

**To:** Merrick Garland, Attorney General  
**From:** NM, Giovanna Arizpe, ME  
**Re:** U.S. Supreme Court Constitutionality Testing  
**Date:** March 8, 2024

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## **EXECUTIVE SUMMARY**

This analysis is for the U.S. Solicitor General who is the primary litigator for public officials within the U.S. Attorney General's Office. The purpose of the analysis is to understand the U.S. Supreme Court's (SCOTUS) ruling habits by considering constitutionality and issue areas to better allocate U.S. Solicitor General resources. To conduct this analysis, we used the 2020 Supreme Court dataset that contains all SCOTUS cases from 1946 to 2020 and compares issue areas (area of controversy) and unconstitutionality rulings by decade.

### Primary Findings

- Our primary findings revealed that from 1946 to 2020 only 7.3% of all cases in a sample size of 8,803 were deemed unconstitutional, while 92.68% of all cases were deemed constitutional by the SCOTUS.
- The 1970s had the highest number of constitutional and unconstitutional cases.
- The issue area that had the greatest number of unconstitutional cases was the first amendment. The issue area with the greatest number of constitutional cases was criminal procedure.
- There was a total decline of constitutional and unconstitutional cases after the 1970s. However, the ratio of constitutional to unconstitutional cases is relatively consistent by decade.

### Recommendations

We propose the following policy and resource allocation recommendations:

- *Policy recommendation:* The U.S. Solicitor General in the Office of the Attorney General should conduct regular research when a new justice comes into the court. The U.S. Solicitor should analyze how the new justice's ruling patterns affect the overall case analysis for the SCOTUS at the justice's 5-year and 10-year mark of their judicial tenure.
- *Resource allocation:* Based on the data, it is recommended that the U.S. Solicitor General in the Attorney General's Office allocate more resources to cases in issue areas that are both likely to be ruled unconstitutional and of high interest to public officials.

## **INTRODUCTION**

One of the only powers the SCOTUS holds is to uphold or overturn constitutional case precedent set by their predecessors. This wields little power in the functions of the United States government. When writing about the SCOTUS, Alexander Hamilton states in Federalist Paper 78, "It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments<sup>1</sup>." Consequently, the SCOTUS's limited power has led to a trend of upholding constitutionality to

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<sup>1</sup> Madison, J., & Hamilton, A. (n.d.). *Research guides: Federalist papers: Primary documents in American history: Full text of the federalist papers*. Full Text of The Federalist Papers - Federalist Papers: Primary Documents in American History - Research Guides at Library of Congress. <https://guides.loc.gov/federalist-papers/full-text>

reinforce its legitimacy. This phenomenon, studied in 2008 by the University of California<sup>2</sup>, shows that the court has ingrained itself in this practice and is referred to as *stare decisis*.

However, as the Supreme Court becomes more politically charged with time, the Solicitor General must question if SCOTUS justices are behaving in the nation's best interest or has the court evolved to value other ways of enforcing power? Over time, court decisions rely on a justice's ideology and their previous opinions because of how complicated the actual law of every decision is to understand and disseminate to the American public<sup>1</sup>.

Both creation and historical documents, like the ones cited above, agree that it is in the SCOTUS's best interest, and in the best interest of the Solicitor General, to continue to uphold precedents set by its predecessors. As the main litigator tasked to petition cases on behalf of United States Government institutions, the U.S. Solicitor General has a vested interest in understanding if the Supreme Court is following historical precedent or if they are becoming more ideology based. By understanding this analysis, the Solicitor can comprehend the likelihood of a ruling to conduct a cost benefit analysis and either invest in SCOTUS case resources or find an alternative legal route.

## RESEARCH QUESTION

Through our analysis we want to address the following questions:

1. *When a case is brought to the court, how often does the court rule the case constitutional vs unconstitutional and does this vary by decade?*
2. *What issue area(s) have the highest rates of unconstitutionality and constitutionality and does this vary by decade?*

## DATA SOURCE AND LIMITATION

For this report, we utilize the U.S. Supreme Court Database from the CORGIS Database Project<sup>3</sup>. Our dataset indexes every SCOTUS decision from 1946 through 2020 using several types of categorical and numerical variables. Our data tracks justices, docket numbers, plaintiff names, and oral explanations to justify decisions and political party alignments.

For our analysis, we focused on using the following variables within the dataset:

- Issue. Area: This variable identifies issues based on the Court's statements as to what the case is about or the cause of the controversy. For example, Sex Discrimination or the First Amendment.
- Decision. Unconstitutional: This variable identifies whether the SCOTUS either declared unconstitutional an act of Congress; a state or territorial statute, regulation, or constitutional provision; or a municipal or other local ordinance.
- Decision. date. year: This variable is the year that the SCOTUS announced its decision in the case.

