States as Litigants

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Numerous scholars have adopted the behavioral approach in their attempts to study Supreme Court decision-making. Important contributions to our understanding of the judicial process have come from studies employing role, social background, and/or other theories. Most of these, however, have focused on the Justices as individuals and not on other external factors, particularly the impact individual parties undoubtedly have on the outcomes of judicial decisions (Casper, 1972).

Thus, the purpose of this study is to explore the role of parties in predicting case outcomes. More generally, we attempt to develop a theoretical framework that can be used to explain and predict litigation success before the U.S. Supreme Court. To do this, we examine the efforts of the fifty states when they appear as parties before the Supreme Court in litigation involving issues of criminal law or procedure. The states as parties before the Court make ideal units for study for a number of reasons. Most important is that states, whether they are asking the Court to reverse or affirm the decision of the court below, always are urging the Court to decide against the claims of the convicted defendant and, therefore, for what many would call the "law and order" position.

To facilitate our analysis, this paper is divided into four sections. In the first, we review characteristics, suggested by the literature, that are important to party success. The second section explains how we operationalize those characteristics, using states as parties. In the third section, we address part of our research question, why are some states more successful than others? And, in the final portion of the paper, we explore the utility of our conceptual framework for litigant success in the more general sense.

Factors for Litigant Success

The scholarly literature suggests that a multitude of factors affect the success of parties before the U.S. Supreme Court. Yet, because no systematic study of success has been conducted, such factors had to be inferred, deduced, and generally teased out of existing case studies, emanating from a diverse body of literature. After reviewing the literature and listing factors important to success, we found that these could be subdivided into three main categories: inherent party factors, judicial process factors, and interest group litigation factors.

Inherent Party Factors (IPF). IPFs are those characteristics over which the party itself has no control. That is, certain parties have inherent advantages over others simply because of "who or what they are." One example of an IPF is the region of the origin of the suit. In his study of U.S. Supreme Court behavior, for example, S. Sidney Ulmer (1969) found southern states acted as negative "signs" for Justice Felix Frankfurter; when a southern state was a party to a suit, he tended to vote against its claims.

Ulmer's finding makes a great deal of intuitive sense. Particularly during the 1960s, the period during which Ulmer conducted his investigation, many explanations exist to justify his results. Most important is that the South was perceived by the Justices as thwarting their authority in the area of civil rights. Moreover, hostile perceptions by both the Court and the Southern states went beyond issues of civil rights: serious disagreements also ensued over criminal justice, civil liberties, and the like.

Another example of an inherent party factor is the sex of the litigant. A recent study of the effects of numerous factors on state supreme court

decision-making in sex discrimination cases found that female litigants had a greater chance of winning than their male counterparts (Gryski, et al., 1985).

The fact that certain parties have inherent advantages over others does not surprise us. For years scholars of the judicial process have noted that litigant status ("socio-political power") affects access to the Court. Early on, scholars agreed that Supreme Court Justices favored "underdogs" (see Pritchett, 1954). Since publication of the pioneering works of Snyder (1956) and Ulmer (1978, 1981), however, we now know that the Justices, particularly those of the Burger Court, tend to favor upperdogs in granting applications for "plenary review" (Ulmer, 1981;295). In short, litigant status is an inherent party factor that we have long recognized as one that affects Supreme Court decision-making.

In sum, these and other IPFs suggest that parties do not initially come before the court on equal footing. Some have inherent advantages over others. Moreover, these "edges" are not merely empirical artifacts; rather, as indicated above, they are intuitively and substantively justified by existing works.

Judicial Process Factors (JPF). Judicial process factors are those characteristics that have been found repeatedly to affect the course of litigation. JPFs suggest that the American legal system does not work in a vacuum; in fact, certain predictable patterns can be isolated that may affect litigation success. The appealing party, for example, seems to be a significant variable in determing success: many have indicated that the Supreme Court grants certiorari most often to reverse lower court holdings (see Provine, 1980; Wasby, 1984) Thus, we would suspect that appealing parties have clear advantages in litigation.

