Reconsidering the Impact of Jurisprudential Regimes*

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Objectives. Recent work on Supreme Court decision making has argued that different areas of law demonstrate the creation of jurisprudential regimes, which alter the importance of different case facts to the justices, suggesting that the justices do alter their behavior in response to changes in the law. However, the work on jurisprudential regimes has suggested that all justices, or at least all justices who participate in establishing the regime, react similarly to the regime creation. *Methods.* I separate out the justices who support the establishment of the regime and those who oppose the establishment of the regime to test the hypothesis that majority and dissenting justices react differently to the creation of jurisprudential regimes. *Results.* Both sets of justices react to the establishment of the regime, but the change in behavior of the dissenters occurs after that of the majority. *Conclusions.* These results suggest that the impact of jurisprudential regimes may be even more substantial than previously believed.

Judicial behavior scholars have begun to outline and offer evidence for a new conceptualization of how law constrains the behavior of justices of the Supreme Court (Kritzer and Richards, 2003, 2005; Richards and Kritzer, 2002). They argue that landmark Supreme Court cases can create jurisprudential regimes that "structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors" (Richards and Kritzer, 2002:305). These jurisprudential regimes cause shifts in Supreme Court behavior—not necessarily more liberal or more conservative decision making (though that certainly is one of the consequences), but in changing which facts are relevant to the decisions Supreme Court justices make.

Attitudinalists are familiar with the claim that case facts matter, but the implications jurisprudential regimes have for the attitudinal model go beyond this claim. Finding that case facts affect the behavior of Supreme Court justices can be read as evidence for both the legal and attitudinal models of

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decision making. As the leading advocates of the attitudinal model argue, "proponents of the legal model conjoin facts with legalistic considerations such as the intent of the Framers, the plain meaning of the law, and prior decisions of the Court, while proponents of the attitudinal model describe the justices' votes as an expression of fact situations applied to their personal policy preferences" (Segal and Spaeth, 2002:319). In short, finding case facts to be significant predictors of Court outcomes, or even of individual justices' votes, does not necessarily mean that the justices find themselves constrained by the law.

But if the weight the justices give to case facts changes in response to Supreme Court policy change, then jurisprudential regimes, even if instigated by the justices themselves, would appear to have an effect on the behavior of the justices. If Justice Powell believes that searches of cars deserve less protection than searches of homes, one is left with the dilemma outlined by the attitudinalists: case facts can matter to the preference-driven justice as well as to the legalist justice. But if Justice Powell treats the searches of cars differently than searches of homes only *after* a Supreme Court decision enshrining such a doctrine into law, then one must trace the source of that change. Unless Justice Powell's preferences change at the same time the Court's precedent changes (an unlikely scenario, to be sure), one has a strong claim that the changes in the Court's precedents *cause* the behavior change.

The argument that the justices behave differently after the establishment of a jurisprudential regime provides powerful evidence that the law exerts an influence on the behavior of Supreme Court justices and does so in a way that can be tested using methods social scientists find suitable: falsifiable hypotheses can be generated and replicable data can be collected and analyzed to test the hypotheses. To date, very few students of the behavior of Supreme Court justices have been able to meet this challenge. Attempts by Spaeth and Segal to test adherence to stare decisis (Segal and Spaeth, 1996a, 1996b; Spaeth and Segal, 1999) demonstrate that the justices are largely unwilling to abandon their revealed preferences in the face of precedents dictating that they should do so. Other attempts to assess the impact of "value-free" methods of constitutional interpretation such as originalism or plain meaning have also failed to find an influence for law in the decisions of Supreme Court justices (Howard and Segal, 2002).

Against this background, the contribution made by the theory of jurisprudential regimes is considerable because it demonstrates a way law can have a "gravitational impact" on the behavior of justices (Howard and Segal, 2002:121). Instead of finding a direct influence of law on the votes of the justices, jurisprudential regime theory argues that the justices will weigh the components of a case differently after the establishment of a regime. For example, the Court's decision in *Lemon v. Kurtzmann* (1971) represents the establishment of a jurisprudential regime. *Lemon* declared that statutes (or practices, like nativity displays) do not violate the Establishment Clause if they (1) have a secular purpose, (2) do not advance or inhibit religion as

their primary effect, and (3) do not foster excessive government entanglement in religion. Creation of the *Lemon* test has meant that the justices are more likely to vote in favor of separation of church and state when the law does not have a secular purpose, is not neutral toward different religions, and requires government monitoring (Kritzer and Richards, 2003:835). Importantly, these criteria did not have a significant influence on the justices' votes before the establishment of the jurisprudential regime, strengthening the causal claim. More broadly, this example demonstrates that regimes do not "dictate outcomes"; rather, they "establish through law the parameters that justices, and other actors, should take into account in deciding cases" (Kritzer and Richards, 2003:839).

