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An Analysis of Cross-Ideological Expectation Voting on the United States Supreme Court,  
2000-2017

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## **Acknowledgments**

To my parents who have encouraged me in every educational pursuit and continue to be my biggest supporters. I love you both.

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## **Abstract**

Contrasted with the other branches of government, the Supreme Court has long been an institution posing a level of secretiveness equal to its power. Naturally, that has developed a desire, and maybe necessity, to gain a better understanding regarding the principal influencers of judicial decision making on America's highest Court. One phenomenon that has long been of interest to Court observers is the notion of the justice's voting across established ideological lines. Previous attempts to explain and reconcile cross-ideological votes have focused on the influence of external actors on the Court, its legitimacy, public opinion, and dynamics between justices. Yet, there remains a need to scrutinize the types of cases most likely to produce cross-ideological votes among justices in order to offer explanatory factors as to when a particular cross-ideological vote occurs. Often ignored in the quest to ascertain factors influencing particular justices and the Court as a whole, is the need for a study of case topics and the ability of these topics to correlate to an unexpected vote by a justice. In this thesis, I analyze which legal issues embedded within Supreme Court cases are most likely to produce cross-ideological votes among justices. I then propose a theory for predicting what issue areas are most likely to produce cross-ideological votes among Supreme Court justices in the future. In this research, I find that the issue area of criminal procedure correlates to the largest number of cross-ideological votes by Supreme Court members. Interestingly, I also find that conservative and liberal justices are equally inconsistent in voting concerning criminal procedure cases.

## **Introduction**

In the recent Supreme Court case of *Gamble v. United States*, justices surprised Court enthusiasts by issuing a 7-2 ruling pertaining to the issue of double jeopardy (Liptak, 2019). Particularly notable in this case was the cross-ideological expectation voting demonstrated by justices. The 7 member majority was Chief Justices Roberts, Justices Thomas, Breyer, Alito, Sotomayor, Kagan, and Kavanaugh while Justices Ginsburg and Gorsuch were the sole dissenters. While the voting patterns present in this case may have been somewhat of a surprise, justices voting across ideological lines is not a new phenomenon.

Since its inception, the United States Supreme Court has issued rulings where particular justice's votes surprise the general public and Court enthusiasts. Given the sheer magnitude of the issues on which the Court rules, it should be of little revelation that interest in each individual justice's votes in various cases is of such importance.

When inconsistencies by SCOTUS members are discussed, such conversations typically lead to a discussion of what has frequently been coined cross-ideological votes. In the most basic sense, a cross-ideological vote can be defined as a liberal justice voting conservatively or a conservative justice voting liberally. Various questions as to the causation behind cross-ideological behavior on the Court have long served to fascinate judicial scholars and Court watchers. Common perceptions of the United States Supreme Court account and allow for nine justices to occasionally be inconsistent in their voting behavior. That said, the rate at which the justices vote inconsistently as well as the reasons correlating to the said inconsistent votes remain frequently discussed and debated.

In attempting to assess cross-ideological expectation behavior by the court, this thesis will take into account previously conducted research and empirical findings with regards to

judicial behavior. Such findings include the impact of public opinion, Court legitimacy, external actors, and various competing theories that impact judicial decision making. While each of these aforementioned factors has been empirically shown to impact the Court, a missing variable in the study of inconsistencies is the issue area at hand in each case. Put most succinctly, this research seeks to answer the broad question, “what legal issues are most likely to produce cross-ideological expectation votes by justices of the United States Supreme Court”? In other words, are certain case topics more likely to see justices be inconsistent in their votes?

My research question is “what legal issues are most likely to produce cross-ideological expectation votes by justices of the United States Supreme Court”? My hypothesis is that cases concerning criminal procedure are most likely to produce cross-ideological expectation votes as compared to other issue areas in which the Court rules. Additionally, I predict that the liberal and conservative members of the Court will be equally inconsistent on the issue of criminal procedure. In other words, inconsistencies within criminal procedure cases are not disproportionate regarding a particular ideology.

The importance of this particular research will serve to answer questions about inconsistencies and ideological drift on the Court within the 2000-2017 Court sessions. Information provided with respect to that period and factors to watch for in the future are both presented. By exploring the issue areas where justices behave the most inconsistently, various other conclusions can be reached, including individual justice’s inconsistencies,<sup>1</sup> inconsistency

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<sup>1</sup> The term ‘median justice’ is frequently used to depict the justice who is ideologically at the center among the nine and often casts the ‘swing vote’ on the Court in 5-4 cases. However, this work operates under the assumption that each justice is an exemplar of being inconsistent on the court. This point is addressed in the literature review, but the important takeaway is that this work is not just considering swing votes, but any vote by a member that could be defined as cross-ideological.

by ideology, and why certain issue areas are more likely to produce cross-ideological expectation votes than others.

## **Literature Review**

The concept of justices voting inconsistently is typically coined “ideological drift”. Most basically, ideological drift is defined as “legal ideas and symbols will change their political valence as they are used over and over again in new contexts” (Balkin, 1993, 247). While some operate under the general assumption that certain members of the Court frequently drift ideologically, the idea of justices consistently displaying a pattern of inconsistency is less accepted. That being said, the extent to which justices vote inconsistently or drift ideologically has been shown to occur at drastic rates. Statistically, research shows “of the 26 justices who served 10 or more terms on the Court since 1937, 22 drifted ideologically. Only four (15%) remained ideologically consistent” (Epstein et al, 2007, 93). This number should serve to show that while certain members of the Court operate ideologically consistently, individual justices have various inconsistencies that frequently dictate their judicial philosophy and case rulings. Put more succinctly, while common perceptions of the Court allow for Justice Anthony Kennedy’s inconsistencies, this does not exclude Justice Antonin Scalia from voting inconsistently in specific cases or issue areas. This is what this research intends to capture.

One of the necessary concepts in debating change on the Court is the recognition that, as an institution, the Court is constructed in such a way to allow for and even encourage changing preferences among its members, especially compared to other branches of government that do not allow for such tumultuous changes (Owens and Wedeking, 2012). The reality of life tenure for SCOTUS justices translates to an institution not so wholly accountable to the general public, thus, allowing for inconsistencies. Put simply, while members of Congress face re-elections and



the Presidents face fixed terms, Supreme Court justices avoid such a challenge. Therefore, the Court and its justices are allowed, simply by the nature of a life appointment, to be more inconsistent in their decision making as justices do not have to consider constituents or voters to the extent that Congress and the executive do (Owens and Wedeking, 2012).

One of the essential understandings upon which this research operates is that Supreme Court justices do, in fact, possess and adhere to their own ideological beliefs. That is to say that the inconsistencies which have already been shown to infiltrate the Court have their rooting in justice's votes being altered by their own policy preferences. In understanding this concept to its fullest, it is essential to delve into three competing theories as to what influences judicial decision making. These three varied theories are the legal, rational choice, and attitudinal models of Supreme Court justice behavior.