A second factor emanating from the judicial process literature is the number of times a specific party has appeared before the Justices. This view, often called the "repeat player" hypothesis, emphasizes that certain parties have advantages in the judicial process because they appear before the Court often enough to well-understand its procedures, traditions, etc. (Galanter, 1974) Once again, such an expectation is only a logical extension of the judicial process. Parties who appear before the Supreme Court several times a year develop a certain familiarity with the Court and its members (and vice versa) that does not exist for so-called "one-shotters." Such "advanced intelligence" and "credibility" with the Court can only help the course of a case (Galanter, 1974:98-103).

Thus, not only do some litigants come to the Court with inherent advantages, some parties are actually assisted by the nature of the judicial process. As we have suggested, the American legal system does not work in isolation; rather appellants and repeat players have advantages not enjoyed by their respective counterparts.

Interest Group Litigation Factors (IGLF). IGLFs are those that have evolved from the body of literature seeking to examine the success of specific groups throughout history. Unlike inherent party factors, IGLFs emphasize the role litigants' attorneys play in the judicial process, rather than the litigants themselves.

Although some of these factors are highly group specific (e.g. sharp issue focus) we can transpose others to fit any party standing before the U.S. Supreme Court. Attorney expertise, for example, could apply to all litigants. Simply stated, the more experienced the attorney, the greater the chances for court

success (see O'Connor, 1980; Vose, 1981; Meltsner, 1973). This factor is important on several different levels or stages in the judicial process. For example, expert attorneys presumably will be better at both the brief-writing and argument stages, two areas on which the Justices place much emphasis.

Interestingly, while scholars have only recently drawn our attention to the importance of expert attorneys, for years Justices of the Supreme Court have acknowledged the importance of this factor. In a 1955 speech, reprinted in Cannon and O'Brien's (1985) Views from the Bench, former Justice John M. Harlan, Jr. discussed the importance of oral argument, in particular. According to Justice Harlan,

> I think that there is some tendency...to regard the oral argument as little more than a traditionally tolerated part of the appellate process. The view is widespread that when a court comes to the hard business of decision, it is the briefs, and not the oral argument, which count. I think that view is a greatly mistaken one... (1985:87).

Current Justices of the Court, through speeches and interviews, have reinforced the importance of the role expert advocacy plays in litigation. Thus, although scholars now recognize the universal importance of this factor, it has been only a recent acknowledgement and one that can be traced directly to the interest group litigation literature.

Similarly, aid from the Solicitor General, another factor suggested by the interest group litigation literature, could apply to all parties. That is, if the Solicitor General files a supporting amicus curiae brief (friend of the court), chances for success greatly increase (see Krislov, 1963; Scigliano, 1971). Studies of issues ranging from race discrimination to abortion and of litigants including law and order groups, public interest law firms, and the

like have reinforced the importance of Solicitor General assistance (see Cortner, 1968; Epstein, 1985; Vose, 1959).

Again these findings are not surprising. The Solicitor General, often called the "nine and a half" (Werdegar, 1967-68) member of the Court, enjoys a special status not accorded to other parties. Even the rules governing amicus curiae participation are more flexible for the Solicitor General (and other governmental parties) than for the average litigant. All litigants but for the Solicitor General must obtain the permission of the opposing party or of the Court before they can file an amicus curiae brief (see O'Connor and Epstein, 1983). The Solicitor General is permitted to forego this formality because of his special status with the Court. In fact, at times the Justices even request the federal government to file an amicus curiae brief. Thus, support from the Solicitor General always has been looked upon as a critical element for litigation success.

In sum, three categories of conceptual varibles seem to affect party success in court. Given that we have little a priori knowledge about the specific linkage between our independent concepts and success, however, it is difficult to determine whether our three explanations represent competing or complementary theories. To remedy this problem, our analysis proceeds on two levels. First, we test the explanatory power of <u>each</u> set of concepts. This procedure assumes that the conceptual categories are "competing" to explain success. On a second level, we examine the possibility that our categories represent complementary, rather than competing, explanations. This second approach is justified if we consider that the categories themselves have significant meanings for litigants. Each represents a varying degree of control parties possess over

the course of their suit and thus, can be conceptualized as complementary. Category I, IPFs, are clearly the least flexible: litigants have almost no control over such variables as region and sex. Parties have some control over Category II factors, JPFs. Knowing that appealing parties have a greater chance of winning may lead some to appeal their cases to the Court, even though such factors as time and money may affect ultimate decisions to pursue specific cases. Realistically, though, Category III factors are the most flexible. At this stage parties can literally go out and retain so-called expert attorneys and solicit the help of the U.S. government. Thus not only are the groupings important in and of themselves, they also may represent complementary explanations as they tap different stages of the litigation process.

