

# Public Opinion and Senate Confirmation of Supreme Court Nominees

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## Abstract

We study the relationship between state-level public opinion and the roll call votes of senators on Supreme Court nominees. Applying recent advances in multilevel modeling, we use national polls on nine recent Supreme Court nominees to produce state-of-the-art estimates of public support for the confirmation of each nominee in all 50 states. We show that greater public support strongly increases the probability that a senator will vote to approve a nominee, even after controlling for standard predictors of roll call voting. We also find that the impact of opinion varies with context: it has a greater effect on opposition party senators, on ideologically opposed senators, and for generally weak nominees. These results establish a systematic and powerful link between constituency opinion and voting on Supreme Court nominees.

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# 1 Introduction

The judiciary is the branch of the federal government most insulated from public influence. Federal judges are unelected and have lifetime appointments. Supreme Court justices, atop the federal judicial hierarchy, need not even worry about promotions to a higher court. This leaves them largely unconstrained in their decision-making, which ultimately reaches the most controversial policy areas. While judicial independence has obvious advantages, leaving the justices free from improper influence, free to make impartial decisions, and free to protect the rights of unpopular minorities, “too much” independence also raises foundational concerns over how counter-majoritarian the Court might be (see Friedman 1998, *inter alia*)

Scholars have long debated whether the justices of the Court are influenced by public opinion in their decision making (Dahl 1957, Mishler and Sheehan 1993, Norpoth et al. 1994, Stimson, MacKuen and Erikson 1995, Flemming and Wood 1997, Giles, Blackstone and Vining 2008). Less noticed has been the possibility that the public might be to influence *who* sits on the Court in addition to *what* the justices decide. The decision to appoint and confirm a justice is in the hands of the presidents and senators, but the electoral incentives, particularly for senators, potentially tie the Court back to the public. Given these incentives, does the public play a key role in confirmation politics? Or do partisan loyalties and the senator’s own ideology trump constituent preference?

Senate lore contains ominous warnings for senators who ignore the public when casting confirmation votes. Despite being virtually unknown, Carol Mosley Braun defeated incumbent Senator Alan Dixon in the Illinois Democratic primary, principally campaigning against his vote in favor of Clarence Thomas (McGrory 1992, Babington 2005). Indeed, Wolpert and Gimpel (1997) showed using 1992 Senate election data that voters did cast their votes in part based on their reactions to their senators’ vote on the Thomas nomina-

tion.

Even the six-year terms of senators do not make them invulnerable, and few decisions made by U.S. senators are as visible to the public as votes to confirm or reject a Supreme Court nominee. While the outcomes of many Senate votes, such as spending bills or the modification of a statute, are ambiguous, or obscured in procedural detail, the result of vote on a Supreme Court nomination is stark: either the nominee is confirmed, allowing her to serve on the nation's highest court, or she is rejected, forcing the president to name another candidate.<sup>1</sup> In this process, note Watson and Stookey (1995, 19), "there are no amendments, no riders and [in recent decades] no voice votes; there is no place for the senator to hide. There are no outcomes where everybody gets a little of what they want. There are only winners and losers."

Given the visibility of roll call votes on Supreme Court nominees, and the stakes for controversial policies at the heart of recent elections, such as abortion rights, we expect reelection-minded senators to pay close attention to the views of their constituents. Whether they do so, anecdotes aside, remains an open question. Twenty years ago, Caldeira (1988-1989) urged students of the nomination and confirmation process to account for the role of "organized and unorganized" interests, including those of the public at large. While scholars have made significant advances in this area, the degree to which constituency opinion influences roll call voting on nominees remains an open question. Using various proxies for state public opinion, the few studies that have examined the relationship between the two have reached conflicting conclusions (e.g., cf. Segal, Cameron and Cover (1992) with Caldeira and Wright (1998)). More recent work has studied the changing dynamics of nomination politics (focusing primarily on partisan, ideological, and legal factors), but has set aside the possible effects of public opinion.

In this paper, we study whether senators are actually responsive to the views of their

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<sup>1</sup>For convenience, we use "she" to denote justices and "he" to denote senators throughout the paper.

constituents when casting their votes on the confirmation of a nominee. Specifically, we analyze the relationship between state-level public opinion and roll call votes on Supreme Court nominees. We begin by producing state-of-the-art estimates of the public's support in all 50 states, for each nominee. These make use of recent advances in multilevel modeling to generate estimates from national polls asking about support for nine recent Supreme Court nominees. These estimates of opinion are a significant advance over earlier efforts: they can be generated for a broader range of nominees than was previously possible; they account for geographic variation among poll respondents; the method used to generate them has been shown to produce highly accurate estimates; and they specifically capture state-level support for confirmation. These advances allows us to move beyond simple correlation between roll call voting and state demographics or between roll call voting and diffuse constituent ideology.

