minimal scholarly attention despite their importance as litigators in the U.S. Supreme Court. This article examined the rate of participation of states as *amici* and the types of cases attracting the attention of large groups of states. State *amicus* activity was found to be increasing both in terms of the number and percentage of cases entered each term as well as the number of states choosing to join *amicus* briefs. The general absence of conflict among the states in Supreme Court litigation, excluding original jurisdiction cases, makes an environment of greater cooperation possible. The states are fairly active in significant numbers as *amici* in cases involving federalism issues, where they are most likely to be opposed by the Solicitor General and in antitrust cases where the support of that federal official is much more likely. On the other hand, unlike the Solicitor General, state attorneys general are scarcely involved as *amici* at all when private parties challenge governmental policies on the basis of the First and Fourteenth Amendments.

State legal offices are at a distinct disadvantage in influencing the Supreme Court in comparison with the Solicitor General's Office. The relative independence and centralized control traditionally enjoyed by the Solicitor General have permitted that office to screen its cases carefully in order to maximize its influence on the Court. Individual state offices, by contrast, are confronted with few cases as direct parties and find it more difficult to screen their cases for the ones most promising of success. *Amicus* opportunities permit the states some discretion in deciding which state cases to support, but even then, limited office resources confine them most of the time to cases in which another state is a direct party. The state legal offices are regularly confronted with the reality of defending existing state practices and policies rather than selectively deciding how best to influence the policy formation of the high court.

Nevertheless, the record of state *amici* when more than ten states participate is considerably higher than when the states appear as direct parties. Increased coordination of state *amicus* activity as part of an overall effort to improve state advocacy has apparently been successful in increasing state participation. Not all state cases are "winnable," of course, but *amicus* briefs can contribute to narrowing the legal or constitutional basis for a decision in hopes of avoiding a sweeping ruling that might adversely affect all states. After all, an *amicus* brief joined by a good number of states provides the Court with an excellent impact analysis in state litigation. □

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States before the U.S. Supreme Court: direct representation in cases involving criminal rights, 1969-1984

by Lee Epstein and Karen O'Connor

How do states fare before the U.S. Supreme Court when they bring or "sponsor" cases involving criminal rights?[1] As shown in Table 1, the mean success rate[2] of the 22 states participating in more than 5 cases was 59 per cent. This compares favorably with that reported by Thomas Morris for *amicus curiae* participation. Tremendous variation exists, however, among state success rates; for example, compare Oregon's 10 out of 11 victories with Arizona's meager 29 per cent success score.

How can we explain such variation among the states? One plausible argument is that states differ in terms of the centralization of their efforts: some states have specialized litigation offices or allow only their attorneys general to handle U.S. Supreme Court litigation, while others permit local attorneys to bring cases before the High Court. Based on the literature analyzing the success of the U.S. Solicitor General, who operates a tight, centralized litigating office, and of other parties, we would expect that states maintaining a high degree of control over their court efforts may perform better than their counterparts.[3]

Table 1 States and the Supreme Court, 1969-1984 terms*

State	Prop. of success	N of participation
Alabama	.50	6
Arizona	.29	7
Arkansas	.29	7
California	.78	32
Connecticut	.83	6
Florida	.63	30
Georgia	.33	18
Illinois	.55	22
Kentucky	.57	14
Louisiana	.25	12
Massachusetts	1.00	9
Michigan	.90	10
Missouri	.50	10
New York	.67	21
New Jersey	.60	5
North Carolina	.50	12
Ohio	.62	13
Oregon	.91	11
Pennsylvania	.50	8
Tennessee	.77	9
Texas	.56	16
Virginia	.50	6

*Data collected by the authors. Only states participating in five or more criminal cases are listed.

In a survey sent to state attorneys general, we attempted to discern how they routinely handled criminal cases at the level of the U.S. Supreme Court. Sixty-eight per cent of the 22 states included for analysis here either possess a centralized litigation department (of the sort run by the Solicitor General) or generally permit only the attorney general's office to bring cases to the Supreme Court; the remaining 32 per cent typically allow local district attorneys to litigate cases they handled at lower court levels. But are such disparate means of handling cases associated with success before the High Court? Table 2 addresses this question by cross-tabulating success (dichotimized as high—above the mean of 59 per cent—

1. The data reported in this note were collected from the *U.S. Reports*. We defined criminal cases as those involving rights under the Fourth, Fifth, Sixth, and Eighth Amendments.

2. We operationally defined success as the number of wins/number of participations.

3. *See* Puro, "The Role of Amicus Curiae in the United States Supreme Court: 1920-1966," unpublished Ph.D. dissertation, SUNY Buffalo (1971); Scigliano, THE SUPREME COURT AND THE PRESIDENCY (New York: The Free Press, 1971); Wasby, *Interest Groups in Court: Race Relations Litigation*, in Cigler and Loomis, eds., INTEREST GROUP POLITICS (1st Edition) 251-274 (Washington, DC: CQ Press, 1983).

