freight Tax (1872), and County of Mobile v. Kimball (1880). Importantly, these cases almost uniformly sided against state governments and removed state barriers to interstate trade, suggesting a shift not only in what issues were important, but also in the ideological direction of legal policy. Also noteworthy is that the rising cases were a mix of

12 While the Commerce Clause is better known as the constitutional foundation for Congressional regulation of the interstate economy, it also authorizes the Court to strike down state laws that impede or discriminate against interstate commerce in the absence of federal statutes.

13 Similar rising cases include Gilman v. Philadelphia (1865), New Orleans Gas Co. v. Louisiana Light Co. (1885), Smith v. Turner (1849), and New York v. Miln (1837). Also worth mention is Henderson v. Mayor of New York (1875), a decision which gave the federal government sole power over immigration laws, fitting the general theme of supporting national power over state power.

14 A pair of Taney Court decisions in this group, namely Cooley v. Board of Wardens (1851) and Thurlow v. Massachusetts (1847) did not side with the federal government. However, a closer reading of the cases which cite these earlier decisions shows these two rulings became more legally relevant because they set up a useful analytic framework on selective inclusiveness and the proper scope of state powers as they relate to interstate commerce, not because of their legal policy outcomes.
much older decisions suddenly viewed as much more legally relevant, decisions that slightly predate the instability shift, and decisions decided early in the punctuation itself which quickly rose to the top of the ranks.

While this analysis suggests a shift in attention away from federalism and judicial power citations towards economic issues as a cause of the punctuation, the narrative also supports personnel change as a potential mechanism. The years before this peak saw an almost total shift in the party of the appointing president: in 1860, all (eight) members of the Supreme Court had been appointed by Democratic presidents; by 1866 Republican appointees held the majority of seats; and by 1869 all but one justice had been appointed by a Republican president. Taking into account a fairly significant lag, it seems plausible that it was not just a shift in attention to new issues, but also a partisan or ideological transformation that overwhelmed the friction created by the five-vote requirement that led to this punctuation.

This narrative of personnel change and agenda shifts nicely fits prior legal-historical work on the time period (Burnham 1999, Bensel 2000, Gillman 2002). Gillman in particular argues that the Republican Party desired to remove obstacles to economic nationalization, but was unable to maintain consistent control of Congress. Since Republican weakness was primarily manifest in the House, rather than the Senate or the Executive Branch, Republicans had free reign to appoint Supreme Court nominees thought to share their policy preferences. Unable to protect its agenda electorally but able to dominate Court appointments, Republicans rationally shifted the venue for economic nationalism to the Supreme Court. While a more thorough analysis testing might enable a better weighing of the contributions for each mechanism, the data suggest that a mix of agenda shifts through venue-changing strategies and personnel change led to this first peak in the instability data.
The 1930-1950 Peak

Figure 4 sheds little light on this second peak, suggesting the primary mechanism for legal policy change in this period was ideological or personnel-based. Given that this peak roughly corresponds to the New Deal era, it would presumably be explained by a combination of personnel change from FDR’s appointments and strategic venue choice—here the Court’s decision to abandon its oversight of federal economic regulation and shift such legal policy determinations to Congress. The data, however, does not fit this assumption very well. The peak begins before the New Deal jurisprudential revolution of 1937; given that there is undoubtedly some lag between the instability peaks and their triggers, the case that the New Deal doctrinal revolution alone drives this change—at least initially—seems untenable. Moreover, a closer look at the rising cases in the top 100 ranks shows that they are simply commerce clause cases (dormant and otherwise) that do not greatly deviate in either ideological outcome or doctrinal framework from the cases they displace. Nor can personnel change be the clear cause of the shift, as FDR did not appoint the first of many justices until the middle of 1937.

Simply put, the timing of this peak fits the historical record much worse than the other two. It may be that the Great Depression and the election of FDR raised the salience of economic disputes, leading the Court to pay increased attention to more recent economic cases simply because they were more relevant to contemporary legal policy debates. The legal doctrinal battles between FDR and the Court could have continued a shift in citation patterns within this issue area, while the doctrinal revolution of 1937 continued and ultimately ended a period of positive feedback as the New Deal changes became locked in. Alternatively, the results here may be an artifact of the limitations in this analysis, with the true changes taking
place below the waterline of the top 100 cases that I examine. A complete issue coding of all cases might thus resolve this puzzle.

