In the study of policy change, the theory of punctuated incrementalism (Prindle 2012), better known as punctuated equilibrium theory (PET), now plays a prominent role. Under PET, policy change is normally incremental but occasionally substantial, as sudden shifts in attention, institutional rules, or personnel disrupt the status quo. This disruption leads to a period of positive feedback where additional changes become more rather than less likely (Baumgartner and Jones 1991, 2009). For the most part, PET scholarship has focused on the output of Congress and state legislatures, with limited discussion of the executive branch and, with a few exceptions (Baumgartner and Gold 2002; Robinson 2013; Swedlow 2011), almost no examination of the legal policy change generated by federal courts. There is no good theoretical reason to exclude court-created legal policy from PET analysis (Robinson 2013). Courts are important drivers of policy change, contain institutional features known to increase the likelihood of punctuated dynamics, and are staffed by judges who, like all policymakers, are subject to the cognitive limitations thought to serve as the universal basis for PET (Jones and Baumgartner 2005).

This article seeks to advance the study of PET at the courts—particularly the Supreme Court—through an examination of the Court’s equal protection and gender decisions from the 1970s. My study of these cases serves two distinct but related goals. First, I contend that the study of legal policy punctuations can benefit from the jurisprudential regimes framework developed by Richards and Kritzer (Richards and Kritzer 2002). Jurisprudential regimes are decision-making frameworks established by landmark Supreme Court precedents that constitute legal analysis by telling justices what facts are relevant. The regime framework is thus well suited for identifying legal policy punctuations and the mechanisms which drive them, as regimes are essentially cognitive frameworks that help judges sort through information. Regimes also appear subject to slip-stick dynamics, defined as periods of incremental change interspersed with breaks where one regime replaces another. If one assumes that changes in legal doctrine generally (if not always) lead to changes in policy, then the jurisprudential regimes framework enables scholars to better
identify legal policy punctuations, providing cut points that can be used to test hypotheses for the causes or mechanisms of change.

Second, my study of these equal protection cases illustrates how culture—as conceptualized in the cultural theory (CT) framework initially developed by Mary Douglas and Aaron Wildavsky (e.g. Douglas and Wildavsky 1983)—can better inform PET dynamics. In particular, I draw on two concepts which have their roots in CT: cultural cognition, in which cultural commitments affect how individuals process information, weigh risks, and assess the credibility of empirical or scientific propositions (Jenkins-Smith and Smith 1994; Kahan, Hoffman, and Braman 2009; Kahan, Jenkins-Smith, and Braman 2011; Silva, Jenkins-Smith, and Barke 2007), and cultural surprises, in which individuals switch cultures as the expectations generated by their cultural commitments no longer matches the world they observe (Swedlow 2011; Coyle and Wildavsky 1987; Lockhart 1999).

These concepts can contribute to our understanding of both the micro-level and macro-level foundations of punctuated change. At the micro-level, Bryan Jones and Frank Baumgartner have posited a general punctuation thesis, in which policymakers are overwhelmed by an information-rich environment, facing considerable uncertainty as they attempt to prioritize and grapple with problems which occur faster than the ability to process them (Jones and Baumgartner 2005). Policymakers reduce this uncertainty through cognitive devices such as policy frames, heuristics, and attention indexes; doing so, however, necessarily means that the signals generated by many policy problems will go unaddressed. Such problems may increase in severity until the signal breaks through existing frames, often leading to a disproportionate response.

Cognition, however, is not culturally neutral. Instead, people engage in cultural cognition, identity-protective behavior which avoids cognitive dissonance by downgrading or ignoring information that does not match cultural expectations. Cultural cognition thus not only affects the types of solutions policymakers consider appropriate for the problems they address, but affects the likelihood they even see particular
issues as "problems." Supplementing the cognitive mechanisms identified by Baumgartner and Jones with the cultural cognition framework should increase our understanding of both stasis and punctuation.

At the macro-level, policy punctuations are sometimes thought to result from exogenous shocks which reorient attention and change agendas, or, tying back to the micro-foundations referenced above, pierce the veil of existing heuristics and frames. Predicting such events, however, is difficult at best, making policy punctuations appear haphazard. Cultural surprises, by contrast, follow a Kuhnian model (Kuhn 1996) in which a gradual disjunction between cultural expectations and perceived reality ultimately reaches critical mass, leading to cultural shifts. The advantage to adding cultural surprises to the list of exogenous shocks, then, is that one can measure cultural change as it occurs, improving our estimations of how likely policy punctuations are to occur.

In my examination of the equal protection and gender discrimination regime launched by Reed v. Reed (1971), I demonstrate the utility of both cultural cognition and cultural surprise, presenting evidence of an egalitarian cultural surprise that led to significant changes in how members of the Court saw the social facts (Kahn 2006) of gender equality through a reading of their opinions. Prior to the 1970s, the Court viewed gender equality and gender roles through the lens of a hierarchical culture, in which members of society have clearly differentiated roles they must follow to maintain stability (Thompson, Grendstad, and Selle 1999; Douglas and Wildavsky 1983). By 1970, however, the Court and wider society alike were caught up in an egalitarian cultural shift on gender issues, under which the assumptions of stratified gender roles were suddenly seen as outdated and anachronistic. In line with the theory of cultural cognition, the hierarchical legal regime had relied on an uncritical acceptance that men and women were not equal, making laws that discriminated on gender "rational" in equal protection terms. Following this egalitarian shift, however, the Court abruptly and unanimously rejected a viewpoint that had been unanimously endorsed only nine years prior. Cultural shifts may thus not only raise the salience of particular issues
Punctuated Equilibrium and Jurisprudential Regimes

The central finding of the PET literature is that policy systems tend towards incrementalism but occasionally undergo radical change (Baumgartner and Jones 2009), a dynamic first coined by evolutionary biologists as punctuated equilibrium (Eldredge and Gould 1972). More recent scholarship, as seen in the general punctuation theory, casts PE dynamics as endemic to the human condition, the result of bounded rationality and cognitive limits on information-processing (Jones and Baumgartner 2005). Policy learning is not Bayesian—people instead “update with difficulty” (Jones and Baumgartner 2005, 15). Moreover, while the general punctuation thesis posits human cognition as the ultimate source of PE dynamics, it recognizes that institutional design—such as the separation of powers, checks and balances, and federalism that characterizes US institutions—can impact the degree to which a policy system incorporates or ignores signals about policy problems (Jones, Sulkin, and Larsen 2003).

Over two decades of research has revealed that PET dynamics fit observable patterns of policy change in a wide array of fields, from budgets in the U.S. and abroad to the rate of executive orders or Congressional hearings held on specific issue areas (Breunig and Koski 2006; Jones et al. 2009; Jones, Sulkin, and Larsen 2003). Generally, though, such analysis has been applied to the work of legislatures and bureaucracies. Courts, by contrast, have received relatively little attention. There is no good theoretical reason for this exclusion (Robinson 2013): no less than any other policymakers, judges and justices are bound by the cognitive and information-processing limitations which generate PE dynamics. The Supreme Court, moreover, possesses institutional characteristics that generate policy friction, such as the certiorari rule, the reliance on minimum winning coalitions, the limits on how many cases the Court will hear in a
term, the limited domain of legal problem solving, and the doctrine of *stare decisis*. Finally, the Court possesses institutional characteristics that may contribute to positive feedback, such as the voting threshold for majority opinions that gives power to new minimum winning coalitions or the interconnected nature of legal doctrine, in which important changes in one legal policy area may have downstream effects on another.

The reluctance to apply PET to courts likely stems from conceptual uncertainty and difficulties in measurement rather than theory. Best practices for diagnosing PET employ stochastic process analysis (Breunig and Jones 2011), but such analyses require valid, reliable, and quantitative measures of policy change. Compared to, say, budget analysis, quantitative measurement of doctrinal and legal policy change is difficult to do. One recent study examined the shortcomings of existing measures of legal policy change at the Supreme Court and developed an alternative measure based on shifts in what precedents the Court is most likely to cite (Robinson 2013). However, while an improvement in many ways over existing measures and useful for establishing the prima facie case for PET in court-created policy, the lack of data prior to the 1940s and the difficulty in disaggregating this measure into separate legal policy domains limits its usefulness in hypothesis testing.

Given these obstacles, a turn to the case study method seems appropriate. Case study analysis can build support for the applicability of PET to legal policy change by demonstrating punctuated dynamics within the issue area in question, with an accumulation of studies increasing the generalizability of any findings. Close examination of a particular issue area using case study methods can also uncover mechanisms for punctuation that can be tested in other contexts, leading to better theory and better empirics.