Operations and Methods

The schema sketched above is both conceptual and generalizable. Certainly, it can be operationalized to apply to a range of different litigants and issue areas. Our concern here, however, is with the states.

As mentioned previously, states make ideal units of analysis for the following reasons. First, at least in criminal cases, states are always on the same side. That is, as primary parties, states always argue for the "law and order" position.<1> This means that we have a "built in" control for ideology of both party and Court. Second, as illustrated in Figure 1, while states are always on the same side of a suit, tremendous variations exist in their success rates before the Burger Court. Compare, for example, the success rates of Michigan (90 percent) and Arizona (29 percent). Third, not only is variation among states' success rates evident, but tremendous diversity exists among many other

aspects of state politics as well. One does not have to be a student of state politics to realize that states possess different "cultures," have diverse populations, etc. Moreover, states approach Supreme Court litigation in varying ways; for example, some states allow local prosecutors to handle Supreme Court litigation, while others have established "special offices" specifically to handle Court cases.

Finally, state litigation before the Supreme Court has been the subject of "judicial" and scholarly controversy. Stories, emanating from speeches and interviews with the Justices, suggest that states are generally poor litigators. A classic example occured during the oral argument of Mapp v. Ohio, 367 U.S. 643 (1961), a case involving the exclusionary rule. During the questioning period, a Justice asked that attorney representing the state about the applicability Wolf v. Colorado, 338 U.S. 25 (1949). The attorney responded that he did not know anything about Wolf, even though it was the leading case in the area! Interviews with the Justices and other material confirm the Court's general disillusionment with the in-court representation of certain states (see Baker and Asperger, 1982).

The scholarly literature tends to confirm "judicial" speculation, but with some demurrers. Political scientists and legal scholars examining state litigation have indeed found that the states as a group fare poorly when compared with the U.S. government's litigation. Yet, certain states perform better than the Solicitor General. Between 1969 and 1981, for example, the Solicitor General won 68 percent of his cases, while the state of Oregon won 90 percent (O'Connor and Epstein, 1983). Again, due to the controversy and concern over state litigation and the variation among states' success rates, their litigation activity is inherently interesting and ripe for systematic examination. Thus, states

shall comprise our units of analysis and their success rates, from 1969 to 1984 terms, our dependent variables.<2>

Our independent concepts, the three conceptual categories, will be operationalized for the the states in the following ways: for our first category, inherent party factors, we shall use the measures of region, population, and general policy "attitudes." Region will be represented in the form of a south/non-south dichotomy, a division justified by other research endeavours indicating that the Court holds negative attitudes towards the south.

The population of each state included for analysis will comprise another IPF measure.<3> Like Gregory Caldiera, we use population as a surrogate measure "for the melange of forces that normally goes under the rubric of societal change" (Caldiera, 1983:95). We realize that it is problematic to use population as a proxy measure. Yet, scholars of the judicial process have repeatedly found important linkages between such amorphous concepts as "social diversity," economic development, and urbanization, all of which they have measured by population (see Caldiera, 1985 for a review of this literature). Moreover, others have found direct links between population and the judicial machinery of states. According to Canon and Baum, for example, "sparse population reduces opportunities for judicial innovation" (Canon and Baum, 1981:980). These and similar findings by others lead us to hypothesize that there will be positive relationship between population and success.

A final IPF measure will be the "general policy" attitude of the states. One available measure, developed by Klingman and Lammers (1984), is well-suited to our concept of an inherent party factor as it takes into account "both expenditures and regulatory policy measures covering an extended period of time" (1984:598). Based on the findings of Klingman and Lammers, we believe that such

a measure taps a concept of utmost concern to the success of states in court: "the nature of a state's society...[and] "the content of its political culture..." Given the scales that this measure encompasses (e.g. expenditures, innovativeness), we believe that states with generally high scores on a policy innovation scale will perform better in the Court.

Our second set of conceptual factors, those emanating from the judicial process literature, will be operationalized as appeal rate (n of appeals/n of participation) and as the number of actual appearances of the state. before the Court. The theoretical justifications for these measures are discussed above. We expect that both appeal rates and participation numbers will be positively related to success.