Our goal is to analyze and present SCOTUS ruling patterns to the Solicitor General. An informed Attorney General's office will create policy and efficiently allocate resources based on our historical data and case ruling analysis.

Current dataset limitations include not having case data from the SCOTUS's inception. This is a noteworthy limitation because we are analyzing the patterns of the Supreme Court and cannot

<sup>2</sup> Fowler, James H., and Sangick Jeon. "The authority of Supreme Court precedent." *Social networks*

<sup>3</sup> The SCOTUS dataset: [https://corgis-edu.github.io/corgis/csv/supreme\\_court/](https://corgis-edu.github.io/corgis/csv/supreme_court/)

provide a comprehensive examination of SCOTUS case patterns because of missing data. We recognize that analyzing by decade can mask anomalies within a specific year and potentially skew the data and our results. Additionally, our sample does not have complete data for the 1940s or 2020s decade and can further skew our results.

## RESULTS

Our analysis utilizes SCOTUS cases from the 1940s<sup>4</sup> through 2020s and has a sample size of 8,803 cases. The SCOTUS cases are bifurcated into constitutional and unconstitutional categories<sup>5</sup>.

After cases are sorted by constitutional/unconstitutional, they are divided into their respective decision decade, and subsequently sorted into issue area. Cases grouped by decade are analyzed to identify increasing or decreasing constitutional/unconstitutional ruling trends. Cases segmented into issue areas investigate which issue area has the greatest number of constitutional and unconstitutional cases by decade and in the overall dataset.

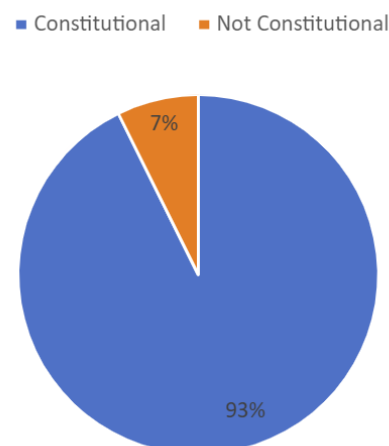
### Constitutional vs Unconstitutional

Our analysis focuses on the SCOTUS cases that have “no declaration of unconstitutionality” or cases that were ruled unconstitutional. When assessing total SCOTUS case constitutionality, 93% of SCOTUS cases were found constitutional<sup>6</sup> and 7%<sup>7</sup> were found unconstitutional (*Figure 1*). The proportion test conducted on the dataset did not have a statistical difference and establishes that the likelihood a SCOTUS case ruled as constitutional (without controlling for other factors) ranges from [92%, 93%] or unconstitutional by a range of [7%, 8%].

### Controlling for Decade

The SCOTUS caseload per decade<sup>8</sup> is positively skewed<sup>9</sup> and has a mean of 1,083 cases. After stratifying for constitutionality and grouping the data per decade, both constitutionality and unconstitutionality cases were less positively skewed than aggregate sample<sup>10</sup> (*Figure 2*). Constitutional SCOTUS cases have a mean of 1,160<sup>11</sup> cases per decade and unconstitutional cases have a mean of 107<sup>12</sup> cases per decade. All decades<sup>13</sup> minimally have a 91% chance to be ruled constitutional or a 4% chance to be ruled unconstitutional.

SCOTUS Constitutionality (1940 -2020)



*Figure 1*

<sup>4</sup> Current dataset does not include all 10 years of the 1940s decade. As a result, it is possible that data and could potentially be statistically significant, have a different constitutional/unconstitutional, or affect dataset mean, distribution, and skew with complete decade information.

<sup>5</sup> The remaining, “state or territorial law/reg or const provision unconstitutional”, “act of congress declared unconstitutional”, and “municipal or other local ordinance unconstitutional” were deemed unconstitutional for our analysis.

<sup>6</sup> CI: 95%, z=0.0155, p=0.9238; fail to reject null hypothesis that there is no difference.

<sup>7</sup> CI: 95%, z=0.0, p=0.73157; fail to reject null hypothesis that there is no difference.

<sup>8</sup> Decision year from variable decision.date.year was encoded into 9 groups from 1-9 representing decades between the 1940-2020.

<sup>9</sup> Total average per decade: 95% CI (1074-1092) with -0.8745 skew.