The legal model holds "the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers, and/or precedent" (Segal and Spaeth, 2002). The legal model is the theory that ardent supporters of a non-politicized court adhere to. In fact, most SCOTUS justices themselves would likely claim their voting is influenced by the legal model. Conversely, the rational choice model contains two primary components as "actors are able to order their alternative goals, values, tastes, and strategies. This means that the relation of preference and indifference among the alternatives is transitive...actors choose from available alternatives so as to maximize their satisfaction". (Ricker, 1990). In short, the rational choice model seeks to combine previously held theories of decision making.

The third model of judicial decision making is what this work is primarily based upon. The attitudinal model is based upon the belief that "the Supreme Court decides disputes in light

of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall votes the way he did because he was extremely liberal” (Segal and Spaeth, 2002). The attitudinal model is neither exempt nor immune to harsh criticism. In fact, rejections of the theory come from the justices of the Court themselves and others who continually profess their belief of an independent judiciary. However, through Segal and Spaeth’s research, the attitudinal model has proven consistent.

I also note that public opinion exists as an influencer of the behavior of the Court (Cassilas, Enns, Wohlfarth, 2011). Public opinion can pertain to the Court’s legitimacy which will be discussed at length. While various explanations exist as to why the Court responds to opinions of the public, it remains an important consideration when discussing behavior of judges, particularly when it comes to isolating their inconsistencies. Somewhat connected to the issue, is how the Court responds and rules based on the circumstances surrounding or embedding a case. Two primary examples of the Supreme Court adapting based on differing controversial circumstances are seen as the Court during times of war and the Great Depression and how, in both of these situations, the court significantly altered its own viewpoints. The two cases of *Korematsu v. United States* and *Home Building and Loan Association v. Blaisdell*, both to be detailed further, demonstrate this point.

Various Supreme Court cases that have been announced during and shortly after times of war or significant crisis present the court’s willingness to “significantly more curtail rights and liberties than when peace prevails” (Epstein et al, 2005). Notably, the Supreme Court’s stance has held true for various wars, showing their acceptance of war being reason enough to alter decision making (Cole, 2003). The most prominent example that comes to mind when discussing

this phenomenon is *Korematsu v. United States* (1944) in which Hugo Black, writing for the majority states “Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire” (*Korematsu v. United States*, 1944). Black and the majority are operating around the prevailing view that times of war allow for the Court to rule differently. Importantly, Black’s opinion details that had *Korematsu* occurred in a non-war era, the Court would’ve likely ruled differently.

Furthermore, times of economic distress, when it is significant, will correlate to justice’s willingness to alter their decision making processes in order to further the country’s needs (Brennan, Epstein, and Staudt, 2010). Perhaps one of the most prominent examples is *Home Building and Loan Association v. Blaisdell* (1934). This case, along with *Korematsu*, make Robert Levy and William Mellor’s “Dirty Dozen” list of cases in which they classify 12 Supreme Court cases that “radically expanded government and eroded freedom” (Levy and Mellor, 2008, 21-95). Similar to the *Korematsu* case, in *Blaisdell*, Justice Hughes denotes the Great Depression and the forgoing economic distress as reason enough for the Court to alter its policy preferences.

Together, these examples point to the willingness of justices to adhere to the country’s needs as a legitimate reason to alter their own judicial preferences. Once again, circumstances surrounding a case and public opinion form an almost spurious relationship in providing perspective as to a correlation for some inconsistent voting patterns by the Court.

Furthermore, the issue of the Court’s legitimacy has led to a justification for cross-ideological expectation voting. Legitimacy, in this context, “concerns empirical, nonnormative consideration of the attitudes, expectations, and behaviors of citizens toward the institutions that govern them....The particular problem of the U.S. Supreme Court is that it is heavily dependent

upon legitimacy for its efficacy and survival.” (Gibson and Nelson, 2014). As denoted in the cited research, “contrary to conventional wisdom, a potent ideological foundation underlies Supreme Court legitimacy vis-a-vis subjective ideological disagreement with the Court’s policymaking” (Bartels and Johnston, 2013). The Supreme Court differs from other branches of government in that it lacks an enforcement mechanism for its own rulings. This lack of power creates the need for the Court to rely heavily on the legislative and executive branches of government as well as the general public to accept its rulings (Peretti, 1999). In order for these three actors to accept Court rulings, the Court must first be seen as legitimate. Therefore, it only follows that the Court must consider its legitimacy far more than other actors because its very survival depends on it (Peretti, 1999).

Additionally, both the legislative and executive branches of the U.S. government impact the Supreme Court. As it pertains to the executive, research has shown justice’s willingness to yield to the President particularly when the President aligns with the justice in question ideologically speaking and when the President’s approval rating is high (Whitford and Yates, 1998). Much of the research previously conducted has signified the relationship between justices and the President who nominated them so it is important to note a finding signaling a willingness to adhere to the President even from justices who were not nominated by the President in question. Furthermore, the legislative branch can impact Supreme Court decision making. Recent research has found the Court is responsive to Congress particularly when the two are ideologically distant on a particular issue (Liquist, Segal, and Westerland, 2011). The notion of Congress impacting the Court is also necessary to note as the prevailing assumption is the Court as the most separated actor among the branches of government.

While the various aforementioned issues including the debate over theoretical models, the Court's legitimacy issue, the influence of the politics and public opinion have all been denoted to correlate to ideological drift, the issue areas present in cases containing ideological drift remain largely unexamined. The need remains to analyze and explain the missing variable of legal issues embedded within Supreme Court cases. This thesis takes into account the previously conducted research on SCOTUS inconsistencies and assesses the impact of various legal issues on Court outcomes.

Another critical point for this thesis was to establish how judicial ideologies can be defined and categorized. In the methods and data sections of this thesis, more detail is provided as to each justice's ideological focal point. It is still necessary to detail the process of establishing an ideal point for justices in an attempt to justify the standard used. The standard used for this work is the Judicial Common Space (JCS) which is described as:

The JCS score is derived from two other indices, the Martin-Quinn (MQ) score, an index developed by Martin and Quinn that measures the ideologies of Supreme Court Justices, and the NOMINATE Common Space score, an index developed by Poole and Rosenthal that measures the ideologies of members of Congress and Presidents, both derived from voting patterns. (Martin et al. 2005) (Poole et al. 1998) MQ scores are unbounded, while NOMINATE Common Space scores are bounded between -1 and 1. The purpose of the JCS score is to convert MQ scores into a bounded measure on the same scale as NOMINATE Common Spaces scores so that Supreme Court Justices' ideologies can be compared to other political actors. (Epstein et al. 2007)

As can be construed from the various other measures previously used and now used in conflation with the JCS, including the MQ and NOMINATE scores, establishing ideological focal points has long remained difficult to define by Court scholars. Still, as the JCS draws on previously conducted research in addition to perfecting the deficiencies of other methods, these scores have become standard practice for this kind of analysis.

As can likely now be ascertained, various theories exist as to what influences judicial decision making. Public opinion, external actors, legitimacy, and other factors have each demonstrated their ability to impact judicial decision making. Yet, the need remains to scrutinize the case topic at hand in examining inconsistencies in SCOTUS rulings which can be brought about with the use of the ideological focal points, and, herein, I conduct that analysis to show that the issue area of criminal procedure is most likely to produce cross-ideological votes and that conservative and liberal ideologies are equally inconsistent in their votes on these case types.