Our third set of factors, those derived from the interest group litigation literature, will be attorney expertise and solicitor general assistance. We used two measures to capture the concept of attorney expertise: whether or not the state has established a special office to handle appeals to the Supreme Court and whether or not one person is in-charge of oral argument before the Court. The first measure is justified by other works which suggest that the states would be more successful if they established special offices, similar to that of the the Solicitor General, to handle Supreme Court litigation. In fact, many have attributed the U.S. government's success in Supreme Court litigation to its centralized decision-making process. That is, decisions concerning participation in cases (e.g. whether to appeal, participate as an amicus curiae), are made in one locale, dissipating the possibility of sending mixed signals to the Court. The second measure responds to suggestions made by many Supreme Court Justices, both past and present, that oral argument expertise can be a decisive factor in litigation. Solicitor general assistance will be simply measured as

whether of not the states claim that they receive assistance from the solicitor general's office.<4>

To summarize: we have suggested that three sets of categories may help to explain variations in parties' (or in this case, states') success rates before the Supreme Court. For each of the sets of variables we have developed a model by which to predict state success, which we used OLS regression to estimate.

Analysis

Inherent Party Factors. Table 1 indicates the results of state success regressed over our three IPF measures. Although the adjusted R2 is significant at the .01 level, only one measure has a noticeable affect on state success, the general policy score (gpscore).

Given the actual operationalization of gpscore, we are not surprised by its overwhelming explanatory power. States ranking high on this measure are generally dedicated to providing funds for a variety of governmental services (see Klingman and Lammers, 1984).

What is surprising, however, is that neither population nor region added to the overall fit of the model. One important factor that may help to explain this rather glaring finding is that gpscore and region are highly correlated (.721) In the face of such multicollinearity, researchers can pursue a number of strategies (see Berry and Feldman, 1985). But given the conceptual nature of our model, we have decided to take what Berry and Feldman call the "most reasonable course when faced with high multicollinearity..."; "recognize its presence, but live with its consequences" (1985:49). For our specific problem, the "consequences" appear to be that region may have an independent affect on

gpscore. Given the fact that the region subsumes gpscore, however, it is difficult within this particular model to discern such an impact. When we regress state success on region we obtain an adjusted R2 of .18 ($p<.05$), which indeed suggests that region is a significant determinant of success, but only when gpscore is excluded from the model. That is, when we control for region in the model, only gpscore attains statistical significance.

On the a whole these findings imply the following: 1) the gpscore is the most significant of the IPFs in predicting success, and 2) since gpscore and region are highly correlated, however, we cannot necessarily dismiss the importance of region as an explanatory variable. In other words, the work of Ulmer and others, which implied that the southern states gave off negative signs to the Court, may still be valid. In sum, the gpscore should be thought of as taking into account a range of concepts concerning states, including regions. In any event, we do know that states are not starting on equal footing before the Court. Those with high gpscores are certainly apt to achieve a higher degrees of success before the Court.

Judicial Process Factors. Table 2 illustrates the estimates obtained by regressing state success on the JPFs. Once again, we find that while the model itself is statistically significant, only one JPF measure, appellate rate, obtains a significant coefficient.

Once again, the finding that appellate rates clearly affect success is not surprising. Over and over again scholars of the judicial processs have found that the appealing party stands a much higher chance of success. From a legal standpoint this makes a great deal of sense as courts of last resort are known to hear cases to correct errors at the lower court level. Based on this and our

findings here, we can conclude that any model of party success take appealing party into account.

The fact that Galanter's repeat player theory does not seem applicable to state litigation efforts, however, is somewhat surprising. Why, we must ask, are states different from other parties that use the courts-- different to such an extent that participation ns do not affect success? One answer to this puzzle may lie in the very nature of states as parties to suits. It may be that all states are "repeat players," and thus no perceived variation among the states exists, at least in terms of their use of the Court.

This interpretation seems reasonable if we return to the theoretical underpinnings of the repeat player notion. In developing his argument, Galanter used corporate litigation as an example. Galanter, did not, however, single out IBM or Xerox or the like; he merely suggested that corporations by their very nature are repeat players. Perhaps, the same can be said about the states.