In some ways, this evidence for jurisprudential regimes as a constraint on the justices' ability to act in accordance with their policy preferences remains unsatisfactory. It is quite easy for the majority justices to adapt their behavior to comply with the precedent they established. In the words of Spaeth and Segal (1996a), doing so does not require that the justices choose between "precedential" and "preferential" behavior. That is, a justice need not choose between what the law prescribes (in Spaeth and Segal's test, the impact of precedent on progeny cases) and what the justice's preferences dictate. This leads to one potential argument against the evidence for jurisprudential regimes: to date, scholars have only proven that the justices who create a jurisprudential regime follow the regime.[1] But if jurisprudential regimes truly alter the decision making of Supreme Court justices by changing the way they weigh case facts, then the more interesting theoretical question is not how the justices who created the regime behave, but how the justices who opposed the creation of the regime behave subsequent to the creation of the regime. This represents a variation on the test outlined by Spaeth and Segal: if precedent matters, justices should respond to the changes in precedent by altering their behavior—they should choose precedential over preferential behavior. Here, if jurisprudential regimes matter, the dissenting justices should gravitate toward the behavior outlined by the regime over their own (revealed) preferences.

The behavior of the dissenting justices is important in two contexts. First, in the field of judicial behavior, it is a tougher test to demonstrate that justices choose the behavior the "law" dictates over their own preferences than to demonstrate that *both* law and attitudes have an effect. Finding that dissenting justices adapt their behavior to the jurisprudential regime would affirm the view of legal positivists that "views law as an external constraint on judges, and this means that legal influence should result in at least a

[1]The case for jurisprudential regimes is somewhat stronger than this statement implies. Richards and Kritzer also argue that jurisprudential regimes bind future justices—those who join the Court after the regime was established, but do not run separate statistical tests on the behavior of these justices.

certain amount of judicial conformity to an identifiable rule or norm'' (Gillman, 2001:485). Second, looking at the behavior of dissenting justices might have broader implications for how we understand political regimes. If regimes ''transform new ideas about the purposes of government into governing routines,'' doing so requires agreement by ''*all* the major actors'' (Orren and Skowronek, 1998–1999:694, cited in Richards and Kritzer, 2002:308, emphasis added). Certainly, the justices who opposed the creation of the jurisprudential regime are important to its success. If regimes (or institutions more broadly) have the power to shape behavior, then one should look at the subsequent behavior of those who oppose the creation of the regime to test its true effect.

In the context of jurisprudential regimes, then, the ideal test might not be how all the justices who participated in changing a regime behave: such a test might obscure important differences among the justices. If the majority justices (the justices who established the regime) change their behavior and the dissenting justices do not, then pooling all the votes of the justices may still reveal an aggregate pattern shift that meets levels of statistical significance. As suggested above, any evidence of change in the importance of case facts is an important finding as scholars continue to look for evidence of the impact of the law on justices' behavior. But if the *dissenters* change by placing more importance on some case facts and less importance on others, then jurisprudential regimes have a greater effect than previously imagined.