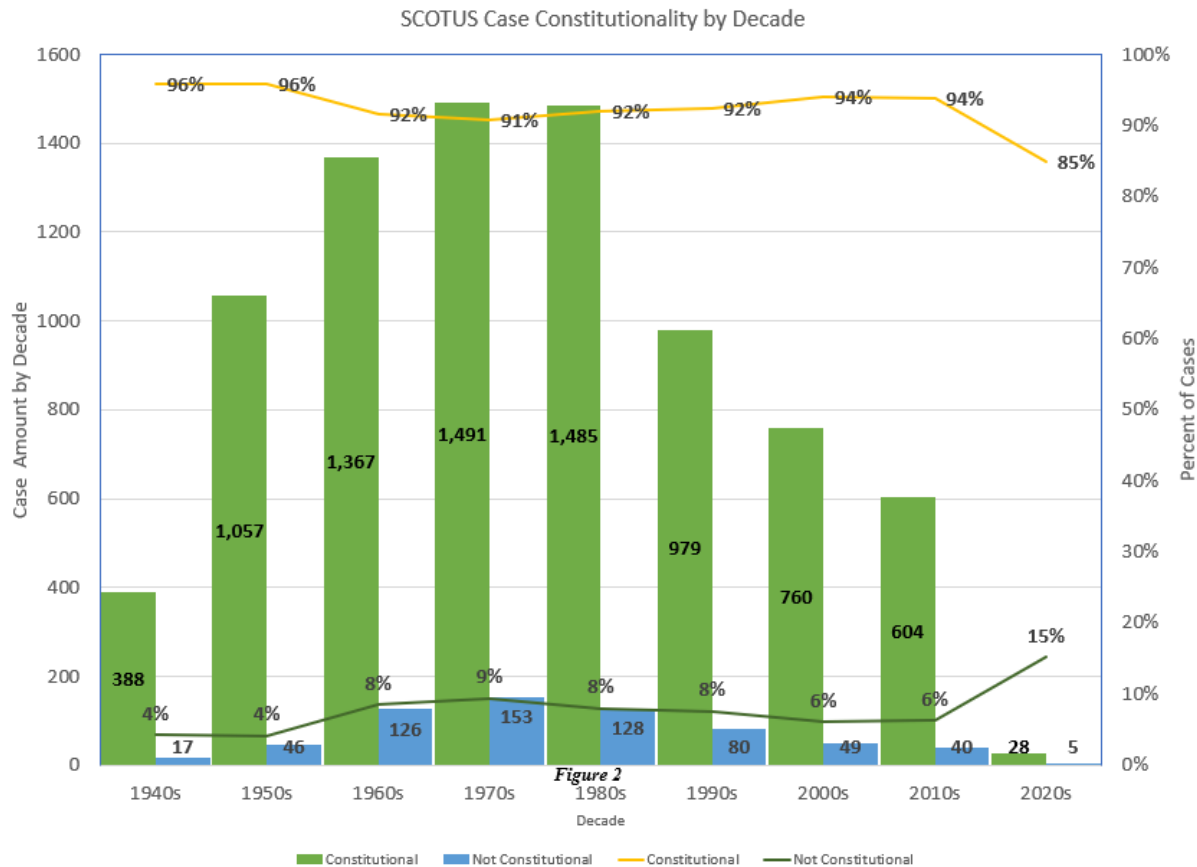
<sup>10</sup> Utilizing variable decision.date.year, skewness is 0.187 constitutional cases and 0.321 for constitutional cases.

<sup>11</sup> Constitutional average per decade: 95% CI (1153-1168).

<sup>12</sup> Unconstitutional average per decade: 95% CI (103-110).

<sup>13</sup> 2020s period is excluded from analysis because it only has 1 year of cases information.

When comparing previous decade constitutional case proportions to the 2010s decade, all decades, except 1970s, did not show constitutional/unconstitutional significant differences<sup>14</sup>. Despite the 1970s statistical difference, the decade's constitutional case range of [89%, 92%]<sup>15</sup> and unconstitutional range of [7%, 10%]<sup>16</sup> is directionally consistent with the 2010s range of [92%, 96%] constitutional case and [4%, 8%] of unconstitutional case proportions<sup>17</sup>.



**Controlling for Issue Area** To investigate the relationship between a SCOTUS case's subject matter and its case constitutionality, the sample is divided by decade and further segmented into 15 issue areas<sup>18</sup>. The results of the grouped data show that economic activity has the greatest number of constitutional cases in the 1940s and 1950s with 124 and 293 cases. However, criminal procedure has the greatest number of constitutional cases from the 1960s<sup>19</sup> until the 2010s (Figure 3) and has the greatest percentage of total constitutional cases at 23.5%.