What, then, is an appropriate unit of analysis for such a study? Here I offer the concept of jurisprudential regimes. Jurisprudential regimes are identified by a landmark decision or a close succession of landmark decisions whose opinions significantly “[re]structure the way in which Supreme Court justices...”
evaluate key elements of cases in arriving at decisions in a particular legal area” (Richards and Kritzer 2002, 308). Specifically, the regime is defined as the period of time for which the landmark opinion or set of opinions structures legal analysis in an issue area, with the name of the foremost case generally serving as its label. Regimes are well suited to PET analysis, as their reliance on a cognitive architecture to limit uncertainty and structure policy considerations mirrors the cognitive micro-foundations posited by the general punctuation thesis. Jurisprudential regimes also operate at a useful middle range of generality, being neither so specific that they only affect the instant case nor so broad that they could apply to any case. Examples of such regimes include the treatment of content-based regulations of speech in Chicago Police Department v. Mosley (1972) (Richards and Kritzer 2002), the Lemon (1971) test for establishment clause cases (Kritzer and Richards 2003), or the tests for search and seizure jurisprudence created by United States v. Leon (1984), Massachusetts v. Sheppard (1984), and Nix v. Williams (1984) (Kritzer and Richards 2005). Jurisprudential regimes thus not only group cases coherently, but also present regime cut points that serve as policy punctuations. One can usefully envision Supreme Court doctrine—a key component of US legal policy—as a series of overlapping (and sometimes contradictory) jurisprudential regimes.

How can we identify jurisprudential regimes? Richards and Kritzer developed the concept to show how law and legal rules might systematically affect judicial decision-making, without relying on the naïve assumption that judicial decision-making is ideologically neutral. Given this aim, their diagnostics focused on whether particular fact patterns—such as the presence of content-based rather than content-neutral regulations on speech—have different impacts on outcomes before and after hypothetical cut points (Kritzer and Richards 2003, 2005; Richards and Kritzer 2002). While specific tests for regime breaks their groundbreaking studies employed have been called into question for relying on inappropriate methodological assumptions (Lax and Rader 2010), the general premise has been supported by more recent, more methodologically sophisticated work (Pang et al. 2012).
The regime concept has broader applicability as a framework for organizing doctrine into coherent blocs with clear temporal cut points. However, the diagnostic criteria that judicial behavior scholars use to identify such regimes are too limited for PET analyses. Richard and Kritzer’s diagnostics require a well-populated issue area in which statistical models can assess whether the impact of legally relevant facts differs before and after the potential cut point. Public policy scholarship, however, makes clear that policy punctuations come not only from changes in the direction of policy, but from the adoption of new agendas or the disavowal of existing ones. Such episodes remain regime breaks; however, these candidate regimes lack sufficient data on both sides of potential cut-points to enable formal statistical modeling.

Given the centrality of agenda shifts to PET, I relax and expand the criteria for identifying jurisprudential regimes in the context of PET analysis. My suggested criteria (which include existing tests) are as follows:

1. A substantial change in legal doctrine at the potential regime break, which justifies further testing
2. A substantial change in which facts impact case outcomes before and after the potential regime break—through statistical modeling in well-populated areas and through mixed methods analysis when the Court leaves or enters a policy field
3. A substantial change in the frequency with which the Court hears cases within a particular legal policy area before and after the potential regime break, highlighting agenda effects
4. A substantial change in decision outcome patterns before and after the potential regime break

Using these expanded criteria should allow scholars to identify regime breaks, and thus potential policy punctuations in the PET mold. The cut points of such breaks can then be used to test whether mechanisms such as personnel change, attention shifts, or venue entrepreneurship best fit the episode in question, leading to better general understanding of such changes.

**Reed v. Reed as a Jurisprudential Regime**

In what follows, I examine the Supreme Court’s decisions on gender equality and the Equal Protection Clause. I do so both to illustrate the utility of the jurisprudential regime framework and to shed
light on how cultural commitments can affect both stability and punctuation within PET. First, I must establish that these decisions—for which I offer Reed v. Reed (1971) as the foundation and temporal cut-point—constitute a jurisprudential regime.

Doctrinal Analysis

For most of American history, gender discrimination was not only imbedded in the social fabric, but also part of the statutory framework. These discriminatory laws served multiple purposes. At times, these statutes created an outright gender preference when men and women might compete for status or resources, normally on the assumption that men were superior in intellect or some other relevant characteristic. At other times, discriminatory statutes were offered with the purpose of “protecting” women as a class. For example, a Florida law provided a five hundred dollar tax exemption to widows, but not to widowers, using “female” as a proxy for “needy” (Kahn v. Shevin 1974). Similarly, Social Security survivor benefits were initially made available to widows, but not to widowers, as Congress assumed that men’s wages were valuable but women’s wages were not (Weinberger v. Wiesenfeld 1975).

Elsewhere in equal protection doctrine, the Court’s post-New Deal jurisprudence was evolving towards a “tiers of scrutiny” approach, where laws that discriminated against suspect classes were held to heightened judicial scrutiny. Prior to the 1970s, gender was not such a class; to the contrary, gender discrimination was seen as both rational and natural, the outgrowth of a “separate but equal” mindset where men and women were assigned specific social roles. Justice Bradley’s concurring opinion in Bradwell v. Illinois (1872), justifying a decision to deny a woman’s attempt to secure a license to practice law, well illustrates this viewpoint:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood (U.S. 141).
While *Bradwell* predates *Reed* by almost a hundred years, similar hierarchical views were still in place not long before *Reed*. In 1948, the Court rejected a claim that the Equal Protection Clause prohibited gender discrimination in *Goesaert v. Cleary*, in which Michigan barred women from obtaining a bartender license unless they were the wives or daughters of a male owner. A female owner, recently widowed, challenged the requirement as unconstitutional. Writing for a six-member majority, Justice Frankfurter upheld the law, remarking that: “to ask whether or not the Equal Protection of the Laws Clause of the Fourteenth Amendment barred Michigan from making the classification the State has made … is one of those rare instances where to state the question is in effect to answer it (465).”

Even as late as 1961, the Court had unanimously ruled in *Hoyt v. Florida* (1961) that Florida’s jury selection system—in which men were automatically registered for jury duty but women had to volunteer to serve—was constitutional. Despite its recognition that women’s roles in society and the economy had been changing, the opinion argued that women are “still regarded as the center of home and family life (61),” and that it was reasonable for the state to require jury service from a woman only if “she herself determines that such service is consistent with her own special responsibilities (62).” Thus only nine years before *Reed*, every member of the Supreme Court signed an opinion which showcased a hierarchical view of gender norms.

Despite a decades-long status quo, however, this hierarchical regime was nearing its end. The women’s rights movement, which had been gestating during the 1960s, burst into view in 1970 (Berkeley 1999; Freeman 1975; Klein 1984). Soon after, the Supreme Court heard *Reed v. Reed* (1971), in which a husband and wife fought over who would administrate the estate of their adopted child, who died intestate. Idaho law required that there only be one such administrator, and that a man was to be preferred to a woman. Not content to let matters stand, Mrs. Reed sued that the law violated the Equal Protection Clause (notably, her case was argued by future Supreme Court justice Ruth Bader Ginsburg).
In a landmark decision, the Court did not reject the plaintiff’s equal protection argument. Writing for a unanimous court, Justice Burger argued that even though women were not a suspect class who merited heightened scrutiny (rejecting Ginsburg’s preferred outcome), Idaho’s preference for men was arbitrary and irrational, violating the Equal Protection Clause’s fundamental requirement that legal classifications be reasonable. Idaho, tellingly, had declined to argue that the law could be justified under hierarchical conceptions of gender roles. Instead, it justified the law’s gender preference as reducing the state’s administrative burdens. Nine years earlier, employing “maleness” as an imperfect but rational proxy for assessing fitness would have succeeded. Now, suddenly, the Court rejected such a justification. Both men and women were similarly situated for the work in question, Burger wrote, and as such the state’s classification was unreasonable and unconstitutional.

While Reed’s rejection of hierarchical views of gender equality was a critical shift in equal protection jurisprudence, the doctrine remained unsettled. Under the still developing “tiers of scrutiny” approach, designation of gender as a suspect classification would mean applying strict scrutiny, where only discriminatory laws which contained a compelling objective and were narrowly tailored to achieve that objective would be constitutional. Reed, notably, had not done so, instead rejecting Idaho’s probate law as failing the much less demanding rational basis test. Emboldened by this success, women’s rights advocates continued to push for the elevation of gender to a suspect classification. Not long after Reed they briefly succeeded in Frontiero v. Richardson (1973), where a plurality of justices led by Justice Brennan applied strict scrutiny to a military regulation which made it more difficult for husbands to be deemed dependents for benefits purposes. Demonstrating an egalitarian view of gender capabilities and equality, Brennan noted that:

What differentiates sex from such nonsuspect statuses as intelligence or physical disability... is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members (686-87).
Brennan's *Frontiero* opinion, however, only secured four votes. While the Court would continue to reject laws justified primarily by hierarchical gender norms as lacking a rational basis, there was no consensus as to whether gender discrimination belonged in the same strata as racial discrimination. Instead, the Court's initial post-*Reed* decisions were erratic, with Brennan and Marshall pushing for strict scrutiny, Rehnquist and often Burger opposed, and the rest of the Court swinging back and forth depending on case facts and the statute under scrutiny.\(^1\) Finally, in *Craig v. Boren*, a 1976 case which of all things dealt with discriminatory standards as to what age men and women in Oklahoma could purchase “low-alcohol” beer, the Court entered a new period of policy stasis: gender discrimination would be subject to intermediate scrutiny, a newly adapted test which sat between strict scrutiny and rational basis in terms of the justifications it required from the government. Despite language in later cases such as *Virginia v. United States* (1996) that suggests a slightly higher standard of scrutiny, *Craig* remains good law today.