The 1960-1980 Peak

Here agenda shifts are undoubtedly a driver of change. The sharp rise in precedential instability seen in Figure 1 corresponds with a sharp shift in the issue area of the top 100 cases in Figure 4. Prior to the 1960s, the top 100 cases in the legal relevance rankings primarily dealt with economic issues; afterwards, they are dominated by rights and liberties cases decisions. This finding is well-supported by existing scholarly accounts, in which an increasing consensus on the constitutionality of federal economic regulation and a declining need to litigate these cases coincided with the sudden salience of civil rights issues and the shared desire of the Warren Court, Congress, and the Johnson administration to dismantle segregation (Powe 2000). For example, the percentage of respondents who selected civil rights issues as the “nation’s most important problem” in Gallup polling rose from only eight percent in 1962 to forty-nine percent in 1963 ("Policy Agendas Project" 2012). While the Court is less susceptible to public pressure than many other institutions, this sort of massive shift undoubtedly caught its attention. During the same time period, the Warren Court began a multi-year campaign to incorporate the

15 Users of data from the Policy Agendas Project are requested to attach the following disclaimer: “The data used here were originally collected by Frank R. Baumgartner and Bryan D. Jones, with the support of National Science Foundation grant numbers SBR 9320922 and 0111611, and were distributed through the Department of Government at the University of Texas at Austin. Neither NSF nor the original collectors of the data bear any responsibility for the analysis reported here.”
Bill of Rights against the states in decisions such as *Mapp v. Ohio* (1961), *Gideon v. Wainright* (1963), or *Robinson v California* (1962). Finally, the early part of this peak saw a raft of landmark First Amendment cases, such as ending teacher-led school prayer in *Engel v. Vitale* (1962), expanding the protections offered to religious minorities in the Free Exercise Clause in *Sherbet v. Verner* (1963), striking down prior restraints offered in the name of national security in *New York Times v. Sullivan* (1964), and significantly tightening the test for illegal advocacy in cases such as *United States v. Yates* (1957) and *Brandenburg v. Ohio* (1969).

Once again, however, the effects of agenda change cannot be easily separated from the role of personnel change. 1962 saw the replacement of Justice Frankfurter with Justice Goldberg, and Justice Whittaker with Justice White, a change which made the Court markedly more liberal. Thomas Keck, for example, argues the Court acted so differently after this pivot point that he divides the Warren Court into “early” and “late” periods (Keck 2004). An examination of Martin-Quinn ideology scores for the justices confirms this analysis, as the leftward shift of median justice in this term is one of the two largest on record. It seems reasonable to argue that these rapid changes in legal doctrine, citation patterns, and legal policy resulted not only from shifts in attention to newly salient issues, but also because the Court was now controlled by a solid liberal majority which could regularly overcome the friction created by the five-vote requirement.

**Discussion**

As policy scholars have expanded their examination of the distributions of policy change, the utility of a PE framework has similarly expanded. Yet this scholarship has mostly ignored legal policy change, or at least legal policy change generated by the federal courts. This
omission, I have argued, makes little sense on theoretical grounds. Instead, I suspect this lack of attention has resulted from the poor quality of existing proxy measures for legal policy change. To address this problem, this article develops a cutting-edge measure of legal policy change generated by the Supreme Court to test the viability of a PE framework. As the citation of precedent justifies decision-making, shapes legal rules, and provides legal actors with predictions for how the Court will decide future cases, I conceptualize shifts in what precedents the Court finds most legally relevant for resolving disputes as a proxy measure for legal policy change. Specifically, I leverage Fowler’s legal relevance rankings to create a measure of precedential instability, which assesses the degree to which the legal relevance ranks in a particular term are stable, suggesting incremental policy change, or fluid, suggesting punctuations. Using a stochastic process analysis, I find that the aggregate precedential instability scores for the top five percent of the network pass multiple tests designed to diagnose PE dynamics. Finally, I find that at least two of the three aggregate peaks uncovered corroborate existing historical-legal explanations for doctrinal change on the Court and appear to be driven by mechanisms that drive PE in other institutions. As a first cut at connecting PE theory to legal policy change at the Supreme Court, my analysis makes a strong opening argument for the presence of PE dynamics.

I believe this study clearly demonstrates the feasibility of applying the PE framework to court-driven legal policy change. In what remains, I discuss two additional items. First, I address some fruitful avenues for future research on the Supreme Court and the PE framework. Second, I address some methodological challenges that must overcome in order for the quantitative study of legal policy distributions to move forward.

Future analyses of legal policy punctuations must work towards hypothesis testing, as knowing why and how such punctuations occur is as interesting as knowing when and whether
they do. In the broader policy literature, there has been a healthy debate about the degree to which policy punctuations are driven by the limits of information processing and sudden shifts in attention to newly salient events, and the degree to which they are driven by personnel change or landmark elections. The same debate seems likely to occur here, as the exploratory analyses of the three instability peaks suggests the viability of multiple mechanisms for punctuated change. Notably, the results here do not particularly favor any one of these options.