We find that greater home-state public support does significantly and powerfully increase the probability that a senator will vote to approve a nominee, even controlling for standard predictors of roll call voting: ideological distance between the senator and the nominee, the party of the senator, and the quality of the nominee. We also find that the impact of opinion varies with context: it has a greater effect on opposition party senators, on ideologically opposed senators, and for weak nominees. These results establish a strong and systematic link between constituent opinion and voting on Supreme Court nominees. We also find that only senator ideology has a greater impact on confirmation vote on average. This suggest that, while constituent preference matters a great deal, the senator still has some leeway when voting on nominees. Moreover, our results extend beyond the direct substantive implications for confirmation politics and speak to larger debates about representation and responsiveness in the U.S. Senate.

## 2 Opinion, representation, and confirmation votes

### 2.1 Linking public opinion to roll call votes

While the goals of members of Congress are multifaceted, the desire for reelection has long been established as a powerful driver, if not the primary driver, of congressional behavior, including roll call voting (Mayhew 1974, Fenno 1978, Arnold 1990). Although the six-year terms of senators provide them with longer intervals, compared to House members, over which they must maintain the approval of their constituents, a reelection-minded senator will constantly consider how his votes may affect his reputation back home. This will be particularly true of highly visible votes, such as whether to authorize a war, votes on taxes, and high profile nominations, such as cabinet positions or Supreme Court justices.

Accordingly, a vote on a Supreme Court nominee presents a situation in which a senator is likely to consider his or her constituents' views carefully, even if his eventual vote puts him odd with the views of a majority of his constituency.<sup>2</sup> Cameron, Cover and Segal (1990, 527) set forth this logic nicely:

With respect to motivation, we imagine senators asking themselves, "Can I use my actions during the confirmation process to gain electoral advantage? If I'm forced to account for my votes, can they be used against me? What is the most electorally expedient action for me to have taken?" ... The senator can generally expect to gain electorally (or at least not to lose electorally) from voting as constituents wish and can expect to incur losses from flouting constituents' desires, regardless of the actual outcome of a vote.

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<sup>2</sup>Senators also considering a run for president may also worry about the views of the national public at large, and how their votes could affect the chances of both winning their party's nomination and a general election. In May 2008, for example, John McCain sought to make an issue out of Barack Obama's vote against the confirmation of John Roberts to become Chief Justice, stating that Obama "went along with the partisan crowd, and was among the 22 senators to vote against this highly qualified nominee" (Bumiller 2008). Obviously such calculations will apply to a minority of senators, and we do not incorporate them into this paper. However, in 2008 six current senators (Obama, Clinton, Dodd, Biden, McCain and Brownback) sought their party's nomination, as did John Edwards, a former senator (unlike the other senators, Edwards did not cast any votes on Supreme Court nominees during his tenure). And two other senators serving in the 110th Congress (Kerry and Lieberman) ran for president in 2004.

Given this thinking, it is no surprise that presidents often “go public” in support of their nominees in the hope of shifting public opinion (Johnson and Roberts 2004). To get their nominees through the Senate, Richard Nixon’s White House actively worked to shift public opinion on Clement Haynsworth and Ronald Reagan’s White House launched a “major (though largely unsuccessful) public relations offensive to build support for [Robert Bork]” (Maltese 1998, 87-88).

Indeed, appeals to the public in nomination politics date back to the shift to the direct election of senators (Maltese 1998, 86). While the nomination process has become increasingly politicized and publicized, even in 1930, the Republican Senate majority was so concerned about rising public opposition to the appointment of Charles Evans Hughes for Chief Justice that his supporters blocked further hearings and moved to a quick vote, before the public could shift any further (Maltese 1998, 55).<sup>3</sup>

In addition to worrying about the immediate implications of a confirmation vote, senators are also likely to think about its long-term implications. Their electoral gain or loss may manifest itself not only in the election directly after a nomination vote: “If we assume senators care about maintaining their seats, they must anticipate not only the immediate reactions of their constituents to their decisions but also future reactions at the next election” (Caldeira and Wright 1998, 503). For instance, in a bid to unseat Pennsylvania Senator Arlen Specter in the 2004 Republican primary, challenger Pat Toomey invoked Specter’s vote against Robert Bork seventeen years earlier—one of only six votes by Republican senators to reject the controversial nominee (Babington 2004).