Like constitutional cases, economic activity has the greatest number of unconstitutional cases in the 1940s and 1950s, with 7 and 16 cases. In the 1960s and 1970s, civil rights has 54 and 57 unconstitutional cases. Criminal procedure has 16 unconstitutional cases in the 2000s. Finally, the first amendment issue area has the greatest number of unconstitutional cases in the 1980s,

<sup>14</sup> 1940: 95% CI,  $z=-1.40$ ,  $p=0.16$ ; 1950: 95% CI,  $z=-1.90$ ,  $p=0.06$ ; 1960: 95% CI,  $z=1.77$ ,  $p=0.08$ ; 1980: 95% CI,  $z=1.41$ ,  $p=0.16$ ; 1990: 95% CI,  $z=1.05$ ,  $p=0.294$ ; 2000: 95% CI,  $z=-0.12$ ,  $p=0.90$ ; fail to reject null hypothesis that there is no difference.

<sup>15</sup> 1970: 95% CI  $z=2.40$ ,  $p=0.0166$ ; reject null hypothesis that there is no difference.

<sup>16</sup> 1970: 95% CI  $z=-2.40$ ,  $p=0.0166$ ; reject null hypothesis that there is no difference.

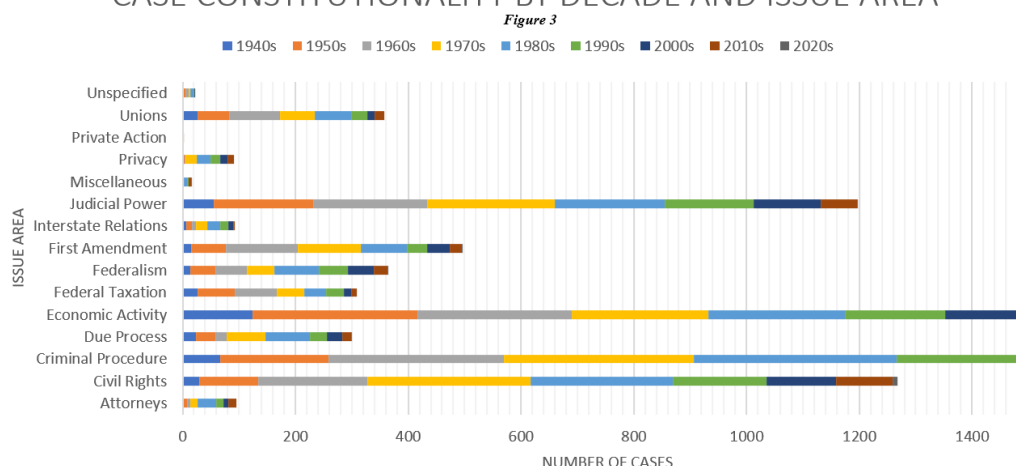
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<sup>18</sup> Unspecified, unions, private action, miscellaneous, judicial power, interstate relations, first amendment, federalism, federal taxation, economic activity, due process, criminal procedure, civil rights, and attorneys.

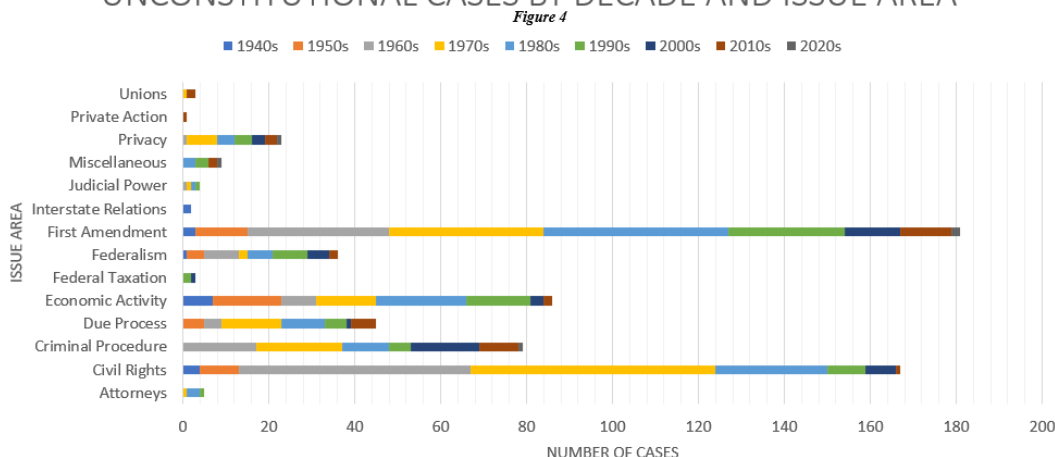
<sup>19</sup> 1950s:67, 1960s:192, 1970s:336, 1980s:361, 1990s:253, 2000s:215, 2010s:179

1990s, 2010s with 43, 27, and 12 cases, respectively. Despite a lack of a clear decade trend for unconstitutionality, the First Amendment issue area comprises the greatest number of unconstitutional cases at 28% of the subsample. (Figure 4).