\(^1\) In *Geduldig v. Aiello* (1974), for example, the Court rejected the plaintiff's claim that California's disability program discriminated against women by failing to include pregnancy as a triggering condition. In *Kahn v. Shevin* (1974), a majority of the Court upheld a Florida law which gave a tax benefit to widows but not widowers, while in *Schlesinger v. Ballard* (1975), the Court upheld a military rule which gave female officers a longer “promotion zone” (i.e. more time to be promoted before being pushed out) than did male officers. By contrast, in *Stanton v. Stanton* (1975), everyone on the Court except for Rehnquist agreed that Utah could not have one majority age for men and another (younger) age for women. Similarly, a unanimous court agreed in *Weinberger v. Wiesenfeld* (1975) that the Social Security Administration could not provide survivor’s benefits to widows with children but deny them widowers with children (children got the benefit either way; the difference was the additional payments to the surviving parent), given that the entire purpose of the benefit was to help the surviving parent take care of his or her children.
Given the preceding discussion, it seems that Reed or Craig, rather than Frontiero or another case, is the most likely regime cut-point. In constitutional law, Craig is more often seen as the key case, given that it established intermediate scrutiny. While understandable, this view undervalues Reed, which marks the disruption of the old regime and the point where gender discrimination claims were added to the Court’s agenda. Prior to Reed, gender discriminatory was deemed rational, unworthy of litigation and accorded no special attention; after Reed, statutes that relied on hierarchical or paternalistic justifications were deemed arbitrary and irrational. This shift in thinking is more consequential than the change in Craig, which only impacted that subset of laws which did not rely on hierarchical grounds but nevertheless might fail intermediate scrutiny.

These cases may be best described as undergoing an “unfreeze-freeze” process (Weick and Quinn 1999), in which Reed signals the end of the status quo and a period of uncertainty about the new policy, as seen in cases such as Frontiero, Geduldig v. Aiello (1974), and Weinberger v. Wiesenfeld (1975). While Reed unfroze policy change, Craig froze it again through the adoption of intermediate scrutiny. In this article, I am more concerned with what causes the initial punctuation—or the unfreezing seen in Reed—than am I with the factors that shape the development and adoption of the new status quo, but clearly both are important.

Quantitative Indicators

Formally tracing changes in outcome patterns for gender rights cases is complicated by the fact that there were very few outcomes prior to 1971. In effect, the legal policy change in Reed turned a regime of non-decisions into one of decisions, making the data poorly suited for time-series analysis. That said, examining several quantitative indicators of change strengthens the argument for a legal policy punctuation timed at Reed v. Reed.

First, I examine two measures of legal importance, testing whether Reed and Craig are, in fact, regarded by legal actors as critical cases within the issue area of gender discrimination. Using the United
States Supreme Court database (Spaeth et al. 2010) and the Policy Agendas Database (“Policy Agendas Project” 2012), I draw up a list of Supreme Court cases from 1946 to 1982 where gender discrimination was the primary legal issue. I then rank these fifty-three cases selected using Shepards Citations, an online tool which provides a list of all known authorities that cite a particular case. Specifically, I total the number of times another court (federal and state, trial and appellate) cites one of these cases as of the end of 2013.

I also rank the cases according to their legal relevance, using a network measure developed by Fowler et al. (Fowler et al. 2007). Fowler’s scores 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 inward relevance scores for most Supreme Court cases (and fifty of the fifty-three here), which rank cases according to how many future cases cite them (while accounting for the importance of the other cases the citing cases reference). Fowler and his co-authors used these scores to predict the likelihood that a Supreme Court case would be cited in a given year, finding that inward relevance scores outpredicted other measures of importance and salience. As inward relevance scores change each year as new cases enter the network, I employ the 2005 scores, the last year for which the scores have been generated.

2 The creators of the Policy Agenda Database request that the following quote be reproduced for studies that use its data: “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.”
Taking both the 2013 Shepard’s citations (for courts) and the 2005 Fowler legal authority scores, I rank the fifty-three cases selected above.³ To conserve space, I present the top ten cases so ranked for each measure.

[Figure 1 about here]

Under the Shepard’s citations measure, both Reed and Craig rank in the top ten, but only just. Other gender rights cases, perhaps because of their subject matter, are cited more frequently. Using the legal relevance scores, however, the legal importance of these two cases is made clear, supporting the qualitative narrative. Craig has the highest score, unsurprising given that it formalizes intermediate scrutiny and establishes the new status quo. Reed, the purported “unfreeze” cut-point, sits at third, with other well-known cases such as Stanley v. Illinois and Frontiero following.

While the legal importance measures offer some support that Reed and Craig serve as foundations of a new jurisprudential regime, the agenda change measures I examine make a much stronger case. Figure 2 illustrates the frequency with which gender discrimination cases appeared on the Supreme Court’s docket between 1948 and 2005, using the same cases in Figure 1. I also test for agenda effects by examining the frequency with which particular terms appear in the opinions of both the Supreme Court and the U.S. Courts of Appeals. For Figure 3, I use the Legal Language Explorer to count how often the USSC and the U.S. Courts of Appeals use the terms “women,” “sex,” and “sex discrimination” in their published opinions between 1949 and 2005.⁴ If there is an agenda shift at or near Reed, this examination should

³ Three of the cases selected did not have Fowler scores; these three cases also had the fewest Shepard’s Citations.

⁴ The Legal Language Explorer (http://legallanguageexplorer.com/) is an online tool that counts the number that a particular word or words appears within the corpus of U.S. Supreme Court and U.S. Court of Appeals
show differences in the rate at which the Court discusses sex discrimination in the context of equal protection before and after 1971.⁵

[Figures 2 and 3 about here]

Both Figure 2 and Figure 3 make a strong case for the presence of an agenda shift centered on 1970-71, or a little before Reed. In the twenty years prior to 1970, the Court heard only one or two cases involving gender discrimination in total, depending on which dataset one examines. This lack suggests a low-salience issue not subject to widespread conflict. This is clearly not the case after 1970-71, after which gender discrimination becomes considerably more salient. Similarly, Figure 3 presents a consistent pattern: little usage of “women,” “sex,” and “sex discrimination” by the Supreme Court and the Courts of Appeals before 1970-1971, and considerable usage and variation afterwards.⁶ This data thus supports Reed as a likely cut-point for a jurisprudential regime.

Finally, while there is insufficient data before Reed to make rigorous comparisons, it is hard to see the general neglect of women’s rights prior to Reed as anything but support for a hierarchical understanding of gender relations, particularly in light of the outcomes and reasoning in Goesaert v. Cleary and Hoyt v. Florida. Given that, the sudden increase in salience of gender and equal protection issues and opinions in a given year, and returns a time-series plot (Katz et al. 2011). Figure 3 reports the normalized results, which control for the volume of cases on the docket in a given year.

⁵ The Legal Language Explorer cannot perform Boolean, proximity, or combination searches (e.g. “women AND equal protection”).

⁶ I also examined changes in the frequencies of the terms “discrimination,” “gender,” and “gender discrimination.” These terms exhibited similar patterns, although two had slightly different cut points: “gender” enters the judicial lexicon in the mid-1970s, probably as an increasingly preferred alternative to “sex”, and “gender discrimination” does not catch on until the late 1970s, likely for the same reasons.
the favorable pattern of outcomes for litigants claiming gender discrimination suggests that Reed served not only as an agenda shift, but a shift in the ideological direction of case outcomes, as claimants alleging gender discrimination before the Supreme Court won at about a two to one ratio between 1970 and 1990.7

Explaining Punctuation in the Reed Regime

Having identified a regime break, I now turn to the consideration of the mechanisms that might have driven its creation. One hypothesis, familiar to judicial politics scholars, is that legal policy change is driven by personnel change. If one assumes that a judge’s attitudes generally determine decisions on the merits for cases at the Supreme Court (Segal and Spaeth 2002), and that on a nine-member Court the fifth or median vote completes a minimum winning coalition (Bonneau et al. 2007; Martin, Quinn, and Epstein 2005), then a personnel shift that shifted the ideology of the median justice might lead to policy punctuations. In 1962, for example, President Kennedy appointed both Arthur Goldberg and Byron White to the Court, shifting its median leftwards. These appointments created a much more liberal minimum winning coalition that presided over multiple legal policy punctuations in areas such as free speech, criminal procedure, and civil rights.