One difficulty that may arise for senators is judging their constituents’ preferences for a given nominee. Public opinion polls, on which we focus in this paper, likely help inform

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<sup>3</sup>One of the most striking examples of concern over public opinion occurred *after* a successful confirmation, that of Hugo Black. Facing public outrage when his prior membership in the Ku Klux Klan was revealed only after the Senate had voted, Black took to the radio to explain himself. The percentage of respondents stating that Black should resign decreased from 59% to 44% following his address (Maltese 1998, 105).

senators, as do more basic forms of communications such as phone calls and letter writing. Segal, Cameron and Cover (1992) and Caldeira and Wright (1998) argue that interest groups play an important role both in *shaping* constituency preferences and *informing* senators of these preferences: “Interest groups attempt to mold senators’ perceptions of the direction, intensity and electoral implications of constituency opinion” (Caldeira and Wright 1998, 503). It is thus likely that most senators will have a good idea of where their constituents stand when they cast a vote on a Supreme Court nominee.

## **2.2 Measuring constituency opinion: previous research**

The modern-day analysis of roll call votes on Supreme Court nominees—beginning perhaps with Songer (1979) but certainly no later than Segal, Cover and Cameron (1988-1989)—has proceeded along two overlapping tracks. The first follows from the pioneering work of Cameron, Cover and Segal (1990), who found that roll call voting could largely be explained by the interaction of nominee quality and ideological distance between a senator and the nominee. Senators will likely approve a nominee if she is ideologically close or if she is of high legal quality; if both these conditions are not met, however, the probability of approval drops rapidly. Partisanship and the political environment are also important: all else equal, senators are more likely to approve a nominee appointed by a president of the same party and a president who is “strong” in that his party controls the Senate and he is not in his fourth year of office. Updating both the methodology of Cameron, Cover and Segal (1990) and the number of nominations evaluated, Epstein et al. (2006) found that this model still accurately captures roll call voting, although the effect of ideological distance seems to have grown over the last 50 years. Shipan (2008) similarly concluded that the influence of partisanship has increased over time.

The second track has sought to augment the first by incorporating the role of constituency preferences and lobbying interests in addition to institutional, ideological, and

nominee-specific factors. Doing so, however, has raised several methodological challenges, especially with respect to measuring constituency preferences. These challenges arise from one harsh constraint—the lack of comparable state-level polls for nominees and thus of “direct” estimates of state-level opinion. As a result, scholars have pursued several different methods, with various advantages and drawbacks. Because these methods both inform substantive findings in the second track of the literatures and motivate our analysis below, a thorough review is useful.

The most ambitious attempt to measure consistency opinion is that of Segal, Cameron and Cover (1992), who generated state-level constituency ideology scores using predictions from regressions of congressional voting scores on state presidential election results and two indicators for Democrats and Southern Democrats.<sup>4</sup> Based on these measures, and using scaling procedures to place nominees, senators and constituents on the same scale, Segal, Cameron and Cover (1992, 109) found that “confirmation voting is decisively affected by the ideological distance between senators’ constituents and nominees.”<sup>5</sup> That study also found that interest group activity for and against a nominee—measured at the nominee-level rather than the senator-level—significantly affects confirmation votes. Thus, the linkage between constituency opinion and senators’ votes would be seem to be robust to the presence or absence of lobbying efforts.<sup>6</sup>

To be sure, this method of estimating constituency opinion is both highly innovative and can be applied to all nominees since 1937.<sup>7</sup> There are several disadvantages, however. First, the measure constitutes a broad evaluation of state ideology, and it is not

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<sup>4</sup>Published in 1992, the paper uses ADA scores as estimates of senator ideology. Certainly their estimates could be marginally improved by following the lead of Epstein et al. (2006) and update the analysis by using more advanced ideal point estimates, but the issues noted below would still pose a problem.

<sup>5</sup>Overby et al. (1994) apply this method separately to the votes on Thurgood Marshall and Clarence Thomas and find that support for the two increased and decreased in state liberalism, respectively, as would be expected.