Another example of the plausibilty of this interpretation can be illustrated by the example of the Solicitor General. The fact that the Solicitor General enjoys repeat player status has almost nothing to do with the specific Solicitor General in office. Rather, it is the office itself that is a repeat player. It may be, then, that in the eyes of the Justices of the Supreme Court, all states are repeat players, ergo rendering the concept meaningless in our analysis.

Thus, as was the case for our IPF model, only one measure produces a statistically significant coefficient. Yet, in the face of this finding, we cannot dismiss the influence JPFs have on the litigation process.

Interest Group Litigation Factors. Table 3 illustrates perhaps the most interesting findings yet-- of the interest group factors, only oral argument seeems to affect success rates. Again, we find that while the model is statistically significant, neither the presence of a special office nor solicitor general help have any significant affect on our dependent variable.

Once again, we are not surprised by the import of oral argument. Justices and scholars have suggested that oral argument is not merely "for show." Rather, it plays an important role in the litigation process.

The fact that assistance from the Solicitor General does not affect success is compatible with our finding that "repeat player" states enjoy no advantages over those with lower participation rates. Simply stated, it appears that the Court regards states generally as repeat players, rendering assistance from the U.S. meaningless. Put another way, would it really benefit the U.S. government to have states file amicus curiae on its behalf?

Moreover, our finding that the presence of a specialized office does not noticeably impact success also is not surprising if we consider the literature on the Solicitor General. As suggested earlier, many scholars have indicated that one office to handle Supreme Court cases on behalf of the U.S. is critical because it avoids sending mixed signals to the Court. In short, the Solicitor General's office must keep its eye on federal litigation in the fifty states. Although one could argue that states must keep a watch over litigation activities in their localities, the whole process is a great deal more centralized per se since only one supreme court exists within each state. Thus, although it is important that states present the Court with a unified front in the guise of one representative in oral argument, the mechanisms by which they get their case to the Court are inconsequential.

Through this point in our analysis, a most interesting pattern has emerged: within each of our conceptual categories only one measure has proved to be significant, gpscore, appeal rate, and oral argument. On one hand, then, our proposed individual concepts for studying party success seems to work. That is, within their individual categories, at least one factor has some explanatory value and each model has proved to be statistically significant. On the other, we still must examine how our framework works as a whole. To do this, we simply selected those measures, within each conceptual category, that had some predictive value. This model resulted in the following;

$$Y = -56.8 + 35.8APP + 9.6GPS + 5.3ORAL$$

adj. $R^2 = .67$ ($p < .01$)

These findings suggest that our conceptual framework provides a useful tool for predicting state success. The above model provides us with greater predictive ability than any of the individual models.

What this may imply is that we can use this framework to examine litigant success, more generally. Although individual measures need to be created, depending upon the party itself, any model of party success can be developed around three guiding concepts: inherent party, judicial process, and interest group litigation factors.

The utility of such an approach can be demonstrated by considering any number of areas of the law and/or parties. Consider criminal litigation from the alleged criminal's perspective. Inherent party factors, in such an example, could encompass measures including the sex of the offender, the type of crime

committed etc. Judicial process measures certainly should include whether the party is appealing or not and perhaps an indication of the opposition. And interest group litigation measures should tap into attorneys representing criminal defendants.

Such a schema could be applied to a variety of issues and/or parties. But certainly an equally significant finding of this research is that external party characteristics and the like <u>do</u> affect Supreme Court decision-making, as an institution. Given that for years our focus in the subfield of judicial process has been on predicting individual Justices voting patterns, these findings suggest that important information may be gleaned by turning to external factors that affect institutional decision-making.

Notes

<1>This is not necessarily the case when states participate as amicus curiae. Consider the now-famous example of Gideon v. Wainwright, 372 U.S. 335 (1963), when the Attorney General of Minnesota, Walter Mondale, led 21 other states to file an amicus curiae brief, supporting Gideon's Sixth Amendment claim to the right of counsel.

<2>Only states that participated in five or more cases were included in our analysis. We based this decision on 1) the fact that only states participating in more than five cases would be useful for meaningful analysis and 2) the results of a regression diagnostic check indicated that it would be severely problematic to include states which had participated in less than five cases.

<3>For purposes of analysis here, we used the natural logarithm of population.

<4>These data were collected from a survey that was sent to every state attorney general.