Disaggregating the analysis of jurisprudential regimes into majority and minority justices has the added value of shedding light on the interaction between the two sets of justices. One might expect the dissenting justices to reject the reasoning of the majority, either implicitly or explicitly. Indeed, dissenting opinions are often replete with rejection—of the majority's reasoning, of the standard the majority might develop, or of both components of the majority opinion.[2] However, scholars of judicial behavior know less about how the justices' behavior changes in subsequent cases. Spaeth and Segal argue that their behavior in progeny cases is driven by their stand in landmark cases (Segal and Spaeth, 1996a, 1996b; Spaeth and Segal, 1999), and the justices themselves are certainly reluctant to admit compliance with a precedent they opposed. But the concept of jurisprudential regimes suggests dissenters' responses to landmark cases may be more nuanced: the factors that influence justices' votes (particularly case facts) may change even for those justices who question the establishment of the regime. In this article, I replicate the analyses of Kritzer and Richards (2005), but separate the justices who supported the establishment of the new jurisprudential

[2]Justice Brennan's dissent in *Illinois v. Gates* (1983) (discussed below) is indicative of this. He argued that abandoning the two-prong test used to evaluate information provided by an informant and substituting the ''totality-of-circumstances'' test demonstrated ''an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment'' (1984:290).

regime from the justices who opposed such a shift. The dissenters changed their behavior as a result of the jurisprudential regime establishment, suggesting that the justices, even those who opposed the institution of the new regime, comply with the shift such a regime establishes.

Data, Hypotheses, Methodology

To test the impact of jurisprudential regimes on dissenting justices, I replicate the analyses of the establishment of a jurisprudential regime in search and seizure. In the other two regimes that have been identified (content neutrality in free expression cases, the *Lemon* test in Establishment Clause cases), no justice fully dissented from the cases establishing the regime (Justice Douglas dissented in part in *Grayned v. Rockford* (1972), but did not dissent in *Chicago Police Department v. Mosley* (1972); Justice White dissented in *Earley v. DiCenso* (1971), but not in *Lemon v. Kurtzman* (1971)), so it is not possible to extend this test to those two jurisprudential regimes.

Kritzer and Richards (2005) present a convincing case that a jurisprudential regime shift in search and seizure occurred in the mid-1980s, as the Supreme Court fundamentally altered what factors it considered in its assessment of searches and seizures conducted by law enforcement officials. The shift in Fourth Amendment jurisprudence occurred in Supreme Court decisions in six cases. In *Illinois v. Gates* (1983) and *Massachusetts v. Upton* (1984), the Supreme Court shifted toward a ''totality-of-circumstances'' approach to determining whether law enforcement had probable cause to conduct the search. Prior to these decisions, the Court's determination of probable cause grew out of *Aguilar v. Texas* (1964). *Aguilar* concluded that the Court should evaluate informants' reliability and basis of knowledge when determining if a warrant was backed by probable cause (this became known as the *Aguilar-Spinelli* test). In *Gates*, however, the Court rejected this ''two-pronged test,'' concluding that:

> there are persuasive arguments against according these two elements such independent status. Instead, they are better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. (Rehnquist, 1984:233, internal citations omitted)

Accordingly, the effect of these decisions should be to place more weight on a lower court's finding of probable cause (Hypothesis 1). Additionally, the change in *Gates* and *Upton* should mean 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'' (Hypothesis 2) (Kritzer and Richards, 2005:39).

Also in 1984, *United States v. Leon* (1984) and *Massachusetts v. Sheppard* (1984) carved out the good-faith exception to the exclusionary rule. Writing for the majority in *Leon*, Justice White concluded that ''the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion'' (1984:922). The Court created two more exceptions to the exclusionary rule in the same year. In *Nix v. Williams* (1984), the Court created the inevitable-discovery exception (allowing illegally seized evidence to be admitted if a judge finds it would have inevitably been discovered in a legal search), and in *Segura v. United States* (1984), the Court created the independent-source exception (evidence may be admitted if it would have been found using an independent source) to the exclusionary rule. Collectively, these exceptions mean that, after 1984, ''the existence of a warrant should be more likely to lead to a decision in favor of the government'' (Hypothesis 3) and ''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'' (Hypothesis 4) (2005:41–42). The search that was permitted in *Segura* illustrates the impact of the legal changes wrought by the Court. Segura was convicted, in part, on evidence obtained in a search of an apartment conducted 19 hours after an illegal arrest and the police's illegal entry into the apartment.