<sup>6</sup>Others have studied public support for the Supreme Court itself (e.g., Hoekstra 2000).

<sup>7</sup>The scaling procedure involved employs Segal-Cover scores (Segal and Cover 1989), which are only available from 1937-on (Epstein et al. 2006, 298, fn. 4).

specific to any particular nominee or even Supreme Court nominations more generally. Moreover, because the predictions are generated using only a few presidential elections, the state estimates are static in many periods, meaning that the opinion on all nominees in a given period will be assumed to be the same (and indeed the same as opinion on any other issue). For example, the estimates of constituent “opinions” of Harry Blackmun and Clement Haynsworth are the same, despite their vastly different profiles. Lastly, because constituency opinion is estimated from voting scores, untangling the influence of senator ideology and state opinion requires strong assumptions about the ability to accurately place them on the same scale.

Indeed, given these limits, one can only show the degree and direction of correlation between the diffuse constituent ideology score and senator vote. Without accurate measures of how constituents want these *specific* votes to be cast, without a common metric for opinion and choice, the inferences we can draw are limited (Erikson, Wright and McIver 1993, 92). A high correlation of votes and opinion reveals strong relationship between the two, but if we do not have a meaningful scale for responsiveness, we cannot tell if vote choice is over- or under-responsive to opinion. That is, we can only tell whether more liberal (conservative) constituents lead to more liberal (conservative) votes; we cannot tell whether these votes are the precise votes desired by constituents without a common metric.

A more contextual proxy for constituent opinion is employed in Overby et al. (1992; 1994), who examined the roll call votes on the nominations of Thurgood Marshall and Clarence Thomas, the only two black nominees to the Supreme Court. The authors analyzed a racial component of constituent ideology, finding that as the percentage of blacks in his home state increased, a senator was *less* likely to support Marshall but *more* likely to support Thomas. They attributed this discrepancy to the changing dynamics of Southern politics: whereas in the 1960s Southern Democrats resisted civil rights measures and

were reluctant to offend white supporters by endorsing Marshall, by the 1990s Southern Democrats were dependent on black votes to gain office, which led many to support the Thomas nomination despite the opposition of most other Democratic senators.

Again, these studies (Overby et al. 1992; 1994) are highly informative and support a conclusion that senators are mindful of constituent wishes when voting for or against Supreme Court nominees. But this approach is difficult to generalize beyond the unique circumstances of these two nominations, and it relies on assumptions as to what these demographic groups preferred. It also suffers from the same correlation problem discussed above. Here, the problem is that one can only assess the correlation between aggregate demographic percentages and vote, not whether votes were cast precisely as desired by constituents.

These shortcomings point to a need for nominee-specific opinion measures. The most recent attempt to estimate constituency opinion—and the one that most resembles the method we use below—comes from Caldeira and Wright (1998) and does provide nominee-specific measures. The authors gathered national polls on the Bork, Thomas, and Souter nominations, and estimated individual-level models of opinion (one for each nominee), regressing survey respondents' views of the nominees on race, partisanship, ideology and rural dwelling. (The next step is, methodologically, one of the main points of departure herein.) Using the parameter estimates from these models, they then generated state-level estimates of opinion by using the mean level of these variables by state. Conducting separate models of confirmation voting on the three nominees, they found that state opinion does not have a significant effect on senators' roll call votes, nor does senator ideology—results that contradict the studies cited above. On the other hand, lobbying for and against a nominee (here measured more precisely at the senator level) are strong predictors of confirming or rejecting a nominee, respectively.

We explain more thoroughly below, but we briefly note two limitations of the method

in Caldeira and Wright (1998). First, it takes into account only demographic variation between respondents, and not geographic variation (Erikson, Wright and McIver (1993) showed that a great deal of geographic variation in state opinion exists beyond that explained by demographic differences). Second, using the mean values of each demographic variable within a state only approximates the correct weighting of demographic influences on opinion. It does not make use of the true frequencies of each respondent type, which is crucial given that, even setting aside geographic differences, demographic variables *interact* with each other to influence opinion at the individual level. Doing so requires using the full set of cross-tabulations, and not merely aggregate percentages (i.e., knowing how many black women there are, not just how many blacks and how many women). Fortunately, it is possible to deal with both of these issues, and improve upon accuracy in other ways, given recent advances in estimating local opinion from national poll data.