In this instance, however, personnel replacement is a poor fit for explaining Reed. A year before Reed, Nixon tilted the median vote considerably to the right with his appointments of Burger and Blackmun; in the year following Reed he solidified this rightward turn with the appointments of Rehnquist and Powell.

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7 Specifically, according to the USSC Database 37 cases were decided in favor of the litigant alleging gender discrimination, while 18 were decided in favor of the government (Spaeth et al. 2010).
A visualization of both Martin-Quinn (Martin and Quinn 2002) and Bailey (Bailey 2007) ideology scores for the Supreme Court's median vote over time in Figure 4 makes this point clear, with the median justice become more conservative in the two or three terms leading up to Reed.

[Figure 4 about here]

Martin and Quinn's measure does show the Court becoming slightly more liberal over the 1970s, although never returning to the liberalism of the Warren Court. Bailey's scores show little movement in either direction following the rightward shifts of 1969-1971. Under both measures, Nixon's nominees create a more conservative court—one likely to be less, rather than more, amenable to women's rights.

These replacements led to more conservative decisions in civil rights and civil liberties cases relative to the Warren Court (Lauderdale and Clark 2012). Given this, the Reed break stands as something of an incongruity, being what is conventionally understood as a "liberal" policy shift occurring while many other areas of constitutional law were moving in a conservative direction. Moreover, in the gender equality cases themselves, the justices most likely to oppose the regime shift were its most conservative members, such as Rehnquist and Burger, with Warren Court liberals Marshall and Brennan being its strongest supporters and the more moderate White, Blackmun, Powell, and Stevens serving as swing votes (O'Connor and Epstein 1983). This does not mean, note, that Nixon's appointees had no effect on the shape of the new regime—indeed, quite the opposite. A more conservative Court meant that Brennan and Marshall could not build a minimum-winning coalition in favor of applying strict scrutiny to gender discrimination, leading instead to the doctrinal compromise in Craig. As a mechanism for explaining the policy punctuation in Reed, however, in which the Court unanimously reversed course from its (also unanimous) prior support of hierarchical gender norms nine years prior in Hoyt, personnel change is a poor fit.

While personnel replacement undoubtedly drives many legal policy punctuations, it does not stand alone as a mechanism for creating PE dynamics, any more than elections serve as the only source of
policy punctuation in federal legislation (e.g. Jones and Baumgartner 2012). Another such mechanism involves venue-shifting (Pralle 2003). Policy punctuations may occur when policy entrepreneurs, disgruntled with the status quo, attempt to expand the scope of conflict beyond its traditional venue in an attempt to destabilize the current policy equilibrium (Schattschneider 1960). A policy area that heretofore had been quietly run by an executive agency, for example, might see a punctuation if Congress suddenly takes an interest (Baumgartner and Jones 1991). There is obviously some degree of policy entrepreneurship in this area, as women’s rights advocates such as Ruth Bader Ginsburg pushed the Court to oversee a policy area it had previously left to the legislative process. At the same time, however, an examination of the timeline, goals, and victories of the burgeoning women’s rights movement shows its members were not shifting to the courts after having failed in other venues, but were instead launching a broad assault on hierarchical policy in multiple venues (Klein 1984). This simultaneous expansion across multiple venues better supports a narrative of broad cultural shifts than one of strategic attempts to move policy from one place to another.

Given the poor fit of personnel replacement and a venue shifting traditionally understood, a sudden increase in the salience of gender issues and a shift in the attitudes of sitting justices seems better suited to explaining this regime break. This hypothesis remains congruent with the current judicial politics literature, which largely accepts both that judicial preferences can shift and that public opinion can impact judicial decision-making. The policy preferences or ideological “attitudes” of Supreme Court justices were initially assumed to be stable (Eskridge Jr 1991; Rohde and Spaeth 1976; Spiller and Gely 1992), but in recent years considerable evidence has emerged that the attitudinal positions of most (though not all) Supreme Court justices “drift” over time (Epstein et al. 2007). Similarly, while a number of older studies found little

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8 A pair of findings illustrates this point. First, in civil liberties and civil rights cases in particular, Segal-Cover scores—a fixed measure of judicial preferences which avoids endogeneity by relying on media
evidence that justices and federal judges were responsive to public opinion (Norpoth et al. 1994; Songer, Segal, and Cameron 1994; Stimson, MacKuen, and Erikson 1995), more recent research supports the hypothesis that public opinion impacts judicial behavior (Casillas, Enns, and Wohlfarth 2011; Epstein and Martin 2010), sometimes in the form of strategic actions that maintain the Court's legitimacy (e.g. Clark 2009), but more often simply in response to social forces (Flemming, Bohte, and Wood 1997; Giles, Blackstone, and Vining Jr 2008; McGuire and Stimson 2004; Mishler and Sheehan 1996), with the justices changing their minds on issues just as members of the public might do.

It seems reasonable, then, to assert that a sudden increase in the salience and visibility of women's issues convinced the Court that gender discrimination was a “problem” to place on its agenda rather than an unobjectionable background feature of the status quo. Such a change was certainly not a phenomena limited to the Courts. Shortly before Reed, for example, media interest in women's' rights was provoked by the Women's Strike for Equality, which took place on August 26, 1970, the 50th anniversary of the 19th amendment (Freeman 1975; Klein 1984). In another example, soon after Reed Congress would send the Equal Rights Amendment out to the states for consideration and pass Title IX of the Education Amendments of 1972.

assessments of Supreme Court nominees—are reasonably good predictors of judicial decision-making. However, Epstein et al. (2007) clearly show that Segal-Cover scores are worse predictors for a justice's tenth term than for their first, suggesting attitudinal drift. Second, relying on term by term ideology scores generated using Bayesian estimation, Epstein et al. find that for the 26 justices in their sample with ten or more terms, all but four noticeably drift to the left or the right over time. Research into the preferences of federal appellate court judges also supports the argument that judicial preferences change over time (Kaheny, Haire, and Benesh 2008).
However, more rigorous evidence of an explosion in the salience of “women’s issues” prior to Reed is available. To demonstrate this, I look at five measures of public and elite interest in the women’s rights movement and gender equality. First, I examine changes in public opinion about gender and gender roles over the time period in question. While this period of history predates some of the better continuous measures of public opinion (such as the General Social Survey), two prior studies provide useful information. The first compiles isolated but similar questions to build a timeline for comparison (Mason, Czajka, and Arber 1976), and the second uses panel data to assess changes in attitudes to gender between 1962 and 1977 (Thornton and Freedman 1979). I present these findings in Table 1.

[Table 1 about here]

The results clearly support a strong, and for many items sudden movement towards more egalitarian views on gender, illustrating what Thorton and Freedman aptly refer to as a shift that was “pervasive throughout society” (841).9

Second, I mirror earlier work by policy scholars (e.g. Baumgartner and Jones 2009; Schrad 2007; Weart 1988), counting the number of times in a given year that particular topics appear in the index for the Readers Guide to Periodical Literature. Under the main topic of “woman,” the three subtopics that seemed most relevant were “women,” “equal rights” and “women’s liberation” (a term which first appears in 1969 and is changed to “feminism” in 1977). Third, I examine the frequency of the word “women” in Google’s Ngram Viewer, which examines how frequently a particular term has appeared in Google’s corpus of books.10 I trace the annual frequency of these index references from 1950 to 1980, and the annual percentage of references in the Google corpus from 1950 until 2005, in Figure 5.

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9 Elsewhere in the study, Thorton and Freedman demonstrate that these shifts are not limited to particular groups of women or even women alone, but cut across all major demographic groups.

10 See http://books.google.com/ngrams/ for more details.
The results in Figure 5 suggest Reed was a slightly lagging indicator of an attention shift towards women's issues. The frequency of “women” in the index rises substantially after 1970, as does “women's liberation.” “Equal rights” does not present as clear a break, but does peak at 1971, the same year as Reed. The frequency of “women's rights” in the Ngram Viewer also supports the attention shift hypothesis, with low frequency and little variance before 1970 and greater frequency and variation thereafter. The overall picture is one where the salience of women's issues rises dramatically shortly before the decision in Reed.

I also consider the possibility that legal elites may have been focused on gender equality even if the issue was not in the public eye. If true, this finding would undercut an attention shift hypothesis. Here I analyze the interest in women's issues within legal periodicals, using both a keyword search of law review titles on the HeinOnline legal database, as well as a manual coding of subjects within the Index to Legal Periodicals, a volume comparable in format to the Reader's Guide index used in Figure 5. Figure 6 tracks keyword searches for “woman,” “women,” “gender,” “sex,” and “women's rights” in law review titles by year within HeinOnline, while Figure 7 traces the frequency of articles categorized under Index topics “women,” “discrimination (sex),” “equal protection (involving women's issues),” and as a contrast, the subjects “married women” and “husband and wife.” Both figures run from 1950 to 1990.