Kritzer and Richards (2005) find that, once they confine their analyses to the justices who participated in the regime-establishing decisions, two of their four hypotheses are confirmed. They find that the lower court's finding of probable cause has a greater impact on the justices' votes (Hypothesis 1), and that location of the search matters less in the determination of its constitutionality (Hypothesis 2). They do not find that the impact of a warrant changes in the new jurisprudential regime, and they also find that searches made after unlawful arrests are treated no differently once the regime is established.[3]

Separating the justices into majority justices (those who advocated establishment of the regime) and dissenting justices, who opposed the establishment of the regime, is not entirely straightforward. In all six cases, Justices White, O'Connor, Rehnquist, Powell, and Chief Justice Burger were in the majority. In all six cases, Justices Brennan and Marshall dissented. In *Gates*, *Leon*, and *Segura*, they were joined in dissent by Justice Stevens. Justice Blackmun dissented only in *Segura*. This leaves doubt only as to the positions of Justices Stevens and Blackmun.

[3]Looking at all justices (not just those on the Court at the time the regime was established) changes these results only marginally: the larger pool of justices is more likely to uphold searches after unlawful arrests after the regime was established.

Two of the cases in which Justice Stevens concurred (and they were special concurrences), *Upton* and *Sheppard*, were the companion cases to *Gates* and *Leon*, respectively, and Justice Stevens clearly articulated his opposition to the establishment of the "totality-of-circumstances" approach, as well as to the creation of the good-faith exception created in *Leon*. Stevens's concurrence (again, a special concurrence) in *Nix*, then, would be the only piece of evidence that suggests he might have supported the establishment of the jurisprudential regime. But this is clearly not the case. The summary of the case puts the point succinctly: Stevens "concurred in the judgment on the ground that while the police officer's Christian burial speech was both unconstitutional and in breach of a promise to counsel, the inquisitorial process did not affect the trial because the body would have been discovered anyway."[4] Accordingly, he is treated as an opponent of the jurisprudential regime established in these cases.

Justice Blackmun, on the other hand, is silent in *Gates*, joining the majority opinion without any statement. In *Leon* and *Sheppard*, he issues a concurrence stressing that the good-faith exception to the exclusionary rule is "provisional," by which he means:

> If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less. (Blackmun, 1984:928)

Blackmun's behavior in later cases provides a clue to his ultimate belief in the tenability of the good-faith exception. In *Illinois v. Krull* (1987), the Court considered the admissibility of evidence seized from a wrecking yard pursuant to a state statute authorizing warrantless administrative searches. The statute was declared defective, but Blackmun authored a majority opinion permitting the evidence to be admitted under the good-faith exception to the exclusionary rule. In the other two cases carving out exceptions to the exclusionary rule, *Nix* and *Segura*, Blackmun joined the majority in *Nix* and joined Justice Stevens's dissent in *Segura*. His *Segura* dissent is the only piece of evidence that might suggest Blackmun be considered as a part of the dissent, but, on balance, Justice Blackmun appears to have agreed with the establishment of the new jurisprudential regime in search and seizure law. Accordingly, Justices Rehnquist, Blackmun, Powell, O'Connor, White, and Chief Justice Burger are treated as the majority justices and Justices Brennan, Marshall, and Stevens are treated as the dissenters.

[4]Stevens's special concurrence in *Nix* follows the lead of the majority in allowing the conviction despite the numerous mistakes made by the police in the case. Stevens acknowledges the inevitable-discovery exception to the exclusionary rule, but this is also true of Brennan's dissent.

Results

The appropriate methodology for estimating the impact of the regime change is to fit a logistic regression model that includes interactions for the case facts with a dummy variable signifying the regime establishment. One can evaluate the impact of the regime change by conducting hypothesis tests on the interaction terms (e.g., regime∗warrant), and one can evaluate the overall impact of the regime establishment by conducting a modification of a Chow test to see if the coefficients are constant across time.[5] The results for these analyses are presented for the *Gates* majority and dissent in Tables 1 and 2.