### **3 Estimating state-level public opinion**

#### **3.1 Methodological overview**

The most intuitive way to measure state public opinion on Supreme Court nominees would be to gather all possible national polls on a particular nominee, then break down responses by state, hoping to get sufficiently many within each state to yield an accurate sample. Such a plan would follow the “disaggregation” approach pioneered by Erikson, Wright and McIver (1993), who pooled polls over 25 years (thus achieving adequate sample sizes) to develop estimates of each state’s overall liberalism. Obviously, in this context, pooling over many years is impossible as we are interested in a narrow time frame between nomination and confirmation. Unfortunately, even if we obtained all existing polls, even for the most-pollled nominees, there are simply not enough respondents in many states to generate

reliable estimates of public opinion using disaggregation.<sup>8</sup>

Fortunately, an alternative exists. Park, Gelman and Bafumi (2004) have modernized an older technique for estimating state public opinion using national poll data. In the first stage, a multilevel model of individual survey response is estimated, with opinion modeled as a function of demographic and geographic predictors (individuals nested within states nested within regions).<sup>9</sup> Instead of relying solely on demographic differences, the state of the respondents is used to estimate state-level effects, which themselves are modeled using additional state-level predictors such as region or state-level (aggregate) demographics (e.g., those not available at the individual level). As a result, all individuals in a survey, no matter their location, yield information about demographic patterns, which can be applied to all state estimates. Those residents from a particular state or region yield further information as to how much predictions within that state or region vary from others after controlling for demographics. The result is a highly accurate model of individual response.

The second stage is poststratification, in which the estimates for each demographic-geographic respondent type are weighted (poststratified) by the percentages of each type in the actual state populations, so that we can estimate with a high degree of accuracy the percentage of respondents within each state who have a particular issue position. Taken together, the method can be labeled multilevel regression and poststratification, or MRP (Lax and Phillips 2009).<sup>10</sup>

Comparisons of MRP with other techniques have demonstrated that it performs very well. Park, Gelman and Bafumi (2004) validated the multilevel modeling approach by using national polls to “predict” the first President Bush’s state support in the 1988 and 1992

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<sup>8</sup>For example, in the eight polls we collected and analyzed to create estimates on the nomination of John Roberts—the nominee with the largest number of polls—in 15 states there were a total of fewer than 50 respondents. The problem is even more severe for other nominees.

<sup>9</sup>See Gelman and Hill (2007) for a comprehensive review of multilevel models.

<sup>10</sup>Lax and Phillips (2008) apply this method to study the responsiveness of state gay rights policies to state-level public opinion.

elections using MRP, comparing the results to two alternate ways of modeling individual response. Their predictions using MRP did better than not pooling at all (running a separate model for each state's respondents) and better than pooling all respondents across states (so that only demographic information was used to model individual response before poststratification), thus demonstrating the benefits of partially pooling information across states. These results demonstrate that MRP beats other multilevel approaches.

In a more thorough analysis, Lax and Phillips (2009) systematically compared MRP with its main competitor, disaggregation and assessed its accuracy on an absolute scale, by using simulation analysis on a large number of opinion polls on gay rights and on elections data. They established the face validity of the estimates and, comparing them to actual state polls, the external validity. Lax and Phillips showed that even a single national poll and a simple demographic-geographic model suffice for MRP to produce highly accurate state-level opinion estimates. MRP estimates using small samples were as accurate as using 10 times as much raw data. They also confirmed the finding of Park, Gelman and Bafumi (2004) that MRP offers a vast improvement over a model of state opinion that uses only demographic information (which suggests that the estimates in Caldeira and Wright (1998) will likely be measured with a high degree of error).

## **3.2 Data and methods**

In the hopes of producing estimates for as many nominees as possible, we searched the Roper Center's *iPoll* archive. Surprisingly, the first such polls dates all the way back to 1937.<sup>11</sup> Perhaps even more surprisingly, not until very recently were polls systematically conducted on Supreme Court nominees. Indeed, not a single poll was conducted of the nomination of Antonin Scalia. Our search left us with us nine nominees who re-

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<sup>11</sup>This is the aforementioned Gallup poll about the public's view of Hugo Black after it was established (after his confirmation) that Black had been a member of the Ku Klux Klan.

ceived confirmation votes and for whom sufficient polling and census data are available:<sup>12</sup> O'Connor, Rehnquist (his 1986 nomination for Chief Justice), Bork, Souter, Thomas, Ginsburg, Breyer, Roberts and Alito.