### CASE CONSTITUTIONALITY BY DECADE AND ISSUE AREA



### UNCONSTITUTIONAL CASES BY DECADE AND ISSUE AREA



## DISCUSSION

Our data analysis reveals that when a case is brought to the SCOTUS, the SCOTUS is more likely to deem a case constitutional. Since the Office of the Attorney General is interested in the patterns of the SCOTUS rulings to allocate resources when faced in representing the public interest in court, it should assume that from a historical standpoint that SCOTUS will rule within the constitutional framework in most cases. However, there are caveats to our data and our analysis: because we did not analyze the relationship between a political leaning in the court and how it can influence ruling on unconstitutionality, we cannot conclude on a ruling based on the political climate of the time. Additionally, without considering internal changes within the SCOTUS, a case's constitutionality can become unpredictable. Our analysis gives insightful information and a breakdown of historical trends, but additional research into which issue areas might be more controversial than others could be done to find trends within political parties.

## RECOMMENDATIONS

### Resource Allocation

- Resource allocation for the office is necessary for two reasons: 1) the government has limited resources that often fluctuate and 2) some cases take significantly less resources

to win. Unspent case time can be reallocated to issues areas with a high concentration of unconstitutionality rulings. Since the Solicitor General has no control in the subject matter of the cases brought for them to litigate, this data will aid them in measuring what cases are most likely to be ruled in favor of the institution (constitutional) based on its issue area. Based on the data, it is recommended that the Attorney General's Office allocates more resources to cases in issue areas that are both likely to be ruled unconstitutional (like the first amendment issue area) and are of high interest to public officials.

- Similarly, the concentration of constitutional cases should be considered when deciding what resources are allocated to certain specialties. More resources, such as time and employees, should be allocated to unconstitutional issues like first amendment rights, civil rights, criminal procedure, and economic activity.

#### Policy Recommendation

- Once a new justice is introduced in the court, the office of the Attorney General should conduct research on how specific justices can affect the overall ruling pattern of this analysis for the SCOTUS at the 5-year mark of the justice's appointment and again at the 10-year mark. Distribution of data should aid the Office of the Attorney General in deciding how to try cases based on the makeup of the court.

### **IMPLEMENTATION CONSIDERATIONS**

Our analysis does not account for issues surrounding political climate or party affiliation of the appointing president, both of which can affect court decisions. The data spanned eight decades, all of which had a different political climate and makeup of the court. While the numbers across the decades are consistent in terms of number of cases ruled constitutional, it is important to know the political climate of each decade to give context to the issue types that were selected and tried the most.

Furthermore, the political affiliation of the appointing president could influence the trends of data going forward. The probability of certain politically charged issue types, such as the first amendment, being ruled unconstitutional would change with the political makeup of the court. It is important to note the changes in rulings that can occur when a substantial portion of the court has turnover like it did in during President Trump's administration. These changes should be noted in the analysis and carried out after a new judge takes office, as outlined in the section above.

### **CONCLUSION**

Overall, our data revealed that, historically, the SCOTUS was more likely to rule cases constitutional than unconstitutional. It is important to mention that the number of cases seen by the SCOTUS has decreased over the decades, but the ratio of the ruling outcome has stayed the same per decade. Through our analysis, we discovered that criminal procedure was the issue area that was ruled most constitutional and the first amendment issue area was ruled as most unconstitutional. While conducting the analysis of the issue area and decade, the most consistent issue area was criminal procedure being ruled as constitutional and it can be assumed that the SCOTUS will likely repeat this pattern. However, data was less consistent on rulings of unconstitutionality in issue areas over the decades.

## REFERENCES

Fowler, James H., and Sangick Jeon. "The authority of Supreme Court precedent." *Social networks* 30.1 (2008): 16-30.

Madison, J., & Hamilton, A. (n.d.). *Research guides: Federalist papers: Primary documents in American history: Full text of the federalist papers*. Full Text of The Federalist Papers - Federalist Papers: Primary Documents in American History - Research Guides at Library of Congress. <https://guides.loc.gov/federalist-papers/full-text>

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