## **Methods**

This work is an analysis of cross-ideological expectation voting by the Court for the 2000-2017 Court terms.<sup>2</sup> Within the 2000-2017 timeframe, 13 justices were on the court: Justice Gorsuch, Justice Kagan, Justice Sotomayor, Justice Alito, Chief Justice Roberts, Justice Breyer, Justice Ginsburg, Justice Thomas, Justice Kennedy, Justice Scalia, Justice Stevens, Justice O'Connor, and Chief Justice Rehnquist.

I must also note that unanimous votes by the court were excluded from this study. As the specific phenomenon under study is voting behavior that is inconsistent and unexpected, 9-0 votes did not meet the criteria necessary to be included in this research. Inherent to the nature of 9-0 votes by the Court is a contextual quality of conformity which did not fit the phenomenon under study. Additionally, unanimous votes are not ideological in nature and thus not pertinent to this research. In short, previously conducted research presents that 9-0 votes only contain a small ideological element and are most likely caused by dissent aversion (Epstein, Landes, and

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<sup>2</sup> Due to the submission deadlines for this work, there was sufficient time to cover these particular years. For future study and research, this timeframe could be broadened to ascertain if patterns and trends from 2000-2017 hold true for past eras of the Court as well. Additionally, future research could attempt to detail whether or not certain issues will continue to dictate inconsistent voting in the future by Court members.

Posner, 2012). With the exception of 9-0 votes, all other ‘vote types’ of the court remained under study whether they were 8-1, 7-2, 6-3, 5-4, etc.

In order to ascertain when a justice was voting in a cross-ideological way, two important factors had to be established: First, each justice’s ideological preferences needed to be determined in order to observe when they violated their own ideology by their vote. As aforementioned, The Judicial Common Space scores by Dr. Lee Epstein served as the framework for determining justice ideology (Epstein, et al 2007). These scores measured the 14 justices in question on a numerical, linear, liberal versus conservative scale. If a justice’s score was liberal, then their cross-ideological votes were defined by the votes in which they voted conservatively. Similarly, if a justice’s score was conservative, then their cross-ideological votes were defined by the votes in which they voted liberally. The scores range from -1 to 1, with 0 representing the median ideology. As the distance from 0 increases, positively or negatively, the conservative or liberal score of the justice in question increases.

As an example of the Judicial Common Space scores within the 2000-2017 time frame, Justice Thomas, widely considered a staunch conservative received a score of 0.7622732 for the year 2003 (Epstein, et al 2007). For the same year, Justice Ginsburg, widely considered an ardent liberal, received a score of -0.4757645 (Epstein, 2007). In the data presentation portion of this thesis, each justice’s ideological “score” will be assessed and further detailed.

As previously mentioned, determining a justice’s ideology is not a simple task. Simply denoting a justice’s party affiliation based on the President who nominated them to the Court falls far short given the complexity of ideological preferences and the number of justices who, once on the court, rule far differently than the nominating President would have expected or

hoped for. This is why it was crucial to gain a quantitative approach to ideological viewpoints which the Judicial Common Space Scores provided.

Importantly, the Judicial Common Space Scores measure a justice annually which provides the important context that, year to year, justices may differ. For most of the members of the court, their scores remained relatively similar year to year. However, for other members, their score fluctuated at a greater rate. As is widely held, one of the reasons for fluctuations in justice's scores from year to year has to do with membership on the Court and, in particular, a desire for the Court to be seen as non-partisan (Baum, 1992). Regardless of the exact reason for slight fluctuations from year to year, the important takeaway is that, with the exception of Justice Kennedy, each justice fit into the category of either liberal or conservative for the entirety of their tenure on the Court.

Justice Kennedy, according to the Judicial Common Spaces Scores, from 2014-2017, is classified as a "liberal" but from 2000-2013, fits within the "conservative" framework. For this work, Kennedy is considered under the conservative framework for his entire tenure on the court. Quite obviously, this is not a perfect solution to the issue of classifying Justice Kennedy on a cross-ideological scale. Still, classifying Kennedy as a conservative and then a liberal would have resulted in an unnecessary skewing of data. Furthermore, most judicial scholars generally consider Kennedy to fit within the conservative viewpoint even if his fitting is slight (Schmidt and Yalof, 2004). Therefore, from 2000-2017, Kennedy is considered a conservative and his cross-ideological votes are when he votes liberally.<sup>3</sup>

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<sup>3</sup> Other scholars have struggled with classifying Kennedy into a liberal or conservative framework. In *The "Swing" Voter Revisited: Justice Anthony Kennedy and the First Amendment Right to Free Speech*, the difficulty of ascertaining Kennedy's ideology or even his judicial philosophy is detailed. As the aforementioned article denotes, Justice's Kennedy behavior can best be understood as his tendency to lean left or right on certain issues.



Additionally, it is necessary to note the degree to which a justice is ideologically confined. While some justices proved to have much stronger liberal or conservative scores, other justices were classified more medially. Once again, these scores will be further detailed in the data presentation section

Second, each case within the 2000-2017 frame was examined using Washington University School of Law's Supreme Court Database. In utilizing this database, the direction of each individual justice's vote in a particular case is denoted as either a conservative or a liberal vote. This database includes a host of measures for each particular case but most necessary to this study were the variables of "issue area" and "direction" of each justice's vote.

Once it could be determined when a justice was voting cross-ideologically, examining the issue area present in each of these cases became necessary. The Supreme Court Database from Washington University School of Law provided 14 issue areas that encompass Supreme Court cases. These issue areas are: Criminal procedure, civil rights, the First Amendment, due process, privacy, attorneys, unions, economic activity, judicial power, federalism, interstate relations, federal taxation, miscellaneous, and private law (Spaeth and Epstein, 2018). In collecting the quantitative data, after a vote was denoted as cross-ideological, the issue area in that particular case was documented as well. Then, the case in question was researched further to determine the specific nature.

In the beginning stages of this research, the cases were the primary source in detailing the issue areas of cross-ideological votes. Yet, as the research further developed, each justice was examined individually in order to ascertain the number of times they voted inconsistently within the given time frame. Additionally, the issue areas the particular justice was most likely to vote inconsistently was also observed.

Furthermore, the justices were classified into traditional ‘liberal’ and ‘conservative’ categories in order to identify whether or not a particular ideology performed more inconsistently on the court. That is to say that based on the Judicial Common Space scores, the justices fitting into the category of liberal and conservative for each year were examined collectively to assess each’s behavior as a “bloc”. Of course, as judicial turnover is present within this timeframe, the groupings changed along with the justices.