These results suggest legal elites did not predate the public in their attention to women's rights. In Figure 6, only the term “woman” begins to noticeably increase in the 1960s, and the change here is small in absolute terms. “Women,” by contrast, jumps substantially after 1970, from 16 mentions in 1969 to 80

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11 The keyword search in HeinOnline looked for each term in separate searches, using the options “all titles” and “all subjects” and articles, comments, and notes as the sources, from 1950 to 1990.
mentions in 1971. “Sex” and “Women’s rights” exhibit similar patterns, rising from 13 mentions in 1969 to 46 in 1971 and from 1 mention in 1969 to 11 in 1971, respectively. “Gender,” finally, does not appear in law review titles until the mid-1970s, suggesting it arose as in reaction to the Court’s own equal protection decisions or as a preferred alternative to the term “sex.” In the Index searches in Figure 7, 1970-1971 again serves as the most common cut point, showing a strong increase in frequency for articles categorized under “women,” “discrimination (sex),” and “equal protection: gender” at that time. By contrast, as the right-hand graphs in Figure 7 show, the more hierarchical references to women do not exhibit the same patterns. Indeed, in 1976 the Index simply abandons the category of “married women” altogether. In short, the timing of the attention shift for legal elites on women’s’ rights issues appears comparable in timing to those seen in the general public.

While one must be cautious of drawing causal inferences from temporal correlation, the evidence above makes a reasonable case that the Court’s abrupt reinterpretation of the Equal Protection Clause was driven by shifts in attention. By contrast, competing explanations such as such as personnel change or venue-shopping seem less likely explanations.12

Specifying the General Punctuation Thesis with the Cultural Cognition Theory of Stasis and the Cultural Theory of Change

So far, my analysis has been an attempt to extend the standard PET model to legal policy punctuations at the Supreme Court. However, the Reed regime serves not only as an example of the utility

12 The latter finding is particularly important. While PET scholarship has rightly noted that policy punctuations often occur in the absence of elections or other instances of personnel change, current theory may too often focus on strategic venue decisions by policy entrepreneurs, giving too little attention to episodes such as this one, where shifts occur simultaneously across multiple venues.
of jurisprudential regimes, but also as an opportunity to illustrate how culture can inform and improve PET. At a micro-foundational level, the general punctuation theory’s focus on cognitive mechanisms can be improved by attention to cultural cognition, or “the tendency of individuals to conform their perceptions of risk and other policy-consequential facts to their cultural worldviews.” (Kahan 2011, 23). At the macro-foundations level, PET scholarship has found that exogenous shocks may jar policy-makers out of their inattention and lead to policy punctuations, such as the Enron scandal and the subsequent passage of the Sarbanes-Oxley Act (Jones and Baumgartner 2005, 70). Such events, naturally, are unpredictable and difficult to model. The Reed punctuation, I argue, shows the utility of including “cultural surprises” among these macro-level causes. Cultural surprises occur when a mismatch between individuals’ perceptions of the world and the expectations generated by their cultural commitments reaches critical mass, leading to cultural shifts that affect cognition and policy support (Swedlow 2011; Wildavsky 2006). While point prediction of cultural surprises is probably not feasible, cultural shifts—such as a shift from hierarchical to egalitarian views on gender—are capable of measurement, allowing us to better predict cultural surprises and thus potential policy predictions.

Both cultural cognition and cultural surprises have their roots in the Cultural Theory (CT) framework championed by Mary Douglas and Aaron Wildavsky, in which a finite number of cultural paradigms—individualism, hierarchy, egalitarianism, and fatalism—help individuals make sense of their preferences and organize their lives (Douglas and Wildavsky 1983; Thompson, Ellis, and Wildavsky 1990). Importantly, CT made clear that there exists “competing social definitions of what will count as rational,” in that different cultural types not only hold divergent values, but differ in their empirical perceptions of the world, so that they might avoid cognitive dissonance with their cultural commitments (Thompson, Ellis, and Wildavsky 1990, 22). CT has explanatory power in predicting what risks individuals prioritize and which they downplay (Douglas and Wildavsky 1983; Jenkins-Smith and Smith 1994; Jenkins-Smith 2001).
Cultural cognition theory builds on this earlier CT work, using survey experiments to test for the impact of cultural worldviews on risk perception. Of particular relevance here is the cultural cognition scholarship involving legal policy disputes. For example, in *Scott v. Harris* (2007), the Supreme Court heard the lawsuit of a motorist who was paralyzed when he was run off the road by police during a high-speed pursuit. Reviewing a video recording of the chase, the Court ruled in favor of the police department, arguing not only that the plaintiff's dangerous driving justified the decision to force him off the road, but that “no reasonable jury could believe” the plaintiff's account (*Scott v. Harris* 2007, 694). In an experiment employing the original video footage, Kahan, Hoffman, and Braman tested to what extent subjects agreed with the Court's perception of Harris's actions (Kahan, Hoffman, and Braman 2009). They found that only a slight majority of subjects agreed with the Court; more importantly, however, they found that measures of cultural worldviews correlated with the degree to which subjects thought police were justified, with a strong correlation between support for the police and hierarchical worldviews. Similar analyses in other legal issue areas such as acquaintance rape (Kahan 2009) or whether protestors were lawfully protesting or illegally blocking access to an abortion clinic or military recruitment station (Kahan et al. 2012) have replicated these findings.

Supplementing the general punctuation thesis with cultural cognition should thus improve PET's ability to explain stasis and change. Cultural stability, either within an institution or the broader culture,

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13 Cultural cognition builds on CT theory, but operationalizes culture in a somewhat different fashion. Douglas and Wildavsky's CT argues that individuals align with particular cultural types (egalitarian, individualistic, hierarchical, or fatalist), while cultural cognition operationalizes cultural values as lying on two axes (hierarchy and egalitarianism, individualism and communalism), with individuals being hybrid types (e.g. hierarchical individualists). In the Reed punctuation, the difference is muted, as a transition from hierarchy to egalitarianism fits both schemes well.
should increase the likelihood of policy stasis, as cultural cognition strengthens the mechanisms that prevent competing frames or priorities from being considered, even in the face of strong signals that a particular issue is a problem.

If cultural cognition theory improves our understanding of the micro-foundations of policy stasis, the concept of cultural surprise can contribute to our understanding of the mechanisms for policy punctuations (Coyle and Wildavsky 1987; Lockhart 1999; Swedlow 2011). Like cultural cognition, the idea of cultural surprise has its basis in Douglas and Wildasvky’s CT paradigm. As described above, cultural commitments generate expectations about the world, not only in terms of what individuals think is dangerous or risky, but more generally in what sorts of empirical claims they are predisposed to accept. An individualist, for example, would more readily blame an individual for his economic failures, while an egalitarian’s distrust of potentially unjust systems might lead him to prefer environmental explanations.

At times, however, the world offers evidence so contrary to one’s cultural expectations that it overwhelms the defenses erected to prevent cognitive dissonance, leading to a cultural surprise where individuals abandon their prior commitments. Such surprises should not be common, given that individuals will view events in ways most amenable to their cultural expectations, and given that complex policy failures will have multiple plausible causes. For example, an egalitarian might easily see the recession of 2008 as being driven by out of control market forces and bad behavior by large banks, while an individualist might be more inclined to blame government lending regulations or poor individual choices (Lodge and Wegrich 2011). Nevertheless, just as the drumbeat of anomalies and contrary findings can eat away at support for a scientific theory over time (Kuhn 1996), so too can a long period of defied cultural expectations lead to a cultural surprise.

A key advantage of adding cultural surprises to the list of potential macro-level mechanisms for policy punctuations is that the underlying cultural shift can be measured, making prediction of punctuation more feasible. Whether using opinion polls or textual analysis of legal or other documents, evidence of a
gradual shift towards a particular cultural type or dimension might signal the increasing likelihood of a policy punctuation. Just as importantly, however, attention to culture might help us better explain the “dog that did not bite.” If support for a particular cultural worldview in a policy area has not been eroding over time, then cultural cognition might enable individuals to explain away a catastrophic but singular event. Just as the scientific community may not abandon orthodox scientific theory on the basis of a single spectacular falsification, so too might the “brute force” of an exogenous event fail to create policy punctuation.

Egalitarian Shifts in the Reed Regime

The shift in attention which led the Court to reconfigure its gender and equal protection jurisprudence was driven by an egalitarian cultural surprise—in which decades of a growing mismatch between hierarchical expectations and the reality of women’s lives hit critical mass about 1970. On both sides of this divide there is evidence of cultural cognition: pre-Reed cases provide strong evidence of hierarchical reasoning where the justices do not see gender discrimination as a problem, while Reed and its progeny contain egalitarian arguments where hierarchical views on gender are deemed unreasonable and unconstitutional.

