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THE INFLUENCE OF LAW IN THE SUPREME COURT'S SEARCH-AND-SEIZURE JURISPRUDENCE

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In this research note/replication, we apply the construct of jurisprudential regimes as described in our recent article to the jurisprudential area of search and seizure. Given the centrality of this area of Supreme Court decision making in the core studies supporting the attitudinal model, replicating our analysis of the jurisprudential regime construct in this area provides an important test of the concept. Our results produce strong support for the proposition that post-*Mapp* decision making can be separated into distinct regimes, with a set of important cases decided in 1983-1984 demarcating the regimes. The predictors of decisions in the two periods are consistent with the types of changes one would expect the regime shift to produce. Our findings challenge the attitudinalists' proposition that there is at best negligible statistical evidence that law influences Supreme Court decision making.

Keywords: *judicial behavior; search and seizure; U.S. Supreme Court; jurisprudential regime*

Proponents of the attitudinal model of Supreme Court decision making have attempted to frame the Supreme Court decision-making research question as law versus the political attitudes of the justices. The only effective statistical test for law that has been devised to date, according to Segal and Spaeth (1996), is to assess whether the justices

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originally dissented from a key precedent but later adhered to it in progeny cases.¹ “We test arguments from the legal model claiming that the United States Supreme Court justices will follow previously established legal rules even when they disagree with them; i.e. that they are influenced by *stare decisis*” (p. 971). In their most extreme statement of their position, Segal and Spaeth (1994) contend that the “the attitudinal model is a complete and adequate *model of the Supreme Court’s* decisions on the *merits*” and “attitudinal factors are all that systematically explain the votes of the justices” (p. 11). In a somewhat later analysis, Spaeth and Segal (1999) concede that justices might defer to law over their policy preferences on some occasions but that “the overall levels of precedential behavior are so low that only . . . preferential models . . . appear to be in the right ballpark” (p. 288).

In a recent article, we proposed a new way of conceptualizing the role of law in explanations of Supreme Court decision making (Richards & Kritzer, 2002). We argue that it is incorrect to think of law at the Supreme Court level as operating through the traditional mechanisms of plain meaning, precedent, or intent of the drafters. Given the Court’s discretionary docket, the cases decided by the Court are precisely those that cannot be decided through the relatively mechanistic processes that Segal and Spaeth label the “legal model.”

In our earlier article, we argue that the influence of law is to be found in what we label *jurisprudential regimes*. We define a jurisprudential regime as “a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area” (Richards & Kritzer, 2002, p. 308). Empirically, jurisprudential regimes show up in terms of the variables influencing justices’ decisions and can be best detected by looking and testing for changes in regime in a particular jurisprudential area. For example, a regime may institute a new standard of review or balancing test. Justices then apply the regime in the relevant area of law, which changes how case factors matter to the justices. We have tested this theory by examining Supreme Court decisions in the area of free expression (Richards & Kritzer, 2002) and in the area of the Establishment Clause (Kritzer & Richards, 2003). In the free expression area, we hypothesized that the 1972 companion cases *Chicago Police Department v. Mosley* and

Grayned v. Rockford demarcated a regime change that is reflected in a central distinction between regulation that is content neutral and regulation that is content based. Our statistical analysis provided strong support for the theory as applied in this area of Supreme Court jurisprudence. In the Establishment Clause area, we hypothesized that *Lemon v. Kurtzman* (1971) demarcated a regime shift and that the factors encompassed in the much discussed *Lemon* test would be more influential after 1971; again, our statistical analysis provided strong support for our theory.

Our core argument is that the influence of law on Supreme Court decision making must be considered from a neoinstitutional perspective (see Clayton & Gillman, 1999; Epstein & Knight, 1998) rather than as a mechanical construct dictating the outcome of cases. That is, law, like other institutions, is created by actors (justices) with political goals (attitudes) whose subsequent decisions are then in turn influenced but not determined by the institutional structure they have created. We point to the early work of Shapiro (1964, 1968) on political jurisprudence, and its later development by Smith (1988), as reflecting these kinds of institutional influences. Asserting that the Court and its justices are political by no means precludes them from having a different relationship to law and legal decision making than is the case for politicians in the elected branches. As we (Richards & Kritzer, 2002) noted, "Leaving jurisprudence out of the analytic framework fails to recognize both the distinctive nature of courts and the theoretical point that ideas and institutions matter" (p. 306).

But why would politically independent, politically insulated decision makers such as the justices not simply follow their political preferences? We argue that the justices create jurisprudential regimes to provide guidance to other political actors and to themselves.² The goal here is consistency, both for themselves and for other political actors (Dworkin, 1978): As the justices decide a case, they reason about how the particular facts of the instant case fit with the principles of the relevant regime they have established in order to promote consistent treatment of similar situations (Richards & Kritzer, 2002, p. 307). This reasoning process also enables the justices to make appeals to their colleagues that are more than just first-personal rationalizations of their own policy preferences (Nagel, 1997; Wahlbeck, Spriggs, & Maltzman, 1998). Thus, we (Richards & Kritzer, 2002, p. 308) argue

jurisprudential regimes help to overcome the coordination problems that occur if each of the justices seeks only to maximize his or her policy goals.

A central question not answered by our original article is whether the pattern we found for free expression cases can be found for other jurisprudential areas. As noted above, we have extended the analysis to the area of the Establishment Clause (Kritzer & Richards, 2003). In this research note, we extend our approach to the area of search and seizure, which has been prominently analyzed by Segal and Spaeth (1993, pp. 216-231; 2002, pp. 314-326), in making their argument about the attitudinal model. Our theoretical contribution, then, is twofold. First, we attempt to expand the jurisprudential regime theory beyond its previous applications to freedom of expression and the Establishment Clause. If it also explains search-and-seizure decisions, this would provide further evidence that the theory is generalizable. Second, we directly challenge the key fact-pattern model that has been touted as prime evidence supporting the attitudinal model. If we demonstrate that the jurisprudential regime model can explain decision making in search-and-seizure cases, this means that Segal and Spaeth's model of search-and-seizure decision making is underspecified and that Segal and Spaeth have overstated the significance of their model for the debate over whether law matters.