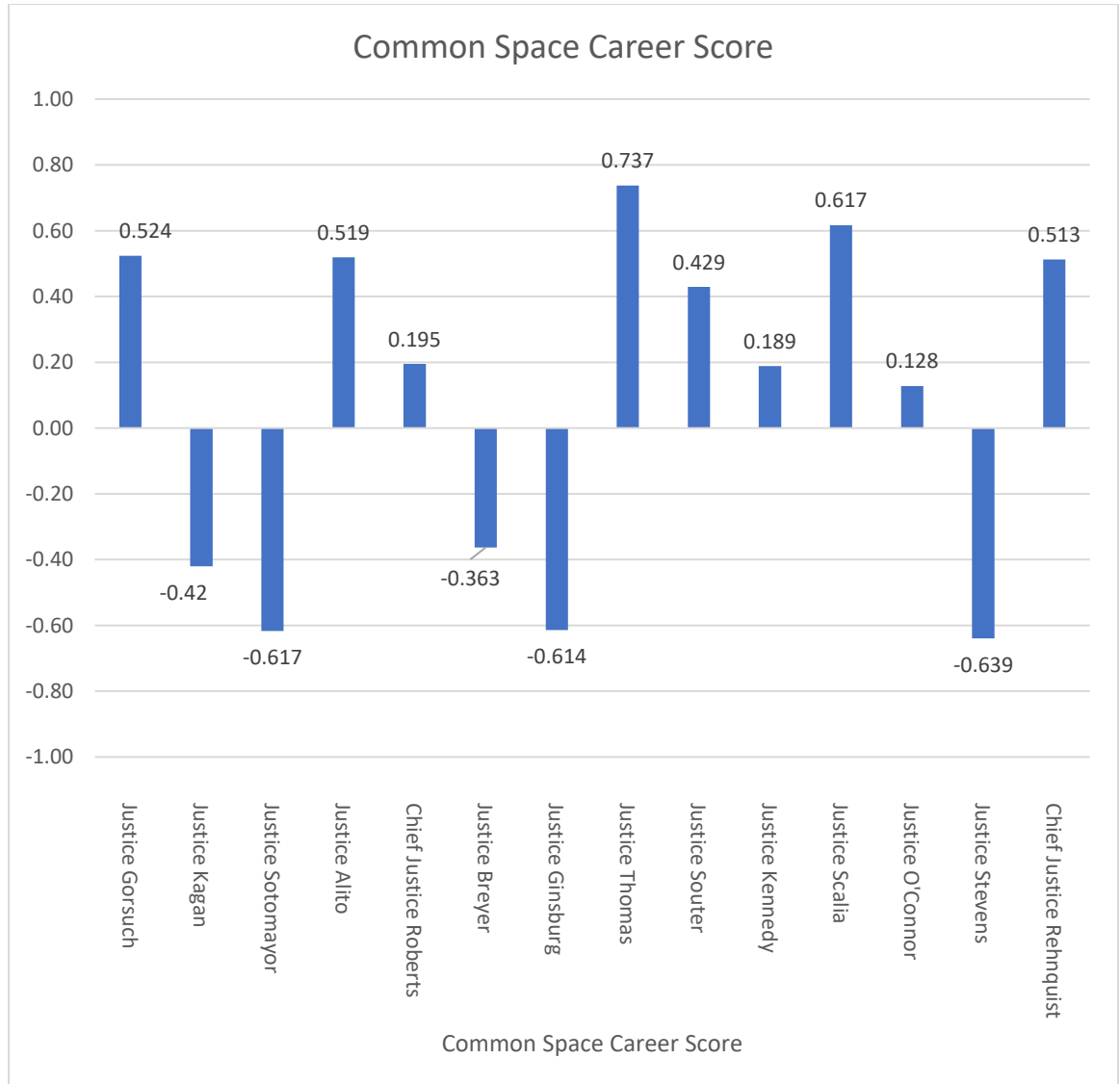
After detailing what issue areas were most inconsistent, these issue areas were examined further using the various sub-categories for each area provided by Washington University. In examining each issue area further, the intent was to be able to depict whether or not a sub-issue area was producing the most cross-ideological votes or, rather, if the entire issue area was inconsistent across the board. In using each of the aforementioned methods, the intent was to fully capture the realities of cross-ideological voting and be able to ascertain to what extent issue areas lead to inconsistencies and to dissect any patterns at the sub-issue level that were abnormal.

### **Data Presentation and Discussion**

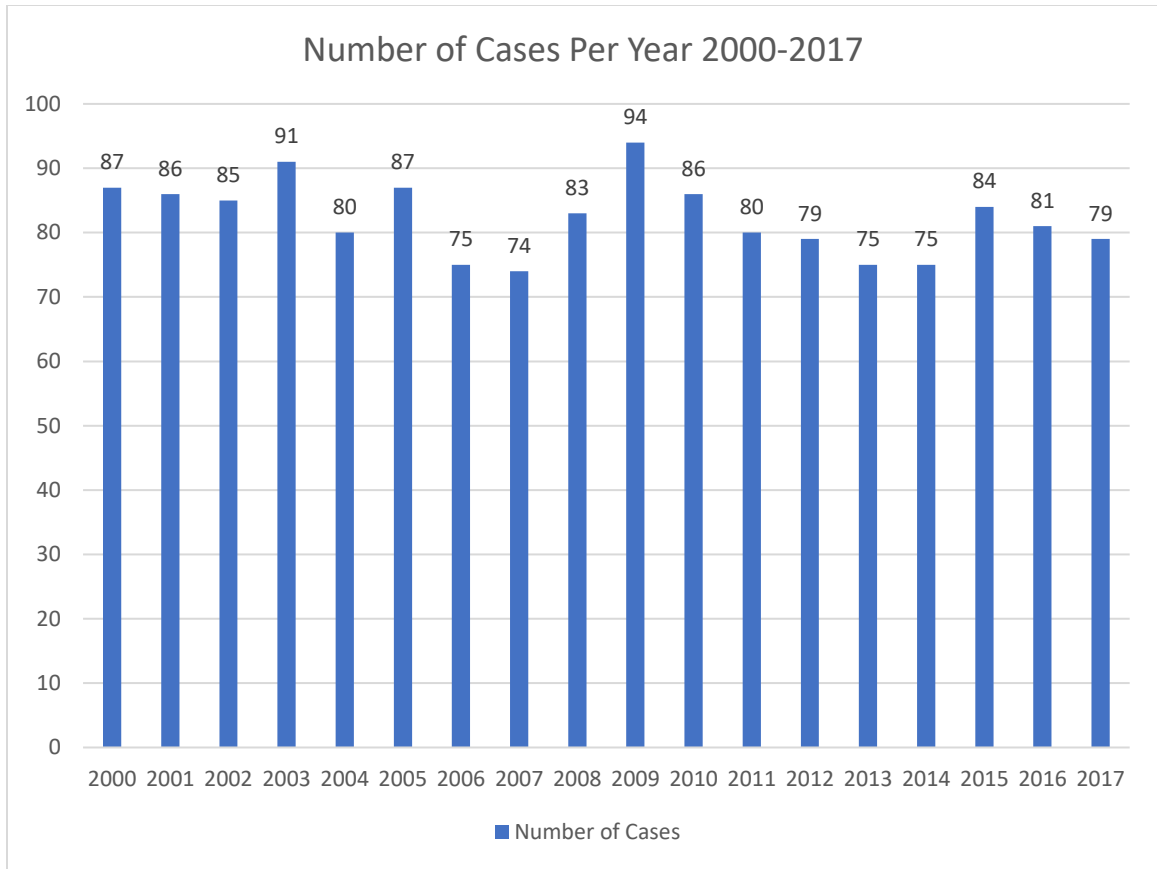
In obtaining the data for this research, four important statistics needed to be garnered: the average number of cases the Court hears per year, the average number of votes that could be classified as cross-ideological, the average number of criminal procedure cases, and the average number of cases containing at least one cross-ideological vote that were cross-ideological fitting in the criminal procedure category.