For nominees who featured in only a handful of polls, we compiled each poll with suitable demographic information on individual respondents and with state indicators. For nominees with a large number of such polls, we sought to retain polls as close to their confirmation vote as possible. For Clarence Thomas, for instance, we only retained polls taken after the Anita Hill allegations surfaced. This procedure helped ensure as much as possible that our estimates would tap state opinion as it existed at the time a senator cast his vote. A complete list of polls we used is presented in Appendix Table A-1.

For each respondent, we usually have the following demographic information: sex (male or female), race (black, Hispanic, or white and other), one of four age categories (18-29, 30-44, 45-64, and 65+), and one of four education categories (less than a high school education, high school graduate, some college, and college graduate). Race and gender are combined to form six possible categories (from male-white to female-Hispanic). Finally, each respondent's state and region is indicated (Washington, D.C.,<sup>13</sup> is included as a separate "state" and separate region, along with Northeast, Midwest, South, and West). For each state, we have the percent of evangelical Protestants and Mormons (American Religion Data Archive 1990).

We start by modeling explicit support for confirmation (coded as  $y_i = 1$ ), as compared to explicit disapproval of confirmation or answering "do not know" (coded as  $y_i = 0$ ).<sup>14</sup> While the predictors we use in each response model vary slightly across nominees, based

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<sup>12</sup>Polls were conducted on Douglas Ginsburg and Harriet Miers (and we analyze the latter in an extension), but their nominations were withdrawn before any Senate action. Clement Haynesworth and G. Harrold Carswell were polled but we do not yet have the contemporaneous census breakdown for poststratification.

<sup>13</sup>Even though we do not use the estimate for opinion in D.C., D.C. respondents are still used to help us estimate demographic effects.

<sup>14</sup>Multilevel models to produce state estimates and analyze roll call votes were estimated using the LMER command in R (Bates 2005).

on the demographic information was available in the survey data, each model takes the following basic form, with individual  $i$ , and indexes  $j$ ,  $k$ ,  $l$ ,  $m$ ,  $s$ , and  $p$  for race-gender combination, age category, education category, region, state, and poll respectively:<sup>15</sup>

$$\Pr(y_i = 1) = \text{logit}^{-1}(\beta^0 + \alpha_{j[i]}^{\text{race,gender}} + \alpha_{k[i]}^{\text{age}} + \alpha_{l[i]}^{\text{edu}} + \alpha_{s[i]}^{\text{state}} + \alpha_{p[i]}^{\text{poll}})$$

The  $\alpha$  terms are the varying intercept shifts for the various groups of respondents:

$$\alpha_j^{\text{race,gender}} \sim N(0, \sigma_{\text{race,gender}}^2), \text{ for } j = 1, \dots, 6$$

$$\alpha_k^{\text{age}} \sim N(0, \sigma_{\text{age}}^2), \text{ for } k = 1, \dots, 4$$

$$\alpha_l^{\text{edu}} \sim N(0, \sigma_{\text{edu}}^2), \text{ for } l = 1, \dots, 4$$

$$\alpha_p^{\text{poll}} \sim N(0, \sigma_{\text{poll}}^2), \text{ for } p = 1, \dots$$

Each effect is modeled as drawn from a normal distribution with mean zero and variance endogenous to that group of parameters, yielding what are called “modeled effects,” “random effects,” or “shrinkage estimates.” The state effects are in turn modeled as a function of the region into which the state falls, the state’s conservative religious percentage, and the contemporaneous Democratic presidential candidate’s state-level vote share:<sup>16</sup>

$$\alpha_s^{\text{state}} \sim N(\alpha_{m[s]}^{\text{region}} + \beta^{\text{relig}} \cdot \text{relig}_s + \beta^{\text{presvote}} \cdot \text{presvote}_s, \sigma_{\text{state}}^2), \text{ for } s = 1, \dots, 51$$

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<sup>15</sup>Hispanics are only separated from whites for Alito and Roberts. We drop predictors when there is insufficient variation to distinguish effects from zero to the limits of the LMER algorithm, that is, when there is no residual variation for these terms to pick up: for O’Connor, state, religion, and presidential vote; for Ginsburg, religion; and for Breyer, religion. Given variation across polls on Bork, we also let age level effects vary by poll. The results of Lax and Phillips (2009) show that such minor variations are irrelevant. The goal is to establish the best predictive model possible. To compare the effects of predictors across nominees, not the goal here, we would use the same predictors in each model.