Segal's (1984) original explanation of Supreme Court decision making in the area of Fourth Amendment search-and-seizure cases was presented in support of a legal model. This model considered legal factors such as whether the search or seizure took place in a home or in a car and whether there was a warrant supporting the search. Whether these facts matter for legal or attitudinal reasons is ambiguous, as Segal noted in 1984. Later, Segal and Spaeth (1993) accurately point out that "Facts obviously affect the decisions of the Supreme Court, but on that point the attitudinal model does not differ from the legal model" (p. 220). In 1993 and 2002, Segal and Spaeth present a model of search-and-seizure decisions very similar to Segal's earlier model but claim that it supports the attitudinal model. In assessing the influence of the content-neutrality regime for freedom of expression law (Richards & Kritzer, 2002) and the influence of the *Lemon* test in Establishment Clause cases (Kritzer & Richards, 2003), we have gained leverage over the ambiguity of these case factors by focusing

on whether the regime conditioned their influence. In this article, we use jurisprudential regime theory to ascertain whether the justices evaluate the search-and-seizure case factors in a significantly different way after a regime is established.

THE SEARCH-AND-SEIZURE REGIME

We hypothesize that six important cases decided in 1983 and 1984 created precedents that constitute a jurisprudential regime that breaks with the Court's prior approaches to Fourth Amendment search-and-seizure jurisprudence by changing how the justices weigh the elements of cases. In our initial planning for this analysis, we consulted with a colleague who regularly teaches a course focusing on criminal law and procedure at the Supreme Court level and who was familiar with the jurisprudential regime concept. He identified the good faith exception as a key shift, with 1984 as a likely break point, because the good faith exception changed "the level of scrutiny that the justices are to employ in assessing . . . case factors" (Richards & Kritzer, 2002, p. 310). We then consulted a constitutional law civil liberties casebook (O'Brien, 1997) that confirmed our colleague's point that the good faith exception to the exclusionary rule was a major shift that was established in 1984 and also pointed out four other cases decided at this time that fundamentally altered the Court's approach to search and seizure. We then used the hypertext citations of Supreme Court opinions at Findlaw.com to ensure that these cases were the original Supreme Court cases in which these particular regime-defining propositions of law were established. We later looked to three additional books, LaFare's authoritative, five-volume search-and-seizure treatise (1996) with cumulative supplement (2004), a casebook on constitutional issues of criminal procedure (Hall, 1997), and a search-and-seizure handbook (Moylan, cited in Greenhalgh, 2003), which confirmed the expectations of O'Brien and our colleague that the cases we identified stood out as demarcating a new search and seizure regime.³ We also examined the most recent version of O'Brien (2003). As we discuss below, this hypothesized post-1984 regime should reflect a shift to a less libertarian view of the Fourth Amendment protections

against unreasonable government searches and seizures that can be operationalized in terms of four specific hypotheses.

Generally, probable cause is required for a search and/or seizure to pass constitutional muster.

In determining whether probable cause has been established, judges consider the *specificity* of what is to be searched, and the *particularity* of what is to be seized. Because police often rely on informants, the Court also demands that police show that information is reliable, not vague, and sufficient for judges to draw their own conclusions about. (O'Brien, 2003, pp. 838-839)

Aguilar v. Texas (1964) established two independent requirements for probable cause. Police must explain how informants know what they know and why the police believe that the information is accurate. Prior to 1983, a failure on the part of the government to meet either one of these requirements meant that the search lacked probable cause and would most likely be held unconstitutional. However, the 1983 *Illinois v. Gates* decision began the move toward a new jurisprudential regime by holding that the two requirements were no longer independent. In a closely related 1984 decision (*Massachusetts v. Upton*), the Court held that the "totality of the circumstances" is enough to justify a finding of probable cause (Hall, 1997, p. 92; O'Brien, 1997, p. 774). This leads to the expectation that after 1984, the Court will be more likely to accept lower court findings of probable cause because the Court would no longer apply the stringent *Aguilar* test in evaluating the determinations of the police and the lower courts.

Moylan (2003, p. 13) notes that *Gates* is a "highly deferential standard" that "dismantled the highly structured framework of analysis that had developed over the course of the preceding nineteen years." LaFave (1996, vol. 2, p. 16) also comments on the higher level of deference afforded to findings of probable cause post-*Gates* and *Upton*,

As the Court emphasized more recently in *Massachusetts v. Upton*, *Gates* teaches that a reviewing court is not to conduct "a de novo probable cause determination" but instead is merely to decide "whether the evidence viewed as a whole" provided a "substantial basis" for the magistrate's finding of probable cause.

Gates and *Upton* represent a major shift in the manner in which appellate courts will assess (or fail to assess) magistrate's findings of probable cause.