Once again, a case was identified as cross-ideological based upon Washington University School of Law’s Supreme Court database. This database was also used to ascertain the issue area present in each case.

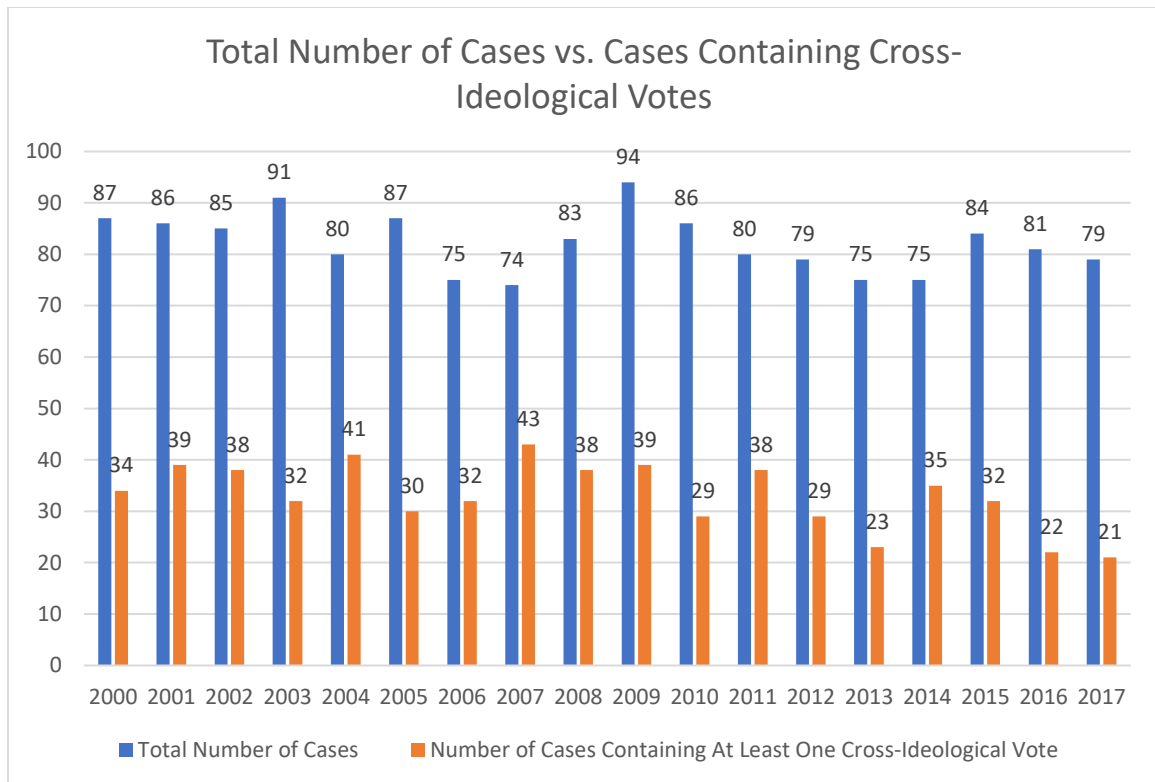
Additionally, as aforementioned, justice’s ideologies were determined using the Judicial Common Space Scores (Epstein, et al 2007). An example of each justice’s cross-ideological score during the 17 years under study:



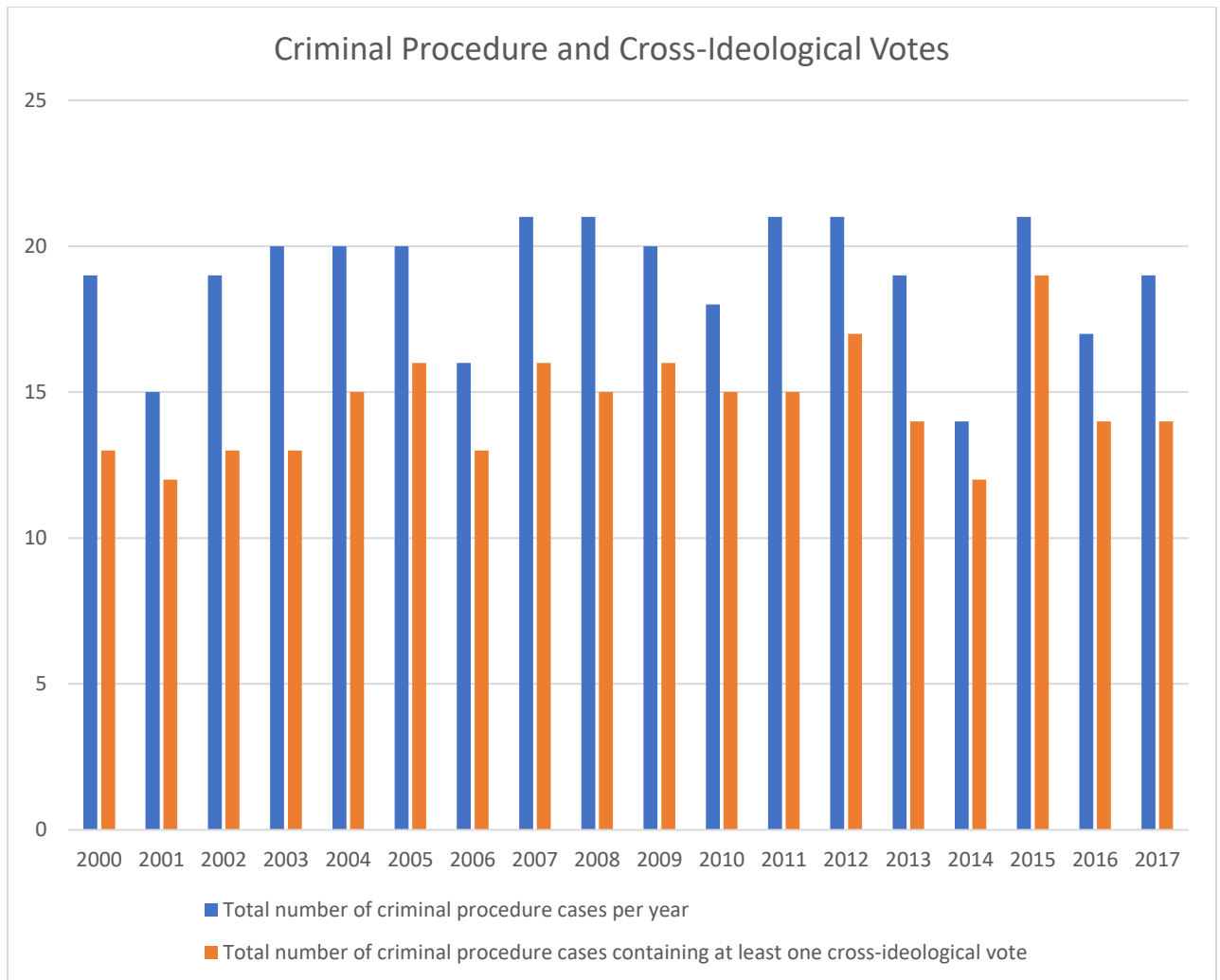
For the 2000-2017 term, the Supreme Court heard, on average, 82.2777 cases per year. The chart below details the total number of cases the Court heard each year.