Turning first to the results for the majority justices, the lower court finding of probable cause is significantly more important (Hypothesis 1), and location appears to matter less (Hypothesis 2): the effects observed for searches of businesses and cars are statistically significant. The impact of a warrant does not change after the establishment of the regime (Hypothesis 3), and the majority justices are no more likely to find searches made after unlawful arrests constitutional (Hypothesis 4). These results square directly with the results reported by Kritzer and Richards for all the justices who were on the Court at the time of the establishment of the jurisprudential regime: the first two hypotheses are supported but the last two are not.[6]

The behavior of the dissenting justices is more interesting. Unlike the majority justices, the dissenting justices are not more deferential to lower court findings of probable cause (Hypothesis 1). Looking at the two models separately, however, a lower court finding of probable cause is significant and positive after *Segura* but not before *Gates* for the dissenting justices (though the interaction term, probable cause∗regime, is not significant). The failure of the dissenting justices to offer more deference to lower court

[5]For more detail, see Richards and Kritzer (2002:Appx. C). The modified Chow test compares the $-2*$LL of the full model (a model with the independent variables—including Segal-Cover scores for the justices, a dummy variable for regime, and interactions between the regime variable and the substantive independent variables) with the same statistic for the restricted model (estimating only the substantive independent variables). The resulting statistic follows a chi-square distribution. Although one may be concerned about the small number of observations (154 for the dissenting justices after the establishment of the regime), the significance tests are derived from the interaction terms in the full model ($N = 434$ for the dissenters, $N = 736$ for the majority).

[6]Although most statistical analyses of interaction terms interpret the coefficients as any other coefficient—using z scores to determine statistical significance—recent scholarship (Ai and Norton, 2003) argues that this approach is incorrect and propose a solution for qualitative dependent variables. Reestimating the interaction effects with the proposed correction produces minor changes in the results. For the majority justices, the variables with significant ($p < 0.05$ or less, one-tailed tests) average interaction effects are business, car, incident to arrest, and after arrest. For the dissenting justices, the variables are house, person, and car. After unlawful arrest has an average z score of 1.51 ($p < 0.066$, one-tailed test). I thank an anonymous reviewer for recommending this approach.

TABLE 1

Gates Majority

	Combined	Before *Gates*	After *Segura*	Before/ After Test
Search location				
House	−1.298**	−1.658**	−0.946	
	(0.441)	(0.582)	(0.759)	
Business	−1.390**	−2.223***	−0.429	†
	(0.459)	(0.604)	(0.812)	
Person	−1.091**	−1.519**	−0.510	
	(0.412)	(0.524)	(0.755)	
Car	−0.968*	−1.935**	0.061	*
	(0.446)	(0.580)	(0.798)	
Full search	−0.961**	−1.028**	−1.294*	
	(0.286)	(0.390)	(0.535)	
Warrant issued	0.818*	1.300**	0.754	
	(0.357)	(0.451)	(0.711)	
Probable cause	0.660**	0.328	1.549**	*
(lower court)	(0.234)	(0.314)	(0.471)	
Arrest (lower court)				
Incident to arrest	0.804*	2.891***	−1.313*	***
	(0.393)	(0.773)	(0.650)	
After arrest but not incident	0.331	1.671***	−1.548**	***
	(0.330)	(0.485)	(0.559)	
After unlawful arrest	0.324	0.283	0.183	
	(0.298)	(0.3975)	(0.516)	
Exceptions	1.154***	1.598***	0.4713	*
	(0.212)	(0.301)	(0.3565)	
Justice's attitude	−0.899***	−1.277***	−0.525	
	(0.247)	(0.328)	(0.427)	
Constant	1.799***	1.893**	2.123*	
	(0.469)	(0.603)	(0.851)	
N	736	468	268	
χ^2 (12 df)	79.48***	90.16***	39.87**	43.21***

†$p<0.10$; *$p<0.05$; **$p<0.01$; ***$p<0.001$, two-tailed test. Standard errors in parentheses.

findings of probable cause may be explained by more conservative lower courts after the regime change than before the regime change. The Reagan appointees to the lower federal courts may have made probable cause findings by which the dissenters simply could not abide, even if they wanted to behave in accordance with the new regime.[7] This explanation may square

[7]Even if there had not been more conservative appointments after 1984, lower court judges should have been making more conservative decisions because of the regime change. I thank an anonymous reviewer for making this point.