Certainly the potential for highly inconsistent and largely unreviewable probable cause determinations is there. When the majority in *Gates* says that from now on probable cause is to be ascertained by a "totality of the circumstances analysis," one cannot help but recall the pre-*Miranda* experience under the old "totality of the circumstances" voluntariness test for determining the admissibility of confessions. That confession standard proved to be a failure; it "left police without needed guidance" and "impaired the effectiveness and legitimacy of judicial review." Should that experience now be replicated in the Fourth Amendment area as a result of *Gates*, then Justice Brennan will have proved prophetic in declaring that "today's decision threatens to obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state, where they are the law." (LaFave, 1996 vol. 2, p. 103, internal citations omitted)

In combination with *Gates*, *Upton*'s totality-of-the-circumstances test leads us to expect that the level of protection afforded to the particular location or object of the search will diminish after the regime is established, due to the more deferential standards that are employed in determining the specificity and particularity necessary to establish probable cause. These two cases also lead us to expect that lower court findings of probable cause should lead the Supreme Court to uphold searches after these two cases, because *Gates* and *Upton* require all reviewing courts to show greater deference to magistrate's findings of probable cause.

The 1984 search-and-seizure jurisprudential regime was also shaped by two 1984 companion cases, *United States v. Leon* and *Massachusetts v. Sheppard*. Previously, the Court had established that evidence obtained through searches based on defective warrants (i.e., that lacked probable cause) was subject to the exclusionary rule laid down in *Mapp v. Ohio* (1961). "*Leon* and *Sheppard* together, then, amount to a good faith rule for with-warrant cases," as LaFave (1996, vol. 1, p. 53) observes. This good faith exception means that the exclusionary rule no longer applies to situations where the police, acting in good faith, seize evidence in the context of reliance on a warrant that lacked

probable cause (O'Brien, 1997, p. 881). In Moylan's (2003) analysis, the good faith exception is critical to the manner in which the justices evaluate the appropriate sanction for a Fourth Amendment violation. "No deterrent effect would be achieved by excluding the evidence even if the judge had made a mistake in issuing the warrant," so the justices would not apply the exclusionary rule (Moylan, 2003, pp. 18-20). Similarly, Hall (1997) notes that exclusion in this context "would not deter future police misconduct" (p. 94). LaFave argues strongly that this is a major shift in the Court's approach to the Fourth Amendment.

The point is simply this: Under the pre-*Leon* version of the exclusionary rule, police had finally come to learn that it was not enough that they had gotten a piece of paper called a warrant. Because that warrant was subject to challenge at a later motion to suppress, it was important to the police that the warrant be properly issued. . . . But under *Leon* there is no reason to go through such cautious procedures and every reason not to. Why take the risk that some conscientious prosecutor or police supervisor will say the application is insufficient when, if some magistrate can be induced to issue a warrant on the basis of it, the affidavit is thereafter virtually immune from challenge? (LaFave, 1996, vol. 1, p. 64)

Moreover, as Justice Stevens emphasized in his separate dissent, "Until today, every time the police have violated the applicable commands of the Fourth Amendment a court has been prepared to vindicate that Amendment by preventing the use of evidence so obtained in the prosecution's case-in-chief against those whose rights have been violated. Today, for the first time, this Court holds that although the Constitution has been violated, no court should do anything about it at any time and in any proceeding" (LaFave, 1996, vol. 1, p. 56, internal citations omitted).

Before stating the hypotheses that are generated for us by the good faith exception to the exclusionary rule, we also need to examine two 1984 companion cases that also carved out significant exceptions to the exclusionary rule. *Nix v. Williams* created the inevitable discovery exception: If the police would have inevitably discovered the illegally obtained evidence, it does not need to be excluded (Hall, 1997, p. 75; LaFave, 1996, vol. 5, p. 240-241; Moylan, 2003, p. 21; O'Brien, 1997, p. 881). Similarly, *Segura v. U.S.* allowed an exception to the exclusionary

rule for evidence that was gained through independent sources, sources that were not related to an illegal search or seizure (O'Brien, 1997, p. 881). The independent source rule means that "although the evidence gained as a result of government misconduct cannot be used in a criminal prosecution, the facts obtained by such conduct are admissible if the government gained knowledge of these facts from an independent source" (Hall, 1997, p. 75). In *Segura*, the

police made a warrantless entry of an apartment, arrested all the occupants (who were promptly removed from the scene), and then remained within that apartment for a period of nineteen hours until a search warrant was finally obtained and executed. (LaFave, 1996, vol. 3, p. 362)

The Court upheld the use of the evidence obtained from the search warrant as an independent source, despite the illegality of the initial entrance (LaFave, 1996, vol. 3, p. 363).

As with the good faith exception, these exceptions are based on the Court's observation that the exclusionary rule's function of deterring police impropriety is not applicable in these situations; these exceptions significantly alter how the justices evaluate the impact of what would otherwise be an unconstitutional government action. "As the Supreme Court explained in *Nix v. Williams*, the inevitable discovery doctrine is similar to the independent source doctrine, in that both are intended to ensure that suppression does not outrun the deterrence objective" (LaFave, 1996, vol. 5, p. 244). Moylan (2003) explains how *Segura* changes the Court's weighing of case facts in terms of the fruit of the poisonous tree analogy. "Where the alleged fruit follows the alleged poisonous tree in point of time but is nonetheless shown to have proceeded from an independent source, the fruit is not tainted and should not, therefore, be suppressed" (p. 21). The good faith, inevitable discovery, and independent source exceptions to the exclusionary rule indicate that after the 1984 jurisprudential regime is established, the existence of a warrant should be more likely to lead to a decision in favor of the government. For example, if the police performed an improper search based on a defective warrant that lacked probable cause, this would not necessarily lead to exclusion of the evidence and a decision against the government. Based on the precedents

of the jurisprudential regime, the police could argue that they were acting in good faith, would have inevitably discovered the evidence, and/or had independent sources. Similarly, after 1984, even if the police made a search following an unlawful arrest, these exceptions to the exclusionary rule could lead to a decision in favor of the government. One additional hypothesis can be derived from the *Segura* ruling and its independent source exception, which is that the level of protection afforded to particular locations such as homes should diminish.