I believe each of these hypotheses is worthy of further testing, as it may be the case that there is no universal mechanism for legal policy punctuations, with different mechanisms operating at different times and for different areas of legal policy. Personnel change is an obvious candidate, sitting firmly in the orthodox tradition in judicial behavior scholarship that legal policy is driven by judicial policy preferences. The beginning of the 1960-1980 peak, for example, was marked by two appointments that dramatically shifted the location of the median justice. It is highly likely that these appointments helped generate the series of landmark liberal decisions that followed. Similarly, though we lack precise measures of judicial ideology in the 19th century, the inexorably partisan shift towards Republican appointed justices on the Supreme Court likely played a part in the first peak. Just as personnel shifts generated by elections might overcome the filibuster or other sources of friction in Congress, critical nominations might shift the ideology of the median justice, making previously impossible legal policy changes suddenly possible. Tools such as quantile regression (Breunig and Jones 2011) could permit scholars to test for correlations between shifts in the location of the median justice and extreme changes in the instability scores.

However, we should not overstate the potential role of so-called “critical nominations” any more than we should attribute elections as the only cause of policy punctuations in Congress.
The tectonic 1962 liberal shift in judicial ideology was soon followed by Richard Nixon’s nominations of Rehnquist and Blackmun in 1969, which moved the Court to the right even further than Kennedy’s appointments had moved it to the left. However, while the Burger Court clearly decided cases in a more conservative direction than did its predecessor, its most important cases, as ranked by Fowler’s legal relevance, were as likely to be liberal as conservative (Robinson 2010). Nixon’s nominees did not shift the Court’s agenda to different issues, did not issue conservative decisions that displaced liberal in the precedential network, and did not—in my reading—have anywhere near the same qualitative impact on judicial doctrine.

Given this, future research must not ignore the role of information processing and attention-switching mechanisms in explaining legal policy punctuations. The 1960-1980 peak, for example, correlates with a dramatic shift in the issue area of the most important cases, specifically moving from economics to rights. This type of attention shift may have served to focus the Court on rights issues, as well as ultimately changing the composition of the universe of cases from which the Court could grant certiorari. The use of the PE paradigm may thus shed additional light on the degree to which the Court is receptive to shifts in public opinion. Going further, such shifts in attention and agenda may also uncover ideological facets to sitting judges that were not extant beforehand. President Eisenhower famously lamented that his two biggest mistakes were “sitting on the Supreme Court.” Yet it would be unfair to judge Eisenhower poorly for not having foreseen the vast changes in constitutional law that would occur in the years following his administration. Perhaps as justices who faced the issues of the 1930s and 1940s, Justices Warren and Brennan would have been unremarkable, ideologically. Faced with the new and suddenly salient issues of the 1960s, however, they would come to be known as two of the most liberal justices ever to sit on the Court. Public opinion and attention shifts may
therefore lead to additional instability for the status quo, upsetting previously stable MWCs and agenda expectations.

Finally, my findings suggest that legal policy punctuations on the Supreme Court may arise as the result of deliberate venue-switching strategies, in line with the work of Sarah Pralle (Pralle 2003, Pralle 2006). The 1880-1900 peak, for example, can be reasonably explained as an attempt by Republicans to promote an agenda of economic nationalism. Stymied in their ability to maintain control of the House of Representatives, Republicans shifted policy venues to the Supreme Court. Similarly, the 1960-1980 peak may have resulted from the decision of liberal interest groups to use the Court to bring state and local outliers on civil liberties and civil rights issues into line with increasingly egalitarian national standards. Finally, the most inscrutable of the three peaks, the 1930-1950 peak, does not appear to have been driven, at least initially, by the New Deal Revolution. However, to whatever extent the New Deal was responsible for this legal policy punctuation, we can imagine the 1880-1900 venue-shifting strategy in reverse: convincing the Court to abandon a particular policy area and move the venue back to the elected branches. I believe this hypothesis—that legal policy punctuations are driven by decisions to take up a legal policy area heretofore seen as unsuited for judicial determination, or to suddenly abandon a policy area to the elected branches—may be a particularly fruitful avenue for future research.

Of course, none of these theories are mutually exclusive, and as these results suggest, may even act in confluence with one another. This raises several interesting avenues for hypothesis testing. Are ideological personnel shifts more important for some legal policy areas than others, such as rights versus separation of powers doctrine? Must such personnel shifts occur alongside attention shifts in the broader public to generate legal policy punctuations? Are Supreme Court justices the primary drivers of legal policy punctuations, as the judicial behavior
literature and the attitudinal model would suggest? Or is the Court more a vessel for implementing broader changes in public opinion or partisan regimes, as suggested by the work of Bruce Ackerman and Stephen Skowronek (Ackerman 1991, Skowronek 1997)?