The average number of cases per year that contained at least one cross-ideological vote was 33.055. It is important to note that this number pertains to the total number of cases and not the total number of votes that could be classified as cross-ideological. That number will be further detailed later. The chart below details the total number of cases for each year versus the number of cases per year containing at least one cross-ideological vote.



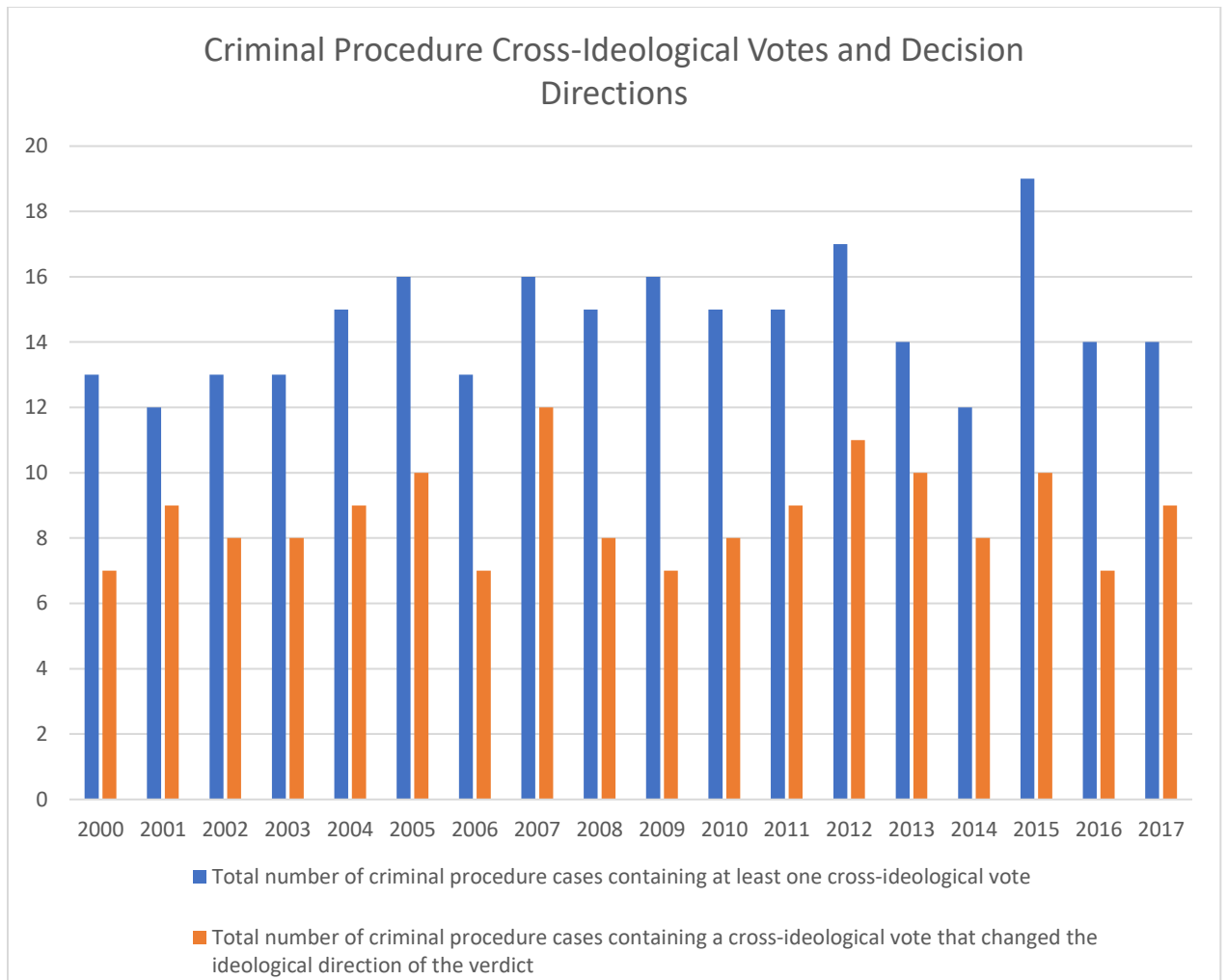
Most important to this research was to compare the number of criminal procedure cases that the Court hears each year, the number of criminal procedure cases that contain at least one cross-ideological vote, and the number of cases in all issue areas containing at least one cross-ideological vote.



In conducting this analysis, it was necessary to consider the issue area of criminal procedure and how frequently the Court actually hears criminal procedure cases. The chart above summarizes the number of times per year that the Court heard criminal procedure cases contrasted with the number of criminal procedure cases containing at least one cross-ideological vote. The average number of cases the Supreme Court heard in the criminal procedure issue area per year was 18.94. The average number of cases that were cross-ideological pertaining to the issue area of criminal procedure was 14.555. Of the 14 various issues the database identifies, criminal procedure was found to be the issue area most likely to produce a cross-ideological vote.

The chart summarizing the Court's cross-ideological behavior as a whole and then the second as it relates to criminal procedure are particularly important to compare and contrast. For example, for the year 2006, there was a total of 16 criminal procedure cases with 13 of those cases containing at least one cross-ideological vote. This is particularly noteworthy when considered with the fact that, SCOTUS justices frequently issue unanimous decisions. The reality that a single issue area is causing ideological splits so frequently is noteworthy in and of itself.

An additional important facet of this research was examining how many times a cross-ideological vote actually changed the decision direction of a case. Given the fact that this research specifically concerns judicial behavior that is unexpected, cross-ideological votes that change case outcomes are certainly pertinent to this research.