The result in *Segura* is most unfortunate. As the four dissenters quite correctly pointed out, the majority's conclusion "provides an affirmative incentive for warrantless and plainly unreasonable and unnecessary intrusions into the home." This is because police know now that if they illegally impound premises for the very purpose of facilitating a later successful warrant execution, that illegality will have no effect upon the evidence first discovered during the warrant execution. (LaFave, 1996, vol. 5, p. 283)

DATA, VARIABLES, AND METHOD OF ANALYSIS

Segal (1984, 1985, 1986) pioneered the statistical analysis of search-and-seizure cases. His work basically defines the factors to be considered whenever one looks at these cases. His most recent analysis of search and seizure, done in collaboration with Harold Spaeth (Segal & Spaeth, 2002, pp. 324-325), is included in *The Supreme Court and the Attitudinal Model Revisited*. That analysis shows both the impact of factual elements and the strong impact of justices' attitudes. Our question is whether that analysis can be improved by taking into account jurisprudential regimes. To examine this question, we apply essentially the same approach we have used previously (Kritzer & Richards, 2003; Richards & Kritzer, 2002); we describe this approach below.

We rely upon a set of 228 cases covering the October 1962⁴ through the October 2001 terms of the Supreme Court (fall 1962 through spring 2002).⁵ We include in our statistical model the same variables used by Segal and Spaeth,⁶ including the same measure of attitudes.⁷ In their model, they consider the location or object of the search (house, business, person, car, other/no property interest), whether the

search was a full or partial search, whether a warrant was obtained, and whether the lower court determined that the officer had probable cause. They also take into account three possibilities related to arrest: whether the search was incident to a lawful arrest, whether the search followed but was not incident to a lawful arrest, or whether the search followed an unlawful arrest. Finally, they consider whether the search fell under one of the accepted exceptions to the requirement for a warrant, and the justices' attitudes.

Our data set includes a total of 1,969 votes. In keeping with Segal and Spaeth's analyses, we coded the dependent variable so that a positive coefficient value indicated support for legality of the search. Summary statistics for all variables over the entire time period (including the cases omitted from the analysis as described in the next paragraph) and separately for the before and after periods are shown in Table 1.

The core hypothesis derived from the jurisprudential regime model is that the factors that influence justices' decisions for a particular area should vary across jurisprudential regimes. The results of statistical models predicting decisions in the two periods should differ in significant and meaningful ways. One dilemma in our analysis was how to operationalize the regime break: We could use *Gates* as the split point for the jurisprudential regime because it represents the beginning of the shift that took place over a period of about 12 months, we could use the last case over that period, *Segura*, or we could use something in between. We actually conducted the analysis several different ways and found that the results were very similar. The results we present below define the "before" regime as all cases in our sample before *Gates* (a total of 1,119 votes) and the "after" regime as all cases after *Segura* (644 votes); we omit the 203 votes from *Gates* through *Segura*. In the discussion that follows, we use "before *Gates*" and "before the regime was established" synonymously; we do likewise with the terms "after the regime was established" and "after *Segura*."

Applying our reading of the regime-defining cases to the variables used in the models, we are able to generate four particular hypotheses.⁸ One, the protection afforded to the particular location or object of the search should diminish in importance after the regime is established, due to the justices' focus on the totality of the circumstances that comes from *Gates* and *Upton* and due to the diminished protection afforded certain premises due to the *Segura* ruling. Second, if a

TABLE 1
Descriptive Statistics

<i>Variable</i>	<i>Mean</i>		
	<i>All</i>	<i>Before</i>	<i>After</i>
Justice's vote (to uphold search)	0.560	0.542	0.587
Location of search			
House	0.266	0.229	0.264
Business	0.125	0.141	0.109
Person	0.292	0.313	0.250
Car	0.222	0.215	0.264
Full (vs. partial) search	0.844	0.853	0.806
Warrant issued	0.144	0.135	0.109
Lower court found probable cause	0.339	0.341	0.290
Arrest (as determined by lower court)			
Incident to lawful arrest	0.064	0.066	0.082
After arrest but not incident to arrest	0.123	0.136	0.098
After unlawful arrest	0.096	0.089	0.110
Exceptions	0.343	0.347	0.335
Justice's attitude	-0.031	0.145	-0.283
Standard deviation	0.706	0.709	0.608
<i>n</i>	1,969	1,119	644

NOTE: With the exception of justice's attitude, all variables are dichotomies, and their means constitute proportions.

warrant is issued after the regime is established, this should increase the likelihood that the search is upheld. Before the regime is established, the warrant variable alone should have less of an impact because searches based on improper warrants would be less likely to be meet constitutional muster. In the after period, the good faith, inevitable discovery, and independent source exceptions could be used by the justices to uphold searches despite police reliance on unjustified or improperly specified warrants. Our third hypothesis is that after the regime is established, if the lower court found probable cause, this should increase the likelihood that the search is upheld, because *Gates* and *Upton* require reviewing judges and justices to show greater deference to determinations of probable cause. Fourth, we hypothesize that searches made after unlawful arrest should be more likely to be upheld after the regime is established than before, because the police could claim the applicability of the good faith, inevitable discovery, or

independent source exceptions, even if the decision to arrest later turned out to be judged unlawful.