Such analyses will almost certainly require disaggregating what this study has aggregated—that is, breaking down instability scores or other some proxy measure for legal policy change by issue area. Doing so is necessary not to only to test potential differences among different doctrinal regimes, or to create a larger set of data, but because legal policy change within particular issue areas is as likely to be independent as interdependent, matching Orren and Skowronek’s depiction of overlapping institutional orders (Orren and Skowronek 1994). The 1960-1980 peak, for example, shifted the overall attention of the Court to rights disputes, but did not undo the economic rulings of the New Deal years. It may be useful, in fact, to analogize particular doctrinal regimes in issue areas such as free speech, federalism, or search and seizure cases as policy subsystems, in which a combination of Supreme Court justices, interest groups, and politicians interact to maintain and support a status quo of precedents, doctrine, and legal policy outcomes.

Significant methodological challenges remain, however, before this sort of quantitative analysis can occur. The main obstacle is data—both the Supreme Court Database and the Policy Agendas Project are left-censored at the 1940s, making it impossible to disaggregate the instability measure by issue area for cases decided before that time. Without these codings, one cannot rank cases by Fowler’s legal relevance scores within particular legal areas to generate issue-specific instability scores. The focus of the quantitative judicial behavior literature on the post-FDR years creates other obstacles, such as the lack of reliable measures for judicial ideology before that time period. Another problem for quantitative hypothesis testing is the
uncertain starting point for the legal policy punctuation peaks, combined with the likelihood of some variable lag between potential triggers (such as a critical nomination) and the legal policy change the instability scores approximate. The instability scores show shifts in citation patterns—but these shifts may occur because of landmark decisions which suggest the Court will cite different sets of cases going forward, because of landmark decisions which will themselves be frequently cited in future cases, or both. The ambiguity of the timing, in short, will complicate analysis.

Given these challenges, the analysis of punctuated legal policy change generated by courts may more immediately benefit from high-quality qualitative work. This is especially true if one wishes to trace long-term causes of punctuated change. For example, Brendon Swedlow has examined how the Ninth Circuit Court of Appeals helped facilitate punctuated changes in environmental policy (Swedlow 2009). Given the existence of dramatic shifts in legal spheres as diverse as the adoption of the individual rights model of the Second Amendment and the application of the Equal Protection Clause to gender discrimination, the general punctuation theory has a great deal to offer traditional historical methods of analyzing legal policy change.

Improving how we characterize, explain, and even predict developments in legal policy will require paying more attention to the punctuated nature of its changes. By providing clear evidence that PE dynamics apply to legal policy change generated by the Supreme Court, this study is a building block towards that end.

References

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Table 1: Kurtosis and L-kurtosis for Selected Proxies of Legal Policy Change on the Supreme Court, 1851-2005

<table>
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<tr>
<th>Measure</th>
<th>Kurtosis</th>
<th>L-kurtosis</th>
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<tr>
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<tr>
<td>Instability mean—important cases (top 20%)</td>
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<td>.08</td>
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<td>Instability mean—top 50% of cases</td>
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Table 1 shows the kurtosis and L-kurtosis for different measures of legal policy change. The top half compares the mean rank-change from four slices of the data; the bottom half examines the median rank-change scores as well as four additional proxies of legal policy change. Kurtosis was generated using Pearson kurtosis in Stata, where a normal distribution has a score of three. L-kurtosis was generated in R using the lmomco package, where a normal distribution has a score of .12.
Figure 1 presents the median and mean rank-change scores in each year for the network of landmark (top) and important (bottom) cases, respectively. The points are connected using loess regression in the R statistical package.
Figure 2 plots histograms for the four variants of the precedential instability measure, the frequency with which the Court’s decisions strike down federal and state laws, the frequency with which the Court overrules its own prior precedent, and the annual absolute change in the percentage of the Court’s decisions decided in a liberal direction (from 1947 to 2005). Histogram bins were generated automatically using the Freedman-Diaconis rule.
Figure 3: Log-Log and Semi-Log Plots for the Median and Mean Variants of Precedential Instability, Landmark Cases, 1851-2005

Figure 3 plots the number of observations within each histogram bin against the bin midpoints on log-log and semi-log scales. The closer the points are to the regression line, the better the data fits the relevant distribution.
Figure 4 presents a trellis graph of the issue area breakdown of the top 100 Supreme Court cases—as ranked by the Fowler legal relevance measure (Fowler, et al. 2007)—in each year from 1850 to 2005. Issue areas were coded using the Supreme Court Database’s VALUE variable, with the original thirteen categories of that variable collapsed into five categories to improve presentation.