TABLE 2

Gates Dissenters

	Combined	Before *Gates*	After *Segura*	Before/ After Test
Search location				
House	−1.701**	−1.851**	0.050	
	(0.518)	(0.623)	(1.171)	
Business	−1.432**	−1.602*	0.216	
	(0.544)	(0.623)	(1.341)	
Person	−1.001*	−1.293*	1.200	†
	(0.457)	(0.538)	(1.169)	
Car	−0.964†	−1.166	1.330	†
	(0.500)	(0.608)	(1.133)	
Full search	−1.223***	−0.860†	−2.790***	*
	(0.341)	(0.472)	(0.751)	
Warrant issued	0.519	0.237	2.301*	†
	(0.397)	(0.481)	(0.947)	
Probable cause	0.763*	0.329	1.367†	
(lower court)	(0.340)	(0.416)	(0.776)	
Arrest (lower court)				
Incident to arrest	0.595	0.853	−0.377	
	(0.508)	(0.596)	(1.247)	
After arrest but not	−0.058	−0.123	0.738	
incident	(0.459)	(0.587)	(0.922)	
After unlawful arrest	−0.508	−1.844*	1.300†	**
	(0.447)	(0.815)	(0.775)	
Exceptions	0.945***	0.971***	1.165*	
	(0.219)	(0.265)	(0.555)	
Justice's attitude	−0.773***	−0.853***	−2.249***	*
	(0.171)	(0.239)	(0.505)	
Constant	0.545	1.020	−1.738†	
	(0.489)	(0.624)	(1.015)	
N	434	280	154	
χ^2 (12 df)	63.83***	48.66***	52.11***	26.09*

†$p<0.10$; *$p<0.05$; **$p<0.01$; ***$p<0.001$, two-tailed test. Standard errors in parentheses.

with another interesting result of these analyses. For the dissenters, attitudes, as measured by Segal-Cover scores, also play a greater role *after* the establishment of the regime.[8] This does not hold for the majority justices.

Justices Stevens, Marshall, and Brennan pay less attention to the location of the search after the establishment of the regime: the effect is statistically

[8]If one substitutes the measures developed by Martin and Quinn (2002) for Segal-Cover scores, the effect of attitudes is no different after the regime change than before. This may have something to do with the flexibility of Martin-Quinn scores: the values themselves change for the justices, so it may be difficult to compare the effect of the two measures over time.

significant for searches of persons and cars. Looking at the coefficients before and after establishment of the regime, the dissenting justices were less likely to admit evidence seized in the search of a home before *Gates*, but not after *Segura* (the interaction term, house∗regime, was not significant) (Hypothesis 2).

Perhaps the most interesting findings can be observed in the tests of Hypotheses 3 and 4. Unlike the majority justices, there are statistically significant results for searches made with warrants—the dissenters are more likely to uphold a search with a warrant after the regime is established, and the dissenting justices are more likely to uphold searches conducted after unlawful arrests. Findings on the fourth hypothesis are particularly revealing. Before *Gates*, Marshall, Brennan, and Stevens were *less* likely to vote to uphold searches after unlawful arrests ($b = -1.844$, s.e. $= 0.815$), but are more likely to vote to uphold the same searches (all else equal) after *Segura* ($b = 1.300$, s.e. $= 0.775$). Put concisely, the dissenting justices meet three of the four hypothesized changes expected as a result of the jurisprudential regime change, while the majority justices only met two of the four hypothesized changes.

The final step is to conduct a sensitivity analysis to determine if the change in behavior occurred when the Supreme Court articulated a new regime.[9] The results of the sensitivity analysis for the majority justices are presented in Figure 1.

The establishment of the regime for the justices in the *Gates* majority is clearly in line with what one might expect if the cases the Court decided in 1983 and 1984 constituted the establishment of a jurisprudential regime. The chi-square value is greatest in 1983, as one might expect. The sensitivity analysis for the dissenting justices, however, paints a somewhat different picture.

There is no evidence that a shift by the dissenting justices occurred in 1983. But one would not expect the cutpoint for the dissenting justices to be in 1983 or 1984, as their votes at that time were the very dissenting votes in the regime-establishing cases. The peak in 1986, though, suggests that the dissenting justices did begin to incorporate the new jurisprudential regime.[10] Additionally, one might look at the main effect for the regime over the different possible points.[11] A significant result would suggest a difference in the likelihood of voting for or against the government on either side of the split. For the dissenting justices, that effect is only significant in models where the regime is set between 1983 and 1986. The dissenters clearly changed their behavior in the directions indicated by the new jurisprudential