Closely following our previous work for the purpose of replication (Richards & Kritzer, 2002, pp. 311-312), our test for a change in the search-and-seizure regime involved the following steps:

- (1) We first estimated logistic regression “models across, before, and after the regime changes to ascertain whether” there is support for our core hypothesis. “The key statistical test of regime-based change is a variant of the well-known Chow test (Hanushek & Jackson, 1977) of differences in regression results across sets of data” (Richards & Kritzer, 2002, p. 311). Included in these models are tests of whether specific coefficients changed across the hypothesized regimes.
- (2) “The next step involved estimating additional models to rule out the major alternative explanation that change over time can be explained entirely by personnel (and hence attitudinal) change” (Richards & Kritzer, 2002, p. 312). To do this, we reestimated the models limiting the analysis to those justices who were on the Court at the time of the hypothesized regime change.
- (3) Finally, we performed a sensitivity analysis by trying alternative annual time breaks. If the chi square statistic for the regime break was high relative to the other annual break points, we would have strong confirmation of a regime that shaped the influence of the jurisprudential variables. This sensitivity analysis was also reestimated for the subset of justices on the Court at the time of the hypothesized regime change (Richards & Kritzer, 2002, p. 312).

RESULTS

The results of this analysis for all justices on the Supreme Court during the time period 1961-2001 are shown in Table 2. The test of significance for differences in the coefficients before *Gates* and after *Segura* yielded a highly significant chi-square of 72.98 (12 degrees of freedom, $p < .001$).⁹ Clearly, the factors influencing the justices’ votes differed in the two time periods.

In looking at specific variables, we focus on those where our tests for interactions show that the coefficients for the two time periods differed in a statistically significant manner. The variables with such differences are indicated by symbols in the right-most column of Table 2.

Turning to the location or object of the search, we observe that before the regime was established, the justices appear to be much less

TABLE 2
Search and Seizure Analysis: All Justices

	Combined		Before		After		Before/After Test
	b	SE(b)	b	SE(b)	b	SE(b)	
Location of search							
House	-1.112**	0.221	-1.561***	0.288	-0.585	0.361	*
Business	-1.107***	0.242	-1.757***	0.304	-0.108	0.430	**
Person	-0.879***	0.207	-1.379***	0.271	0.033	0.351	***
Car	-0.764***	0.227	-1.595***	0.307	0.513	0.362	***
Full (vs. partial) search	-0.834***	0.164	-0.800***	0.227	-1.205***	0.284	
Warrant issued	0.499**	0.180	0.696**	0.220	0.973**	0.371	
Lower court found probable cause	0.563***	0.140	0.026	0.181	1.419***	0.274	***
Arrest (as determined by lower court)							
Incident to lawful arrest	0.520*	0.227	1.453***	0.327	-0.309	0.375	***
After arrest but not incident to arrest	-0.026	0.190	0.518*	0.241	-0.731*	0.363	**
After unlawful arrest	-0.026	0.192	-0.361	0.264	0.399	0.339	†
Exceptions	0.902***	0.111	1.009***	0.139	0.822***	0.220	
Justice's attitude	-1.252***	0.081	-1.282***	0.107	-1.929***	0.188	**
Constant	1.244	0.231	1.905	0.315	0.151	0.348	
<i>n</i>		1,763		1,119		644	
Model χ^2 (12 df)		418.31		289.59		210.74	72.98

Two-tailed significance tests: * $p < .05$. ** $p < .01$. *** $p < .001$. One-tailed significance test: † $p < .05$.

likely to uphold searches of homes, businesses, persons, and cars than locations where the subject does not have a property interest. (“No property interest” is the base category for this set of variables.) After the regime was established, the location or object of the search has much less importance; the only location that is afforded some extra protection appears to be homes, and the protection is much reduced compared to the before period. Where before *Gates* justices might have looked to specific location or object criteria, the diminution of influence of these criteria in the after period would be consistent with the movement toward a totality-of-circumstances evaluation and the diminished protection afforded to certain premises due to *Segura*.

Although the difference in whether a warrant is issued before or after the regime break does not achieve statistical significance, it does come close. We note that the nature of the difference suggests that whether a warrant was issued may have more importance after the regime change; this would be consistent with the good faith, inevitable discovery, and independent source exceptions to the exclusionary rule. Before the regime was established, whether a warrant was issued would not have as strong an influence as it would later, because if it was justified or used in a constitutionally impermissible way, the search would be thrown out of court. After the regime was established, even if a warrant was justified or used in a manner that would be constitutionally improper under the previous standards but was also used in good faith, or if the evidence would have been inevitably discovered or obtained through independent sources, the search would likely be upheld.

Before *Gates*, the lower court’s finding of probable cause had no measurable influence on the justices’ votes; after *Segura*, the lower court’s finding of probable cause significantly increased the likelihood that a justice would vote to uphold the search. The coefficient goes from approximately zero (0.026) to 1.419. After *Segura*, the odds of the justices’ voting to uphold the search increases by a factor of 4.13 (i.e., the odds are more than 4 times greater) if the lower court found probable cause; before *Gates*, a finding of probable cause had essentially no impact on the odds of the search being upheld. This is consistent with the expectation that the combination of *Illinois v. Gates* and *Massachusetts v. Upton* would lead the justices to be more deferential to a finding of probable cause by the lower court.

The differences we observe before and after the regime change for the next two variables are not tied directly to any hypotheses about changes that the regime should have generated. Nonetheless, we include these variables in the model because we follow Segal's prior specification, and we report the differences because they are significant. Before *Gates*, a search incident to a lawful arrest was significantly more likely to be upheld; after *Segura*, such a search was less likely to be upheld. A search after but not incident to an arrest was more likely to be upheld before *Gates*, everything else being equal; after *Segura* such a search was *less* likely to be upheld, everything else being equal. We should point out that as the regime changed how the justices evaluated particular case factors, this may have led to other, unanticipated effects such as the ones we have just observed, possibly due to changes in the mix of cases coming before the Court. However, we do not claim that these changes are due to regime change.

A search following an unlawful arrest was marginally more likely to be upheld after *Segura* than before *Gates*. This is consistent with the development of the good faith, inevitable discovery and independent source exceptions to the exclusionary rule. Even if an arrest was unlawful, if the officers conducted a search on the basis of a good faith belief that the arrest warrant was lawful or (even in nonwarrant situations) if the evidence would have been inevitably discovered or obtained through independent sources, the search could be upheld.