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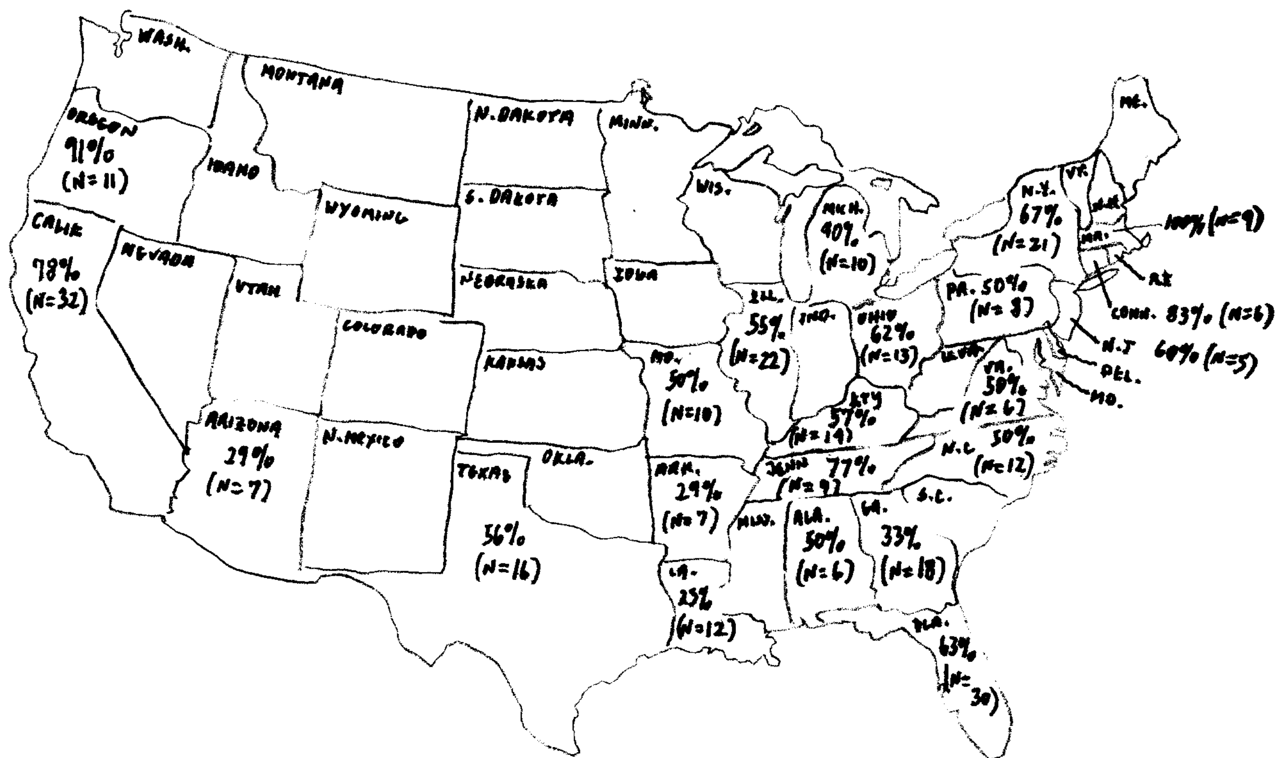
Figure 1

States and the Supreme Court: 1969-1984*



*Data collected by the authors. Only states participating in five or more cases are depicted.
%=state success rates (n of success/n of participation)
N=number of participations

Table 3.
Regression of State Success on Solicitor General Assistance, Specialized Office, and Oral Argument

Independent Variable	Slope	Standard Error
Solicitor General Assistance	- 1.8	11.8
Specialized Office	- 1.5	13.3
Oral Argument	23.7*	10.4
Constant	53.5**	7.9

adj. $r^2 = .16$
$F = 2.13$

*$p<.05$
**$p<.01$

Table 1.
Regression of State Success on General Policy Scores, Region, and Population

Independent Variable	Slope	Standard Error
General Policy Score	15.5*	4.3
Region	- 6.2	9.5
Population	- 5.2	6.2
Constant	-11.6	87.5

adj. $r^2 = .47$
$F = 7.2$*

*$p < .01$

Table 2.
Regression of State Success on Appeals and Participants

Independent Variable	Slope	Standard Error
Appeals	63.37*	15.7
Participation	.49	.46
Constant	20.6	11.0

adj. $r^2 = .41$
$F = 8.4$*

*$p < .01$