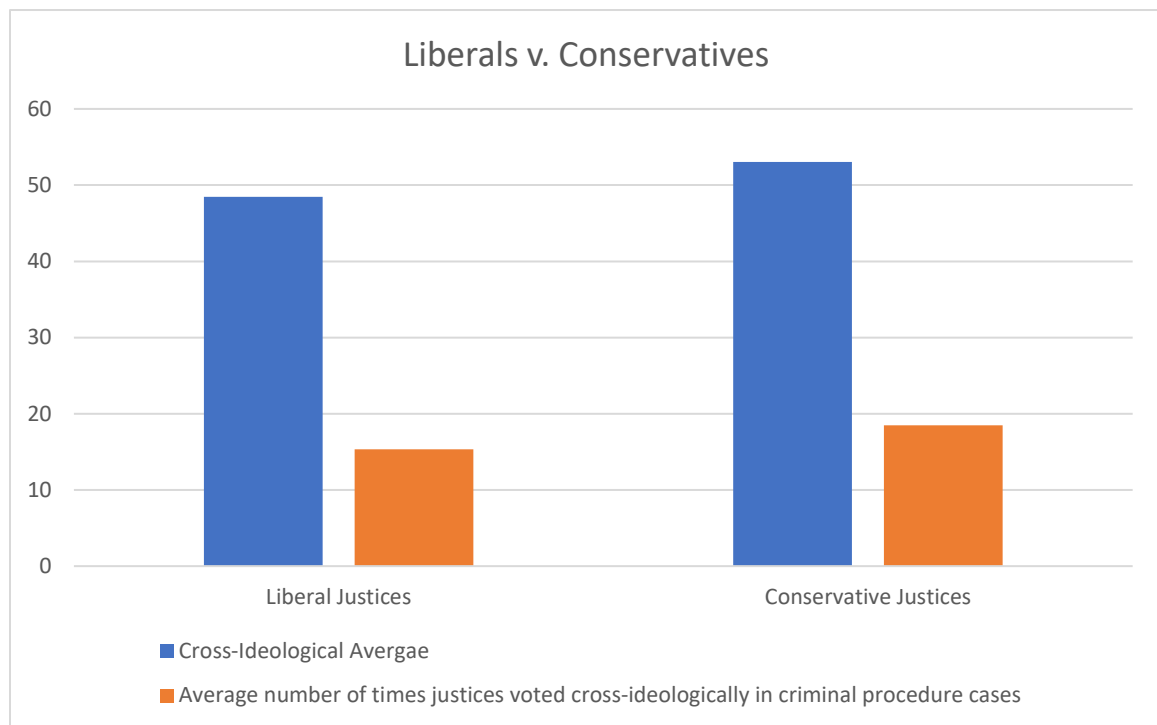


One reason for including the number of times that a cross-ideological vote altered the decision direction of a case was the importance that such a vote contains. For a justice to knowingly vote in such a way to alter the decision direction of a case and their own ideological preference speaks volume (Lim, 2000). Put succinctly, for a justice to go against their own ideological viewpoints as well as containing a recognition of the magnitude of a vote that would alter a verdict, was a phenomenon that this research needed to capture.



An example of a case in which a cross-ideological vote changed a verdict occurred in the case of *Carpenter v. United States* in 2017. At issue in this case was the search and seizure of cell phone records. While many expected a conservative majority in this case, the Court ruled 5-4 with Chief Justice Roberts joining the liberal justices in affirming that “warrantless acquisition of Carpenter’s cell-site records violated his Fourth Amendment right against unreasonable searches and seizures” (*Carpenter v. United States*).

Additionally, I conducted an analysis in order to be able to ascertain the differences between liberals and conservatives as it comes to voting cross-ideologically but, in particular, on the criminal procedure issue area.<sup>4</sup>



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<sup>4</sup> Washington University School of Law’s Supreme Court database defines criminal procedure saying “criminal procedure encompasses the rights of persons accused of crime, except for the due process rights of prisoners” (Spaeth and Epstein, 2007). Notably, due process is a separate category distinguished by the database and did not translate to as many cross-ideological votes

From 2000-2017, the liberal justices voted cross-ideologically an average number of 48.470 times per year. It is important to note that this is each of the justice's votes compiled together i.e. if 2 justices voted cross-ideologically on the same case, each of their votes was counted in obtaining the aforementioned statistic. As was mentioned earlier, the average number of cases containing at least one cross-ideological vote was 33.033 so the statistic of 48.470 should serve to show the overlap in the cases in which justices vote inconsistently. From 2000-2017, the liberal justices voted cross-ideologically in criminal procedure cases an average of 12.411 times per year. The conservative justices voted cross-ideologically an average of 53.058 times per year. The conservatives voted cross-ideologically in criminal procedure cases an average of 14.235 times.

Importantly, the chart above summarized the average number of times a justice either fitting within the conservative or liberal ideology voted cross-ideologically. Obviously, justices like Anthony Kennedy and Sandra Day O'Connor fit less squarely into an ideological parameter resulting in more cross-ideological votes. Additionally, Justice Stevens and Justice Thomas, for example, both are placed so squarely into the categories of liberal and conservative that cross-ideological voting by the two of them was less likely but, as the average above construes, still occurred.

The aforementioned statistics should serve to demonstrate how closely aligned liberals and conservatives are in their cross-ideological behavior pertaining to criminal procedure cases. These statistics with regards to liberals and conservatives are important for a number of reasons. First, as was briefly alluded previously, some justices fluctuated from year to year. Additionally, other justices like Sandra Day O'Connor and Chief Justice Roberts straddled the line of liberal v. conservative with their judicial common space scores slightly placing them in the category of

conservative. Yet, despite the various fluctuations, the justices proved to be rather equally inconsistent on the area of criminal procedure.

Additionally, despite the fact that it might appear that conservatives are voting cross-ideologically slightly more than liberals, it is important to note that, for all of the years under study, conservatives held a majority on the court and, thus, more opportunity for cross-ideological votes.