Justices' attitudes influence the justices' votes both before *Gates* and after *Segura*, with conservative justices more likely to vote to uphold the search; however, the influence of attitudes is significantly greater after *Segura* than before *Gates*. Overall, our findings produce strong support for our hypothesis that there was a regime change around the time of the *Gates* decision. Three of our four hypotheses pertaining to specific variables were supported, and we were very close to observing a statistically significant difference before and after the regime change for the hypothesis pertaining to whether a warrant was issued.

It is possible that the findings above reflect shifts not in how the justices were deciding cases but shifts in who the justices were that were deciding the cases. As discussed above, we tested this by replicating our analysis using only those justices who were on the Supreme Court at the time the *Gates* through *Segura* set of cases was decided (there

was no change in Court membership during this period). The results of this analysis, involving a total of 1,170 votes, are shown in Table 3. A test of significance for before-and-after differences in the coefficients yields a chi-square of 46.71 ($df = 12, p < .001$). The basic pattern of before-and-after differences is the same. The most noteworthy difference is that the influence of attitudes does not shift significantly for this limited group of justices, suggesting that some of the change in the influence of attitudes in Table 2 may reflect that some of the justices who decided cases only before *Gates* were less attitudinally driven in search-and-seizure cases than the justices who decided *Gates* or who joined the Court after *Segura*. One other difference is that the incident-to-unlawful-arrest variable does not even achieve marginal significance for the subset of justices, although the magnitude of the difference between the before-and-after coefficients is actually larger than was the case for all justices.

A final question to consider is whether the change in voting patterns before and after *Gates* is significant compared to other annual before-and-after differences. To test this, we conducted the sensitivity analysis discussed above. This involved running a series of logistic regressions, splitting at each year from 1969 through 1995. If we have identified a regime change, we would expect the amount of shift in the coefficients to peak around the time of the shift. The amount of shift is indicated by the size of the chi-square testing for before-and-after change. Figure 1 shows the sensitivity analysis, with the solid line representing the analysis for all justices and the broken line representing it for the justices on the Court when the regime change was occurring in 1983-1984. The analysis shows that the peak before-and-after difference occurs using 1983 as the split, which is consistent with our argument that there was a regime change around this period.

CONCLUSION

We have previously argued that the role of law in Supreme Court decision making is to be found in the decision structures justices establish to guide decisions, both their own and those of other actors. In this research note we have replicated our previous analyses by

TABLE 3
Search and Seizure Analysis: *Gates* Justices

	Combined		Before		After		Before/After Test
	<i>b</i>	SE(<i>b</i>)	<i>b</i>	SE(<i>b</i>)	<i>b</i>	SE(<i>b</i>)	
Location of search							
House	-1.250***	0.315	-1.603 ***	0.403	-0.378	0.531	†
Business	-1.191***	0.332	-1.848***	0.424	0.040	0.566	***
Person	-0.946**	0.293	-1.373***	0.364	0.105	0.523	*
Car	-0.853**	0.318	-1.529***	0.409	0.407	0.540	**
Full (vs. partial) search	-0.988***	0.211	-0.875**	0.302	-1.364***	0.348	
Warrant issued	0.665**	0.246	0.872**	0.303	0.881	0.469	
Lower court found probable cause	0.595**	0.183	0.197	0.238	1.140***	0.336	*
Arrest (as determined by lower court)							
Incident to lawful arrest	0.644*	0.297	1.783***	0.417	-0.938	0.516	***
After arrest but not incident to arrest	0.263	0.251	0.976**	0.333	-0.705	0.427	**
After unlawful arrest	0.066	0.224	-0.310	0.313	0.466	0.374	
Exceptions	0.951***	0.142	1.200***	0.187	0.567*	0.256	*
Justice's attitude	-1.585***	0.105	-1.624***	0.130	-1.962***	0.222	
Constant	1.150	0.321	1.541	0.416	0.279	0.533	
<i>n</i>		1,170		748		422	
Model χ^2 (12 <i>df</i>)		376.10		276.70		149.54	46.71

Two-tailed significance tests: * $p < .05$. ** $p < .01$. *** $p < .001$. One-tailed significance test: † $p < .05$.

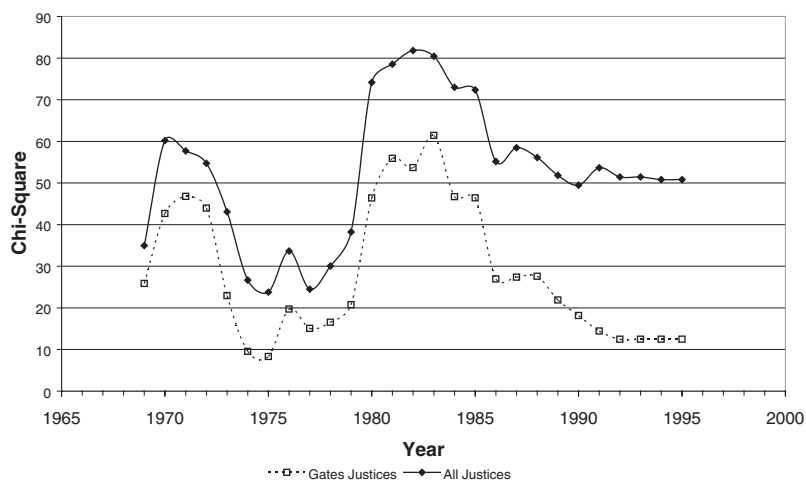


Figure 1: Sensitivity Analysis

extending our approach to the jurisprudential area of search and seizure, a set of cases that has been a central part of Segal and Spaeth's analysis of the attitudinal model.