Egalitarianism is a CT type characterized by support for “a shared life of voluntary consent without coercion or inequality” (Wildavsky 1987). Egalitarians champion natural equality and are suspicious of hierarchical distinctions, distrust “bigness” in government or in business, believe in individual goodness and thus tend to blame corrupt systems for bad outcomes rather than individual choices, and are prone to demonizing their opponents in order to maintain unity. An egalitarian cultural surprise, then, would result when individuals come to believe that their ills result not from their own shortcomings or natural inequalities but from an unjust system, leading them to embrace egalitarianism.
This description fits accounts of the women’s’ rights movements rather well. Since the 1930s, women had been entering the workforce in increasing numbers, were having fewer children, were having children later in life, were becoming more educated, were getting married later and remarried less often, and were getting divorced at higher rates (Freeman 1975; Klein 1984). These trends well predated the rise of the contemporary women’s rights movements, occurring during what some women’s rights advocates referred to as the “barren years” between 1925 and 1960. Unsurprisingly, given this label, the policy status quo remained largely intact.

Beginning in the 1960s, however, spurred on by modest egalitarian changes in public policy—such as President Kennedy’s creation of the Commission on the Status of Women in 1961—and by increasing egalitarian successes in the battle against racial discrimination, the women’s rights movement underwent a transformation. In contrast to the earlier suffrage movement, in which egalitarians were joined by hierarchs who argued that the electoral process would be improved by the inclusion of feminine virtue, the movement of the late 1960s and 1970s was explicitly and increasingly egalitarian in both its aims and organization. The movement was marked by the development of a feminist, egalitarian consciousness, a view that women were a distinct group with identifiable interests, and the contention—commonly ascribed by CT theorists to egalitarians—that gender inequality resulted from an unjust system, rather than individual failure (Thompson, Grendstad, and Selle 1999). For example, the 1966 founding “Statement of Purpose” of the National Organization for Women explicitly attacked hierarchical gender norms and argued for far-reaching changes in the legal system. Moreover, many women’s rights groups suffered the organizational

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14 Evidence that the battle for equal rights in the courts was impacted by the Civil Rights movement of the 1960s can be clearly seen in Ruth Bader Ginsburg’s party brief in Reed. While Ginsburg did argue that Idaho’s gender classification was irrational, the bulk of her brief was spent drawing parallels between racial and gender discrimination to justify the elevation of gender to a suspect class.
dilemmas that CT predicts egalitarians will face (Thompson, Ellis, and Wildavsky 1990): suspicion of centralization, a tendency to view compromise as capitulation and betrayal, and severe collective action problems (Freeman 1975).

Given that the women's rights movement “took off” in 1970 (Freeman 1975), a year before Reed's doctrinal reformulation, it seems reasonable to examine whether the agenda shift was driven by cultural change. Ideally, this hypothesis would be tested using independent measures of cultural commitment for the justices or opinion text; however, such measures do not exist. As mentioned above, moreover, the relative lack of data prior to the Reed cut point complicates testing for the causes of agenda-driven policy punctuations. Given this, I look instead to the Court's legal reasoning for evidence of cultural cognition, comparing how the justices use the opinion text to justify their views on gender before and after Reed.

Even using this method, there is less data before Reed than one would like. Still, comparing the reasoning in Goesaert and Hoyt with that seen in Reed and its progeny provides good evidence of cultural change. Goesaert v. Cleary (1948) involved an equal protection challenge against a Michigan law that forbade women from being licensed as bartenders unless they were the wife or daughter of the owner. At trial, the district court ruled in favor of the state, arguing that Michigan's distinction was neither arbitrary or unreasonable, and that “the power of the legislature to make special provision for the protection of women is not denied” (Goesaert v. Cleary, 1947, 739). Similarly, it was deemed reasonable for the legislature to conclude that “that the presence of female waitresses does not constitute a serious social problem where a male bartender is in charge of the premises (739).”

On appeal to the Supreme Court, Justice Frankfurter affirmed the rationality of the legislature's determinations. “Since bartending by women may … give rise to moral and social problems,” he wrote, the legislature could put conditions on employment if those factors “eliminate or reduce the moral and social problems otherwise calling for prohibition (466).” In other words, it was reasonable to assume women required protection and a male owner would keep women safe (even though the law in question did not
require a man on the premises, or permit a hired male bartender or bouncer to fulfill this purpose). To be sure, neither opinion forthrightly endorses a hierarchical worldview, instead relying on the fig leaf of judicial deference to the legislature. Still, it is clear that both courts believed Michigan’s assessment of female (in)capability was at least rational, no worse a justification for public policy than any other whose empirical grounds may come into question.

Even in 1961—only nine years before Reed—there is good evidence of a hierarchical outlook regarding the social facts of gender. Hoyt v. Florida involved a Florida law which placed women on the jury pool only if they affirmatively registered for jury duty; men, by contrast, were automatically registered. Hoyt, who had been convicted of the second-degree murder of her husband, argued that her conviction had been biased by her all-male jury, which she contended resulted from this statutory scheme. In rejecting her claim, the Court unanimously agreed that Florida’s scheme was rational and constitutional. While recognizing “the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men,” the Court held that women were “still regarded as the center of home and family life,” and possessed “special responsibilities” that vindicated Florida’s statute (Hoyt, 61-62). The Court also noted that the gender discrimination could be independently justified by the administrative difficulties involved in changing the status quo. Indeed, while not directly addressing the issue (deciding the case instead on narrower grounds), Justice Harlan suggested that even an explicit “males only” jury requirement remained constitutional (60).

By the time the Court hears Reed, something dramatic has happened to the way in which the justices perceive gender and gender norms. Again, in Reed an Idaho law held that when otherwise equally entitled individuals seek to administer an estate in probate, males must be preferred to females. In a unanimous decision, the Reed Court argued that Idaho’s gender preference was the sort of “arbitrary legislative choice forbidden by” the Equal Protection Clause (Reed, 76). The Court clearly relied on the factual inference that men and women are similarly situated, at least when it comes to administering an
estate. Notably absent were dicta about the special role of women in family life, or other references to a hierarchical world view. Moreover, the same administrative convenience which had served as ample justification for rejecting the suit in Hoyt now fell short, as hierarchical view of gender roles were no longer natural or unworthy of mention but instead arbitrary and irrational. Reed thus made a good target for women's rights advocates—the statute's discrimination was clear and there were no alternative acceptable justifications. However, the key here is not Reed per se but the shifts in culture and attention that drove it: a decision of this sort was almost certainly inevitable during the time frame in question.

The critical importance of the cultural shift from Hoyt to Reed does not mean that the Court had reached a consensus on the shape of the new regime, of course, as the cases between Reed and Craig show. Nor did it mean that states and the federal government were not initially able to defend gender discrimination on grounds that we might find questionable today. But there seems little doubt that within the assessment of gender discrimination claims, Reed closed the door on statutory justifications that relied solely or even primarily on hierarchical cultural worldviews. After Reed, governments or sympathetic judges would struggle—often in obvious contravention of a statute's original purpose—to find non-hierarchical grounds to justify existing discrimination. As early as 1972 in Frontiero v. Laird, in which the plaintiff challenged a military rule that allowed men to automatically claim their wives as dependents but required a showing of dependency when women claimed their husbands, the district court went out of its way to defend Congress by noting that there was no reason to assume that “the present statutory scheme is merely a child of Congress' 'romantic paternalism' and 'Victorianism' (209)."

Egalitarian views of gender norms also had implications for men. In Stanley v. Illinois (1972), the Court struck down an Illinois law which required that the children of unwed parents became wards of the state when the mother, but not the father, died. Illinois had presumed that unwed fathers (but not unwed mothers) were unfit to raise children, given its view that that mothers were more strongly bonded to their children than fathers (a point that, in dissent, Justice Burger would defend as based in “common human
experience” (665)). Illinois may not, wrote the Court, employ such a presumption to protect minors, as its claim that fathers uniformly have less attachment to their children than do mothers was irrational. Similarly, *Weinberger v. Wiesenfeld* (1975), a case in which a plaintiff challenged the Social Security Administration’s policy of providing survivor benefits to widows but not widowers, the Court unanimously rejected the policy as being based on an “archaic and overbroad generalization (643),” in which “a man is responsible for the support of his family and children,” but not the converse (644). By contrast, the Court would still permit discrimination that ostensibly favored women if it could be convinced that the purpose of the law was to remedy to past discrimination, rather than simply push hierarchical notions of gender roles. In *Califano v. Webster* (1977), for example, the Court overturned a lower court’s rejection of a federal statute that allowed women to use fewer working years than men to calculate their maximum Social Security benefit. Adapting logic quite similar to that initially made by liberals in affirmative action cases involving race, the Court wrote (per curiam) that this distinction was not based on “archaic and overbroad generalizations” about women or on “casual assumptions that women are ‘the weaker sex’ or are more likely to be child-rearers or dependents.” Instead, “the only discernible purpose of … [the statute was] the permissible one of redressing our society’s longstanding disparate treatment of women” (*Califano v. Webster*, 317). Even this ruling, however, can be seen as evidence of an egalitarian shift in thinking, given that the reasoning—at least on its face—views prior discriminatory treatment of women as unjust and requiring remediation.