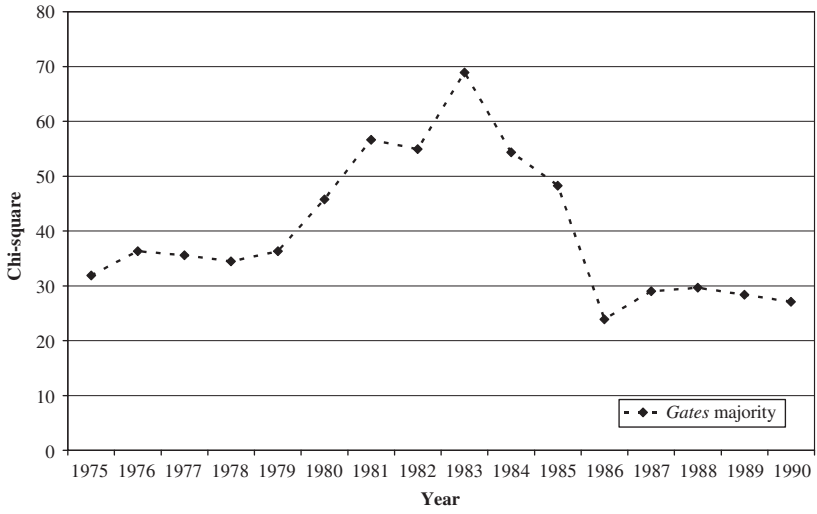
[9]Kritzer and Richards (2005:45) describe the process as follows: ''Finally, we performed a sensitivity analysis by trying alternative annual time breaks. If the chi square statistic for the regime break was high relative to the other annual break points, we would have strong confirmation of a regime that shaped the influence of the jurisprudential variables.''

[10]The 1986 peak is clearly not the highest peak, but Kritzer and Richards (2003) and Richards and Kritzer (2002) suggest that the chi-square value need not be at its highest, simply higher than surrounding values to constitute a candidate for regime establishment.

[11]The chi-square test reported in Figures 1 and 2 includes only the interactive effects (regime∗warrant, regime∗probable cause) and not the main effect for the regime.

FIGURE 1

Sensitivity Analysis for *Gates* Majority



regime, but the evidence as to *when* they did so is not as clear-cut as for the majority justices.

Discussion

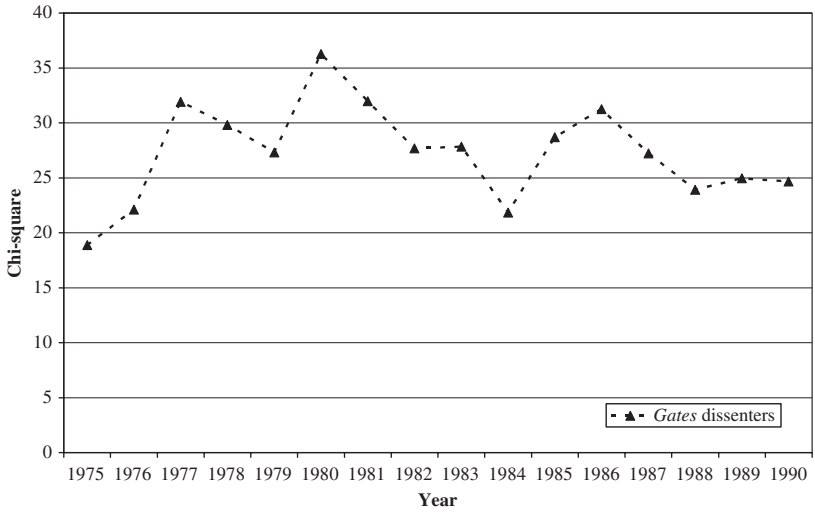
Segal and Spaeth (2003:33) criticize the jurisprudential regime argument as articulating little more than "attitudinal regimes." The ability of justices to follow a jurisprudential regime of their own construction does not force justices to choose between their preferences on public policy and the course of action dictated by the law. To demonstrate that jurisprudential regimes have any independent effect on the behavior of Supreme Court justices, Segal and Spaeth propose the following test:

> start with a search and seizure factor that, as of a certain date, has not been declared influential, such as a totality of the circumstances test for confidential informants. Consider first a justice who supports such a test. If that justice is acting attitudinally, then that factor should be just as important to him or her before the Court decision on the topic as after. Next, consider a justice who opposes such a test. That factor would not be important before the regime, but may be important after the Court announces the decision. (Segal and Spaeth, 2003:33)

This article takes up the test proposed by Segal and Spaeth. The results are indicative, but not conclusive.