Comparing the structure of jurisprudence, as well as the models and statistical findings, in the areas of freedom of expression and search and seizure yields at least two worthwhile observations. First, the content-neutrality doctrine analyzed previously (Richards & Kritzer, 2002) is arguably more sweeping in its scope than the particular doctrines examined in this article; the content-neutrality jurisprudential regime produced significant changes in variables that were directly linked to the regime.¹⁰ Although there is some truth to this comparison, the contrast is somewhat overstated. In our free expression model, content neutrality did not apply to cases in which the threshold of First Amendment protection was not met or to cases that involved less protected categories of expression such as obscenity, so its scope was partly limited. In addition, we observed changes in a variety of other case factors such as the identity of the speaker or the level of government acting against the speaker; these changes were not tied directly to the regime change. Moreover, the aggregate scope of the search-and-seizure standards discussed here is fairly wide. Taken

together, the good faith, inevitable discovery, and independent source doctrines constitute major exceptions to the exclusionary rule; they fundamentally alter how the justices weigh or balance key case factors. Similarly, the move away from a structured analysis of probable cause toward a highly deferential totality-of-the-circumstances standard has wide-ranging implications for how the justices evaluate the significant portion of Fourth Amendment cases dealing with probable cause.

A second comparison is that our approach is to “retrofit” the jurisprudential regime model to Segal and Spaeth’s model, rather than building a database from the ground up as in our free expression analysis (Richards & Kritzer, 2002). Although the jurisprudential aspects of the search-and-seizure model may not be structured in the architectonic manner of our other models (Kritzer & Richards, 2003; Richards & Kritzer, 2002), that may be due in part to the differences in the jurisprudence of the First and Fourth Amendments. In addition, we have been able to tie our theoretically and jurisprudentially derived expectations for search-and-seizure cases to at least four specific variables. Finally, the retrofitting is important because the search-and-seizure model has been the model most prominently referred to by Segal and Spaeth (1993, 2002) as supportive of the attitudinal model.

Just as we have shown regime shifts in free expression cases and Establishment Clause cases, our analysis provides strong evidence that the justices did change the way they decide search-and-seizure cases in a manner that is consistent with a regime change around 1983-1984. The results of our analysis provide additional evidence in support of the jurisprudential regime approach as one way of understanding the influence of law in Supreme Court decision making, in contrast to the proposition of the attitudinalists that there is at best negligible evidence that law matters.

NOTES

1. This approach fails to produce support for a legal model (Segal & Spaeth, 1996). Levels of precedential behavior are quite low (Spaeth & Segal, 1999).

2. See our earlier paper (Richards & Kritzer, 2002) for a detailed discussion of why justices use jurisprudential regimes.

3. As in our previous analysis, we required that the candidate regime cases should have been adopted by at least a five-member majority of the Court.

4. The 1961 Supreme Court decision in *Mapp* extended to all courts in the United States the exclusionary rule that previously the Court had applied only to federal courts. Since *Mapp*, we estimate that the Supreme Court has decided over 200 search-and-seizure cases. *Mapp* itself did not so much set up a framework for deciding what was and was not in violation of the Fourth Amendment as establish the consequences of such a violation. Although in one sense one might argue that *Mapp* did not establish a regime as we used that term previously (Richards & Kritzer, 2002), it is likely that *Mapp* effectively constituted a regime shift because of the significance of Fourth Amendment violations under *Mapp*; that is, it would not be surprising to find that the Court treated cases after *Mapp* differently than before *Mapp*. We do not examine this question. Rather, like Segal and Spaeth, we focus only on cases since *Mapp*.

5. The data through 1990 were generously provided by Jeff Segal. We coded additional cases decided up to the end 2001-2002 term of the Supreme Court.

6. Arguably, there are other variables that might be included in the model: whether the solicitor general participated either as *amicus* or as a party, changing public opinion over time, attorney experience; we have not done so in this short note because we are more interested in testing whether the regimes hypothesis can be applied to the model used by Segal and Spaeth.

7. A justice's attitude is measured based on newspaper commentary at the time the justice was appointed (see Segal & Cover, 1989; Segal, Epstein, Cameron, & Spaeth, 1995). We chose the Segal-Cover score as the measure because we sought to replicate the Segal and Spaeth (2002) analysis with the addition of the regime construct. For purposes of comparison, we repeated our analysis substituting the recently developed Martin and Quinn (2002b) measures of justices' attitudes, which allows the justices' ideal points to vary over time. The possible advantage of this alternative measure is that it relaxes the assumption that the justices' attitudes are stable over time; the disadvantage is that it is computed based on the same behavior we seek to explain. Martin and Quinn (2002a, p. 18) caution about the use of their measures that "ultimately these are vote-based measures and cannot be used *per se* as explanatory variables for studies of voting on the Supreme Court." Their point raises concerns that behavioral changes arising from a regime shift can be incorporated into the Martin-Quinn measures and be mistaken for a change in attitude. In any case, when we repeat our analysis using the Martin-Quinn measures, our global test of change remains significant and the same individual-level shifts appear to occur, although dampened for some variables (particularly the setting indicators) as reflected in reduced significance levels or, for a couple of indicators, nonsignificance.

8. Although we did not establish hypotheses for changes in specific variables in advance of doing the statistical analysis, at the suggestion of the reviewers, we have done so here to promote analytical clarity.

9. It is worth noting that the chi-square for change we find roughly equals the *overall* chi-square for the models Segal (1985, p. 474) reported in his own analysis of change in Supreme Court decision making in search-and-seizure cases and is many multiples of the chi-squares he reports for change. The difference probably reflects a combination of the relatively little change that had occurred by the time Segal did his analysis and the likelihood that the jurisprudential regimes model better represents the changes that have occurred.