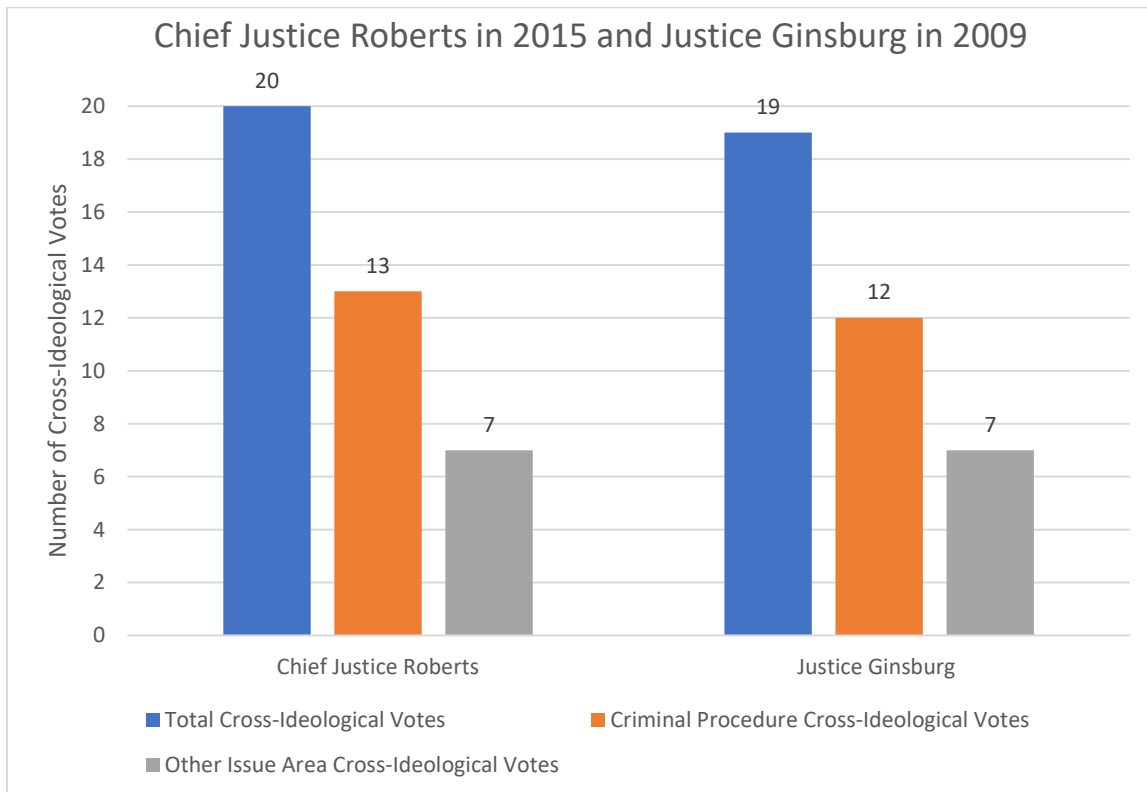
A close examination of many of the cases under study containing cross-ideological votes demonstrates the willingness of the justices to separate from their fellow members who share the same ideological values. While many SCOTUS cases are 5-4 votes with the justices strictly acting as either liberal or conservatives, many of the cases under study were 5-4 in which the conservatives and liberals intermingled in their votes. For example, during 2012, the court heard a total of 79 cases. Of those 79, 24 were cases resulting in a 5-4 vote. Furthermore, 8 of those 24 were criminal procedure, 5-4 cases accounting for 1/3 of the total. Most importantly, 6 of those 8 contained intermingling of liberal and conservatives. For example, in the case of *Florida v. Jardines*, the 5 member majority of Justices Scalia, Thomas, Ginsburg, Sotomayor, and Kagan affirm a decision by the Florida State Supreme Court that an individual's front porch is not to be searched by an officer without a warrant (*Florida v. Jardines*). In this case, Chief Justice Roberts and Justices Kennedy, Breyer, and Alito dissent presenting an example of the intermingling of liberals and conservatives concerning criminal procedure. As previously denoted, cross-ideological votes regarding criminal procedure cases have large implications on Court outcomes. The sheer fact that criminal procedure cases are not only resulting in a large percentage of cross-ideological votes but also frequently altering the decision direction of cases is certainly noteworthy.

As another example, in the case of *Missouri v. McNeely* (2013), the 5 member majority hold “the Fourth Amendment’s protection against warrantless searches applies to blood alcohol tests unless specific exigent circumstances exist” (*Missouri v. McNeely*, 2013). In that case, Justice Alito and Justice Kennedy join the Court’s liberal members in the ruling while Justice Breyer dissents with some of the other conservative justices. Making note of the 5-4 intermingled votes contained in criminal procedure cases draws further point to the reality that, as an issue area, the criminal procedure topic is distinct from others as it relates to justice’s inconsistencies.

The reality of this intermingling raises the question of what exactly could be denoted as a conservative/liberal vote regarding criminal procedure cases? While some issues fit neatly into liberal and conservative categories, criminal procedure is more difficult to ascertain what position liberals and conservatives would hold. While conservatives are typically more strongly identified with little government interference positions, as it pertains to criminal procedure, they more strongly identify as pro-law enforcement and pro-government (Smith, 1997). Furthermore, when it comes to criminal procedure, some liberals adopt more of a libertarian stance preferring little to no governmental interference (Smith, 1997). Perhaps it could be ascertained that a portion of the reason for criminal procedure cases translating to cross-ideological votes has something to do with the ambiguity of what position liberals and conservatives should hold on the topic. Regardless, it could certainly be an avenue for future research.

For each particular justice, some years proved to produce more inconsistent votes than others. For example, during the year 2009, Justice Ginsburg voted cross-ideologically a total of 19 times, 12 times concerning criminal procedure cases. As previously denoted, given the fact that Justice Ginsburg is a typical fit within the liberal viewpoint, the sheer magnitude of 12 votes

classified as conservative within one year is worth noting. As another example, Chief Justice Roberts, during the 2015 term, voted cross-ideologically a total of 20 times, 13 of which were criminal procedure cases. While Chief Justice Roberts certainly does not fit as squarely within an ideological framework as dictated by his Judicial Common Space Scores as Justice Ginsburg, it is still, nonetheless, an important note. This is depicted in greater detail in the chart below:



The aforementioned statistics prove my hypothesis of criminal procedure being the issue area in which Supreme Court justices are the most likely to vote cross-ideologically. Additionally, the data collected shows that concerning criminal procedure cases, the liberal and conservative justices of the Court perform remarkably similar in their inconsistencies.

## **Conclusion:**

A return to my research question of what legal issues embedded within Supreme Court cases are most likely to produce cross-ideological expectation voting by justices now is answered in that the issue area of criminal procedure is the most likely to produce these said inconsistencies.

While many factors including public opinion, legitimacy, and various external actors have long been considered to impact jurisprudence particularly as it pertains to cross-ideological voting by Supreme Court members, the need remained to examine the issue areas present in cases containing cross-ideological votes. In this thesis, through using the Judicial Common Space scores and Washington University School of Law's Supreme Court, Supreme Court cases from 2000-2017 were analyzed in order to be able to ascertain if certain issue areas cause inconsistencies amongst SCOTUS justices. Through various data and statistics gathered and examined, the issue area of criminal procedure was found to be the topic most likely to correlate to cross-ideological expectation votes by Supreme Court justices. Additionally, data proved that the conservatives and liberals are almost identically equal in their inconsistencies surrounding this topic providing proof that the issue area of criminal procedure correlates to inconsistencies across both ideological spectrums.

Given the fact that criminal procedure has been found to translate to the most cross-ideological votes, it is now necessary to answer the question of why this particular legal issue is consistently producing such inconsistency. As was detailed previously, the sheer fact that conservative and liberal positions on the issue of criminal procedure are difficult to depict provides insight as to why justices are voting cross-ideologically. In the aforementioned case of *Florida v. Jardines*, Justices Ginsburg, Scalia, Thomas, Sotomayor, and Kagan all find

themselves aligned in ruling despite their deep ideological variations. The inability to pointedly depict a conservative or liberal stance concerning criminal procedure cases creates a juxtaposition in which conservative and liberal justices find themselves aligned. Other issue areas including freedom of speech, property rights, and privacy rights possess more clearly defined liberal and conservative positions thus creating less of an opportunity for cross-ideological voting.

Future avenues of research could attempt to further examine the issue area of criminal procedure in its various sub-categories in order to ascertain if sub-issues within criminal procedure like habeas corpus, confronting one's accuser, search and seizure, etc are translating to more inconsistencies. It would be beneficial to be able to detail whether or not criminal procedure, as a whole, is causing inconsistencies or if there are sub-categories that are translating to criminal procedure being a strong correlation for cross-ideological votes.

Additionally, future research could detail why liberal and conservative justices are equally inconsistent in their voting on criminal procedure cases. Whether or not this phenomenon is caused by the ambiguity of typical liberal and conservative stances on criminal justice issues could attempt to be detailed. Regardless, examining ideological inconsistencies embedded within the Supreme Court remains paramount to better understand cross-ideological expectation voting on the United States Supreme Court.

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