That the Court would no longer accept justifications for gender discrimination based on hierarchical cultural worldviews is driven home most clearly in *Stanton v. Stanton* (1975). Utah law posed different ages of majority for men (21) and women (18), a choice called into question when Mr. Stanton ceased child support payments for his daughter upon her 18th birthday. Mrs. Stanton sued, challenging the distinction as unconstitutional under the Equal Protection Clause. The Utah Supreme Court upheld the law, arguing that while it treated men and women differently, the distinction was reasonable. Going further, the UTSC defended what it referred to as “old notions,” such as that “it is the man’s primary responsibility to provide a
home and its essentials,” and “it is a salutary thing for him to get a good education and/or training before he undertakes those responsibilities (quoted in *Stanton v. Stanton*, 1975, 10).” The Utah Supreme Court declared these ideas to be “widely accepted” even in a “time of change,” and argued changes in the law should be made by the legislature rather than the courts (10).

The Supreme Court was not impressed. “We perceive nothing rational in the distinction drawn by [the statute]… No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas (*Stanton v. Stanton*, 1975, 14).” The factual differences perceived by the UTSC, Justice Blackmun wrote, were wrongly imputed to natural differences rather than the predictable results of discriminatory social structures. “If the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed (15).” Blackmun’s views of gender roles, as well as his willingness to champion systematic explanations for existing inequality, well fit an egalitarian cultural worldview.

Perhaps the most interesting thing about *Stanton* was that the Utah Supreme Court did not simply acquiesce after its ruling was reversed and remanded. Instead, it defied the USSC, engaging in what appears to be a culturally motivated reaction to being told that one’s worldview is unsupported by the facts. Cultural cognition theory holds that individuals who are told that the “facts” do not support their position double down on their initial perceptions rather than accept the argument made (e.g. Kahan 2011; Nyhan and Reifler 2010). The UTSC responded in this vein, retorting that “regardless of what a judge may think about equality, his thinking cannot change the facts of life … to judicially hold that males and females attain their maturity at the same age is to be blind to the biological facts of life (quoted in *Stanton v. Stanton*, 1977, 503).” If the Court had not been impressed by the UTSC’s initial opinion, its reaction in the rehearing was downright frosty: “apparently the Utah Supreme Court did not read our opinion as requiring that the
child support law must be nondiscriminatory to comply with the constitutional standard. That, of course, is a misunderstanding (503-4)."

No other case would engender this sort of resistance. In fact, the speed and thoroughness with which hierarchical defenses of gender-discrimination vanished validates the presence of a cultural surprise. Aside from the Utah Supreme Court’s tilting at windmills, and perhaps Burger’s defense of Illinois in Stanley v. Illinois (1972), defenses of such laws would quickly come to turn on other grounds, such as remedying specific past discrimination towards women (e.g. Kahn v. Shevin, 1974), deference towards specific military needs (e.g. Schlesinger v. Ballard, 1975; Rostker v. Goldberg, 1980), or the plaintiff’s lack of standing, (e.g. Rehnquist’s dissent in Orr v. Orr, 1979). Laws that could not find some conceivable alternate purpose were instead deemed to be the product of “archaic and overbroad generalizations,” as in Duren v. Missouri (1979, striking down a state law that granted an automatic exclusion to female jurors who asked for one or who were absent from venire, but not to male jurors), Orr v. Orr (1979, striking down an Alabama law that required alimony payments from men but not women), and Caban v. Mohammed (1979, striking down a New York law that treated unwed fathers differently from unwed mothers in terms of their ability to block adoptions). Even in Michael M. v. Superior Court of Sonoma County (1981), a case which dealt with a California law that treated men and women differently in regards to statutory rape, the law survived only because the Court accepted California’s dubious assertion that the gender distinction in question was enacted to deter teenage pregnancy, rather than because of hierarchical views about female virtue.

To be sure, the language in these opinions is only indirect evidence of a shift towards egalitarian cultural beliefs, as we cannot directly assess judicial cognition. Cultural cognition asserts culture is prior to perception, but the arguments in the above cases could also support a narrative in which the justices do not view the social facts of gender through egalitarian cognition, but nevertheless employ such arguments to justify their desired policy outcome. This alternative hypothesis seems unlikely, however—why, exactly, would the Court press for gender equality if its members did not support egalitarian aims? With this caveat
in mind, it seems fair to see Reed v. Reed and its progeny as evidence of a cultural surprise, particularly when contrasted with cases prior to the cut point.

Finally, while I give primacy of place to attention shifts driven by cultural shifts as the mechanism for policy punctuation, two other dynamics may have played a role here, particularly in regards to the swing justices in this time period. First, future justice Ginsburg's brief in Reed focused primarily on drawing parallels between the history of racial and gender discrimination, hoping to convince the Court to apply strict scrutiny. By contrast, only eight of sixty-seven pages in the brief dealt with the winning argument that gender discrimination failed the rational basis test (Campbell 2002). While the failure to reach strict scrutiny undoubtedly disappointed Ginsburg and other women's rights advocates, the presence of a middle option between adopting strict scrutiny and maintaining support for hierarchical gender roles may have been crucial for gaining the support of the “swing” justices, a point reinforced by the creation of intermediate scrutiny in Craig. Second, though the political science literature generally points to judicial attitudes and policy preferences as the foremost cause of Supreme Court decision-making, justices do vary considerably in the deference they accord to legal factors such as past precedent. Justice Powell, for example, appointed in 1972 after Reed was decided, scores very highly in his deference to precedent (Bailey and Maltzman 2008, 379). Some portion of the refusal to accept hierarchical justifications after Reed may thus have resulted from respect for stare decisis, rather than cultural shifts alone.

Discussion and Conclusion

This paper has worked to advance two goals. First, I have offered the jurisprudential regimes framework as an organizing device for studying legal policy punctuations at the Supreme Court. Jurisprudential regimes tell judges what facts are legally relevant, constituting the framework for legal analysis in similar situated cases. As such, the concept is well suited to help identify potential PET cut
points. In some cases, potential candidate regimes can be assessed using sophisticated statistical methods (Pang et al. 2012); in others, particularly when the Court's decision to enter or abdicate a policy area leads to a lack of data on one side of the cut-point, agenda-setting trends can be examined. To demonstrate the utility of this concept, I examine the candidate regime of Reed v. Reed, which upon analysis largely meets my suggested criteria. Reed was a critical juncture in legal policy, trading hierarchical understandings of gender roles for egalitarian viewpoints. Further examination of this legal change suggests a shift in the salience of women's rights in society, rather than venue manipulation or personnel change, as the most likely mechanism for policy punctuation.

I use this same case study to show how concepts derived from cultural theory, specifically cultural cognition and cultural surprise, can inform PET. The general punctuation theory provides a convincing cognitive foundation for punctuated dynamics, but its account can be improved by incorporating cultural cognition theory, which demonstrates how cultural commitments affect individual assessments of what risks seem risky, what problems are seen as problems, and what evidence is worth taking seriously. Cultural stability thus provides further support for the status quo. By contrast, the concept of cultural surprises can be added to the list of possible macro-level causes of policy punctuations, as shifts in cultural commitments—either broadly or in particular policy realms—may alter not only policy views but whether society perceives something as a problem, impacting agendas. I argue that the changes seen in Reed and its progeny were driven in large part by a societal shift from a hierarchical view of gender relations to an egalitarian one. Once cultural change altered the "social facts" of gender, shifts in legal doctrine quickly followed.

Taking culture seriously—and in particular, the more rigorous manner in which CT and its variants define and operationalize culture—should improve our ability to analyze and predict the likelihood of legal policy punctuations. Numerous legal policy ideas compete to gain space on Supreme Court dockets. Understanding the interaction between cultural commitments and judicial perception of what constitutes a
problem (or perhaps, what is justiciable) may give us clues as to where policy punctuations are more or less likely. For example, while not a story of attention shifts, the Court’s decision to strike down the Defense of Marriage Act in United States v. Windsor (2013) seems predictable given the recent acceleration of egalitarian views about sexual orientation. By contrast, cultural stasis may help explain why a policy status quo remains unscathed despite a “brute force” event or catastrophe that some expected to dislodge it.