10. We acknowledge the suggestion of one of the anonymous reviewers that we discuss this comparison of the two regimes.

REFERENCES

- Aguilar v. Texas, 378 U.S. 108 (1964).
- Chicago Police Department v. Mosley, 408 U.S. 92 (1972).
- Clayton, C. W., & Gillman, H. (Eds.). (1999). *Supreme Court decision-making: New institutionalist approaches*. Chicago: University of Chicago Press.
- Dworkin, R. (1978). *Taking rights seriously*. Cambridge, MA: Harvard University Press.
- Epstein, L., & Knight, J. (1998). *The choices justices make*. Washington, DC: CQ Press.
- Grayned v. Rockford, 408 U.S. 104 (1972).
- Greenhalgh, W. W. (2003). *The Fourth Amendment handbook: A chronological survey of Supreme Court decisions* (2nd ed.). Chicago: American Bar Association.
- Hall, D. E. (1997). *Criminal procedure and the Constitution*. St. Paul, MN: West.
- Hanushek, E. A., & Jackson, J. E. (1977). *Statistical methods for social scientists*. New York: Academic Press.
- Illinois v. Gates, 462 U.S. 213 (1983).
- Kritzer, H. M., & Richards, M. J. (2003). Jurisprudential regimes and Supreme Court decision making: The *Lemon* regime and Establishment Clause cases. *Law & Society Review*, 37, 827-840.
- LaFare, W. R. (1996). *Search and seizure: A treatise on the Fourth Amendment* (Vols. 1-5, 3rd ed.). St. Paul, MN: West.
- LaFare, W. R. (2004). *Pocket part for search and seizure: A treatise on the Fourth Amendment* (Vols. 1-5, 3rd ed.). St. Paul, MN: West.
- Lemon v. Kurtzman, 403 U.S. 602 (1971).
- Mapp v. Ohio, 367 U.S. 643 (1961).
- Martin, A. D., & Quinn, K. M. (2002a). *Assessing preference change on the U.S. Supreme Court*. Unpublished manuscript retrieved from <http://adm.wustl.edu/change/change.pdf>.
- Martin, A. D., & Quinn, K. M. (2002b). Dynamic ideal point estimation via Markov chain Monte Carlo for the U.S. Supreme Court, 1953-1999. *Political Analysis*, 10, 134-153.
- Massachusetts v. Sheppard, 468 U.S. 981 (1984).
- Massachusetts v. Upton, 466 U.S. 727 (1984).
- Moylan, C. E., Jr. (2003). A conceptualization of the Fourth Amendment. In W. W. Greenhalgh (Ed.), *The Fourth Amendment handbook: A chronological survey of Supreme Court decisions* (2nd ed., pp. 1-21). Chicago: American Bar Association.
- Nagel, T. (1997). *The last word*. New York: Oxford University Press.
- Nix v. Williams, 467 U.S. 431 (1984).
- O'Brien, D. M. (1997). *Constitutional law and politics: Vol. 2. Civil rights and civil liberties* (3rd ed.). New York: Norton.
- O'Brien, D. M. (2003). *Constitutional law and politics: Vol. 2. Civil rights and civil liberties* (5th ed.). New York: Norton.
- Richards, M. J., & Kritzer, H. M. (2002). Jurisprudential regimes in Supreme Court decision making. *American Political Science Review*, 96, 305-320.
- Segal, J. A. (1984). Predicting Supreme Court cases probabilistically: The search and seizure cases, 1962-1981. *American Political Science Review*, 78, 891-900.
- Segal, J. A. (1985). Measuring change on the Supreme Court: Examining alternative models. *American Journal of Political Science*, 29, 461-479.
- Segal, J. A. (1986). Supreme Court justices as human decision makers: An individual-level analysis of the search and seizure cases. *Journal of Politics*, 48, 938-955.

- Segal, J. A., & Cover, A. D. (1989). Ideological values and the votes of U.S. Supreme Court justices. *American Political Science Review*, 83, 557-566.
- Segal, J. A., Epstein, L., Cameron, C. M., & Spaeth, H. J. (1995). Ideological values and the votes of U.S. Supreme Court justices revisited. *Journal of Politics*, 57, 812-823.
- Segal, J. A., & Spaeth, H. J. (1993). *The Supreme Court and the attitudinal model*. New York: Cambridge University Press.
- Segal, J. A., & Spaeth, H. J. (1994, Spring). The authors respond. *Law and Courts*, 4, 10-12.
- Segal, J. A., & Spaeth, H. J. (1996). The influence of *stare decisis* on the votes of United States Supreme Court justices. *American Journal of Political Science*, 40, 971-1003.
- Segal, J. A., & Spaeth, H. J. (2002). *The Supreme Court and the attitudinal model revisited*. New York: Cambridge University Press.
- Segura v. U.S., 468 U.S. 796 (1984).
- Shapiro, M. (1964). *Law and politics in the Supreme Court*. London: Free Press of Glencoe.
- Shapiro, M. (1968). *The Supreme Court and administrative agencies*. New York: Free Press.
- Smith, R. M. (1988). Political jurisprudence, the "new institutionalism," and the future of public law. *American Political Science Review*, 82, 89-108.
- Spaeth, H. J., & Segal, J. A. (1999). *Majority rule or minority will: Adherence to precedence on the U.S. Supreme Court*. New York: Cambridge University Press.
- United States v. Leon, 468 U.S. 902 (1984).
- Walhbeck, P., Spriggs, J., & Maltzman, F. (1998). Marshalling the Court: Bargaining and accommodation on the United States Supreme Court. *American Journal of Political Science*, 42, 294-315.

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