Table 2 Litigation control and state success

	Low control	High control
Low success	57.1%	53.3%
	(4)	(8)
High success	42.9	46.7
	(3)	(7)
Totals	100.0	100.0
(N)	(7)	(15)

Lambda=0.0

Table 3 Region and state success

	South	Non-south
Low success	80.0%	33.3%
	(8)	(4)
High success	20.0	66.7
	(2)	(8)
Totals	100.0	100.0
(N)	(10)	(12)

Lambda=.40

Table 4 Appellate rates and state success

	Low appeal	High appeal
Low success	72.7%	36.4%
	(8)	(4)
High success	27.3	63.6
	(3)	(7)
Totals	100.0	100.0
(N)	(11)	(11)

Lambda=.30

and low—below the mean) with the presence or absence of "litigation control" (also dichotimized as high—state litigation is conducted almost exclusively by a centralized office or by the attorney general—and low—litigation may be conducted by local prosecutors).

As Table 2 indicates, no apparent association exists between state success in criminal litigation and "control." Of the 15 states possessing a "high" degree of control, success was almost equally divided, with 8 falling below and 7 above the 59 per cent success mark. In fact, the only support for the proposition that centralization alone is related to increased success for all states is that 7 of the 10 states achieving success rates of over 59 per cent were categorized as having high litigation control.[4]

More specific examples reinforce the finding that litigation "control" and success of states generally are unrelated. Consider the example of New York, a state with a 67 per cent success score. According to the deputy solicitor general of the state, "The handling of criminal issues, unless there is a direct challenge to the constitutionality of a state statute, rests with the district attorneys." Hence, New York possesses no centralized apparatus, yet its success score is 7 points above the mean. Arizona, on the other hand, claims that its criminal division in the attorney general's office handles 99 per cent of all U.S. Supreme Court cases, but its success rate of 29 per cent is well below the 59 per cent mark.

Other explanations

If the presence of a specialized office alone does not provide a useful indicator of state success, what other explanations may be more helpful? Scholars have argued that at least two other factors may explain variations among parties, including states. S. Sidney Ulmer, among others, has noted that the Court holds negative perceptions of states in the South and Southwestern regions of the country.[5] Researchers have based such a claim on a number of factors; during the 1960s, for example, the justices perceived the South as thwarting their authority in the areas of civil rights, liberties, and criminal justice.

Table 3, which presents a cross-tabulation of success by region (southern versus non-southern),[6] tests this proposition for the Burger Court era. As is clearly indicated, assumptions about the Court's negative perception of Southern litigators remain valid. The lambda statistic suggests that knowledge of a state's region reduces error in predicting its success category by 40 per cent. Put in other terms, 80 per cent of the Southern states had success rates lower than 59 per cent, compared with only 33 per cent of the non-southern states! Hence, we can conclude that regional differences are certainly related to success rates before the Court, a finding that reinforces Ulmer's conclusion that "some sections of the country appear consistently more prone to Constitutional Turpitude than others."[7]

Another explanation for variation among parties in Supreme Court litigation emanates from the literature on the judicial process. Scholars have argued that "appellants" have advantages over their "appellee" counterparts because the Court usually takes cases to reverse.[8] Table 4 examines the relationship between appellate rates[9] and success. Here, we simply defined appeal rates as "high" (above the mean of 51 per cent) and "low" (below the mean of 51 per cent) and cross-tabulated those with state success. Once again, our analysis in Table 4 seems to confirm scholarly suspicions concerning appellants. Eight of the 11 states appealing fewer than 51 per cent of their total cases had success rates lower than 59 per cent. In contrast, only 3 of the 10 states with high success scores appealed fewer than 51 per cent of their cases. Finally, consider two extreme examples: the State of Massachusetts, which won all of its cases during the period under analysis, appealed 8 of its 9 cases (89 per cent), while one of the least successful states, Georgia, appealed only 4 of its 18 cases (22 per cent).

In this brief note, we attempted to draw a descriptive picture of states as sponsors of criminal litigation. Although our analysis provides an examination of several explanations for variations among the states, we encourage more systematic research efforts, of the sort conducted by Thomas Morris, exploring these important litigators and their efforts as sponsors and *amicus curiae* before the Supreme Court. □

4. A multivariate model of state success also found centralization to be an insignificant determinant of success. When we looked exclusively at success of Southern versus non-southern states and controlled for a range of other variables, however, centralization adds to our understanding of the success of Southern states, but not to that of their non-southern counterparts. *See* Epstein and O'Connor, "States and the Court: An Examination of Litigation Success," unpublished manuscript (1986).

5. Ulmer, *The Discriminant Function and a Theoretical Context for its Use in Estimating the Votes of Judges*, in Grossman and Tanenhaus, eds., FRONTIERS OF JUDICIAL RESEARCH 355-69 (New York: John Wiley and Sons, 1969); Ulmer, "The Sectional Impact of Judicial Review: Another Look," paper delivered at the annual meeting of the American Political Science Association, Washington, DC, 1986.

6. "Southern" states included for analysis were: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, North Carolina, Tennessee, Texas, and Virginia.

7. Ulmer, "Sectional Impact," *supra* no. 4 at 16.

8. Provine, CASE SELECTION IN THE UNITED STATES SUPREME COURT (Chicago: University of Chicago Press, 1980); Wasby, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM (2nd Edition) (New York: Holt, Rinehart and Winston, 1984).

We use the terms "appellees" and "appellants" to represent winners and losers at lower court levels. As such, we also included "respondents" and "petitioners" to represent the same concepts.

9. We operationalized appealing party as the proportion of cases that a state appealed (number of appeals/number of participants).

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