FIGURE 2

Sensitivity Analysis for *Gates* Dissenters



For the most part, the majority and dissenting justices responded the same way to the establishment of the Fourth Amendment regime inaugurated by *Gates* and completed by *Segura*. These findings provide an interesting counterweight to the discussion of precedential and preferential behavior that dominates the discussion of how Supreme Court justices respond to changes in precedent. Spaeth and Segal (1999) argue that preferential behavior is the norm, while precedential behavior is relatively rare. But the literature on jurisprudential regimes suggests that legal-oriented behavior may manifest itself in changing response to facts, a more nuanced explanation than justices simply abandoning their preferences to follow the Court's precedent in progeny cases.

Jurisprudential regimes affect the justices who oppose the establishment of the regime in much the same ways as they affect the justices who support the regime. Those looking for evidence that law matters to Supreme Court justices might take heart in this finding, but the limitations should be clear as well. Two are particularly notable. First, it is difficult to develop an expectation about *when* justices who oppose the regime should change their behavior. Certainly, their behavior should not be the same as the majority justices, but it seems fair to develop an expectation as to when the dissenting justices "come around." There is some evidence that that point occurs two years after the creation of the jurisprudential regime but, clearly, the change is gradual. Second, the findings presented here are restricted to search and seizure. As additional "candidate regimes" are identified by scholars of judicial behavior, attention should be given to the justices who oppose the

establishment of the regime. Their response to the establishment of the regime represents an important test of the effectiveness of jurisprudential regimes in altering the behavior of the justices of the Supreme Court.

REFERENCES

Ai, Chunrong R., and Edward C. Norton. 2003. "Interaction Terms in Logit and Probit Models." *Economics Letters* 80:123–29.

Chicago Police Department v. Mosley, 408 U.S. 92 (1972).

Earley v. DiCenso, 403 U.S. 602 (1971).

Gillman, Howard. 2001. "What's Law Got to Do with It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making." *Law and Social Inquiry* 26:465–504.

Grayned v. City of Rockford, 408 U.S. 104 (1972).

Howard, Robert M., and Jeffrey A. Segal. 2002. "An Original Look at Originalism." *Law and Society Review* 36:113–34.

Illinois v. Gates, 462 U.S. 213 (1983).

Illinois v. Krull, 480 U.S. 340 (1987).

Kritzer, Herbert M., and Mark J. Richards. 2003. "Jurisprudential Regimes and Supreme Court Decision Making: The *Lemon* Regime and Establishment Clause Cases." *Law and Society Review* 37:827–40.

———. 2005. "The Influence of Law in the Supreme Court's Search-and-Seizure Jurisprudence." *American Politics Research* 33:33–55.

Lemon v. Kurtzmann, 403 U.S. 602 (1971).

Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court." *Political Analysis* 10:134–53.

Massachusetts v. Sheppard, 468 U.S. 981 (1984).

Massachusetts v. Upton, 466 U.S. 727 (1984).

Nix v. Williams, 467 US 431 (1984).

Orren, Karen, and Stephen Skowronek. 1998–1999. "Regimes and Regime Building in American Government: A Review of Literature on the 1940s." *Political Science Quarterly* 113:689–702.

Richards, Mark J., and Herbert M. Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96:305–20.

Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83:557–66.

Segal, Jeffrey A., and Harold J. Spaeth. 1996a. "The Influence of *Stare Decisis* on the Votes of United States Supreme Court Justices." *American Journal of Political Science* 40:971–1003.

———. 1996b. "Norms, Dragons, and *Stare Decisis*: A Response." *American Journal of Political Science* 40:1063–82.

———. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.

———. 2003. "Reply to Critics of the Supreme Court Attitudinal Model Revisited." *Law and Courts* 13(3):31–38.

Segura v. United States, 468 U.S. 796 (1984).

Spaeth, Harold J., and Jeffrey A. Segal. 1999. *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court*. New York: Cambridge University Press.

United States v. Leon, 468 US 897 (1984).