This point leads to two final concerns, addressing potential critiques of either this study or of employing CT theories in general. First, rigorous investigation of the role culture plays in PET will require independent and reliable measures, beyond what existing survey measures can provide. Better tests of the relationship between cultural shifts or cultural stasis and policy change must provide for the possibility that policy punctuations occur even when culture remains static, or the less likely possibility that policy remains static even when culture shifts. Absent such measures, analyses such as this one risk becoming “just-so” stories that cannot be easily falsified. Such measures would also help assess the fit of particular mechanisms for policy punctuation. For example, in this study I have downplayed personnel change as a driver for Reed, given that Nixon had just made the Court more conservative prior to Reed and judicial conservatives tended to be less supportive of egalitarian views on gender than liberals. Without measures of culture, however, we cannot rule out that some of Nixon’s appointees—such as Justice Blackmun, who wrote both Stanton v. Stanton and the majority opinion in Roe v. Wade (1973)—were more egalitarian on gender than the liberal justices they replaced.15

15 A full description of how this might be accomplished is outside the scope of this article, but one promising approach would involve the creation of custom conceptual dictionaries for the CT dimensions (e.g. egalitarianism). Psychologists believe the use of particular words is associated with larger concepts, such as negativity or certainty (Tausczik and Pennebaker 2010). Using the content analysis program Linguistic Inquiry and Word Count, one can investigate large amounts of text and generate quantitative
Second, the reader might wonder why we should employ cultural dimensions such as egalitarianism and hierarchy when we could instead rely on a standard liberal-conservative framework. Ideological attitudes operationalized in this manner have also been found to structure perception, salience, and attention, and tentative attempts have been made to connect legal outcomes and a liberal-conservative framework using motivated reasoning (Braman 2009). Why reinvent the wheel? There are several reasons why the cultural theory framework might prove more valid in describing legal policy attitudes than the standard attitudinal model. First, cultural cognition provides a clearer theoretical basis for how extrajudicial influences shape decision-making, and has ample support for that theory. The attitudinal model, by contrast, is largely agnostic about its own mechanisms (Braman and Nelson 2007).

The dimensions or cultural types which CT and cultural cognition generate may also lead to less contortion than a liberal-conservative axis when applied to American legal doctrine and legal change. The attitudinal model has its genesis in an “underdog” framework, with victories for individual plaintiffs—such as criminals or individuals facing censorship—deemed liberal outcomes and victories for the government deemed conservative ones (Spaeth et al. 2010). Given the nature of American politics and rights issues during the time period in which Spaeth developed the United States Supreme Court database, this framing seemed reasonable, and has had success in explaining appellate decisions on the merits over the last few decades (Ruger et al. 2004). Over time, however, cracks have emerged in the “liberals as underdogs” framework, as conservative legal actors shifted from opposing the creation of a stronger rights framework scores for these concepts based on the count of the relevant dictionary terms (e.g. Corley and Wedeking 2014; Owens and Wedeking 2012). Such measures could allow one to more rigorously measure the degree to which an opinion is egalitarian, individualist, and so on; moreover, such tools could be applied to a justice’s personal communications (e.g. Owens and Wedeking 2011) to generate exogenous CT measures that could be employed in hypothesis testing.
to employing that framework to advance their own policies (in areas such as freedom of association and commercial speech (Epstein et al. 2006), affirmative action (Keck 2006), and takings (Baum 2013)). Such outcomes would, under older coding conventions, be deemed “liberal.” Ad hoc coding adjustments could be (and have been) made to account for these incongruities, but using the CT framework may avoid these contortions in the first place. Seeing “liberals” at the time of Reed possessing egalitarian and individualistic wings, for example, at first united against hierarchical doctrine but eventually coming into conflict with each another, provides a coherent narrative of change that the attitudinal model’s one-dimensional framework cannot easily provide.

Finally, CT’s operationalization of culture provides a framework for examining legal attitudes more broadly applicable across time and space. It would be quite difficult, for example, to analyze 19th century Supreme Court cases using a liberal-conservative axis, given how time and place-dependent such notions of ideology are. What is the liberal position, for example, in Charles River Bridge (1837)? By contrast, CT’s cultural types are more amenable for historical analysis (Ellis and Wildavsky 1990; Wildavsky 1985) and permit more coherent comparisons between past and present. CT may also be better suited in cross-national comparisons, particularly for countries that do not have a clear left-right division in their politics (e.g. Lodge and Wegrich 2011; Thompson, Grendstad, and Selle 1999). Naturally, these arguments may not hold up to testing, but in theory, at least, they merit further investigation.

For too long, PET scholars have eschewed the Supreme Court. The use of jurisprudential regimes provides a framework by which interested scholars can examine the potential causes of doctrinally driven legal policy punctuations. As I hope I have shown here, moreover, doing so might uncover mechanisms impacting stability and change—such as cultural cognition and cultural surprises—that will not only improve our understanding of legal policy change, but of policy change broadly understood.
References


Kahn, Ronald. 2006. "Social Constructions, Supreme Court Reversals, and American Political Development: Lochner, Plessy, Bowers, but not Roe." In The Supreme Court and American


Table 1: Percentage of Respondents Giving Egalitarian Answer to Poll Questions on Gender Roles

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<tr>
<th></th>
<th>Mason, Czajka, and Arber (1976)</th>
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<tr>
<td></td>
<td></td>
<td>1964</td>
<td>1970</td>
<td>1973</td>
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<tr>
<td>Women can't make long-range plans</td>
<td>54.8</td>
<td>89.4</td>
<td></td>
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<tr>
<td>Working mothers can establish warm and secure relationships with children</td>
<td>54.8</td>
<td>67.4</td>
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<tr>
<td>Men should share in the housework</td>
<td></td>
<td>55</td>
<td>72.6</td>
<td></td>
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<tr>
<td>Women should be able to keep their jobs post-pregnancy</td>
<td>63.7</td>
<td>80</td>
<td></td>
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<tr>
<td>Women should have the same job opportunities as men</td>
<td>65.8</td>
<td>76.8</td>
<td></td>
<td></td>
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<tr>
<td>Women can successfully serve as a president or CEO</td>
<td>52.3</td>
<td>67.5</td>
<td></td>
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<tr>
<td>Women can live a full life without marrying</td>
<td>55.3</td>
<td>70.1</td>
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<table>
<thead>
<tr>
<th></th>
<th>Thorton and Freedman (1979)</th>
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<tr>
<td></td>
<td></td>
<td>1962</td>
<td>1977</td>
<td></td>
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<tr>
<td>Decisions should be made by the man of the house</td>
<td>32.5</td>
<td>67.3</td>
<td></td>
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<tr>
<td>It's okay for women with children to be active outside the house</td>
<td>42.5</td>
<td>60.5</td>
<td></td>
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<tr>
<td>A wife shouldn't expect her husband to do housework</td>
<td>45.8</td>
<td>62.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men and women have different spheres of work</td>
<td>55.5</td>
<td>77.4</td>
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</tbody>
</table>

This table presents public opinion data from Mason, Czajka, and Arber (1976) and Thorton and Freedman (1979) on changes over time for attitudes towards gender and gender roles. The former study compiled isolated questions with similar aims and standardized them for comparative purposes; the latter relies on original panel data. In all cases, the answers have been transformed so that the numbers reflect the percentage of respondents giving the egalitarian response choice.
Figure 1: Shepard’s Citations, Courts (2013) and Fowler’s Authority Scores (2005) for Gender Discrimination Cases at the Supreme Court, 1946 to 1982

This figure presents indicators of legal importance, tracking the total number of Shepard’s Citations attributed to state and federal courts for a particular case, as well as the case’s legal authority or inward relevance score, using Fowler’s network measures (Fowler et al. 2007).
Figure 2: Gender Discrimination Cases at the Supreme Court, 1948 to 2005

This figure shows how often gender discrimination cases appeared on the Supreme Court’s docket. The left-hand figure tracks the frequency of cases categorized as “sex discrimination” from the United States Supreme Court Database (Spaeth et al. 2010), while the right-hand figure tracks the frequency of cases categorized as “gender and sexual orientation” cases from the Policy Agendas Database ("Policy Agendas Project" 2012).
This figure tracks the annual frequency with which the words “women,” “sex,” and “sex discrimination” occur in the opinions of both the United States Supreme Court and the U.S. Court of Appeals, using the Legal Language Explorer (Katz et al. 2011). The counts are normalized to account for variation in docket size.
Figure 4: Ideological Location of the Supreme Court Median Justice, 1960-1980

This figure tracks the ideological location of the Supreme Court’s median justice in each term under two different estimation methods. For both sets of scores, a higher score illustrates increasing conservatism.
Figure 5: Frequency of Women’s Rights Indicators in the Index to the Reader’s Guide to Periodical Literature and in Google’s Ngrams

This figure tracks the annual frequency for particular indicators of interest in women’s rights and gender equality. The left-side and top-right figures draw on the frequency of articles categorized under certain headings in the Index to the Reader’s Guide to Periodical Literature, while the bottom-right figure looks at the frequency of Ngrams (as a percentage of Google’s corpus) for the term “women’s rights.”
Figure 6: Frequency of Women’s Rights Indicators in Law Review Article Titles, HeinOnline Database, 1950-1990

This figure tracks the annual frequency with which particular indicators of interest in women’s rights and gender equality appear in the titles of law review articles compiled by the HeinOnline Database.
Figure 7: Frequency of Articles in Selected Subject Categories in the *Index to Legal Periodicals*, 1950-1990

This figure tracks the annual frequency of articles categorized under specific headings in the *Index of Legal Periodicals*. 