<sup>16</sup>Group-level predictors such as these reduce unexplained group-level variation, leading to more precise estimation overall (Gelman and Hill 2007, 271). While including religion at the individual level might be superior to including it only as a state-level indicator, that data is less commonly available for survey respondents and is not available at all for the census data, so that we could not poststratify by religion in any case. Estimates are robust to variations in this specification.

The region variable is, in turn, another modeled effect (D.C. is included as its own region and own “state”):

$$\alpha_m^{region} \sim N(0, \sigma_{region}^2), \text{ for } m = 1, \dots, 5$$

The individual response models perform well.<sup>17</sup> The next step is poststratification, weighting individual-level predictions according to demographic patterns within each state. There are 4,896 possible combinations (fewer if Hispanic is not a separate category, as for some nominees) of demographic and state values (96 within each state), ranging from “White,” “Male,” “Age 18-29,” “Not high school graduate,” in “Alabama,” to “Hispanic,” “Female,” “Age 65+,” “College degree or more,” in “Wyoming.” For any specific cell  $j$ , specifying a set of individual demographic and geographic values, the coefficients we estimated above allow us to make a prediction of support for the nominee,  $\theta_j$ . Specifically,  $\theta_j$  is the inverse logit given the relevant predictors and their estimated coefficients.

The prediction in each cell needs to be weighted by the actual population frequency of that cell,  $N_j$  (that is, by how many such people are in the state). For each state, we then can calculate the average response, over each cell  $j$  in state  $s$ :

$$y_{state\ s}^{pred} = \frac{\sum_{j \in s} N_j \theta_j}{\sum_{j \in s} N_j} \quad (1)$$

We calculate the necessary population frequencies using the “1-Percent Public Use Microdata Sample” from the 1990 or 2000 census, which has demographic information for one percent of each state’s voting-age population. For example, in 2000, for the cells mentioned above the frequencies are 581 (1.7% of Alabama’s total population) and 0 respectively.

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<sup>17</sup>See Gimpel and Wolpert (1996) for an alternate empirical model of individual attitudes towards Bork, Thomas, Rehnquist, and Souter, including some factors we do not use here, such as the individual’s approval of the president.

Applying these weights yields the predicted percentage of the state that explicitly approves of confirmation. We then repeat the steps above to estimate explicit disapproval (now coded as  $y_i = 1$ ) as compared to explicit approval or answering “do not know” (now coded as  $y_i = 0$ ). We then calculate the percentage within each state explicitly supporting confirmation among those with an explicit opinion, and this is the opinion variable used below.<sup>18</sup>

### 3.3 Opinion estimates

The distributions of state support for each nominee are depicted in Figure 1 in order of mean nominee support (the full list of opinion estimates is given in Table 2). Nominees are ordered by mean support (indicated by the dashed line), from lowest to highest. Bork had the lowest mean support and also the widest spread of support, while O’Connor was the least controversial nominee, both in terms of mean support and the variance of support across states. In addition, Bork was the only nominee for whom the balance of public opinion in a significant number of states was opposed to his nomination. Thus, among voters with opinion, all but one nominee received broad public support. The bottom histogram depicts support for all nominees combined, revealing that most of the distribution of opinion falls between 60% and 80% support.

Despite the overall tendency to support a nominee, the histograms show widespread variation in state support for several nominees. We map this variation in Figure 2, with darker shading indicating greater support.<sup>19</sup> Each nominee is shown on its own shading scale to best reveal variance across states within nominees, and hence variation in support cannot be compared across nominees. While regional and state variation is roughly in accordance with state liberalism or partisanship, nominee-specific support does not reduce

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<sup>18</sup>Results are robust to using the absolute percent support or the absolute level of disapproval, though overall model fit is slightly decreased.

<sup>19</sup>Figure A-1 in the Appendix reproduces the maps with an opinion scale that is constant across nominees.

to these general measures.

## 4 Roll call voting and state-level opinion

The nine nominees in our sample were each voted on by the full Senate, for a total of 891 confirmation votes (a total of nine senators abstained), 75% (667) of which were to approve the nominee.<sup>20</sup> We begin our analysis by studying the bivariate relationship between public opinion and voting. For each nominee, the dark lines in Figure 3 presents the estimated logit curves from a logistic regression of roll call votes on state public opinion, while the lighter lines depict uncertainty in the estimated regressions. The hash marks at the top and bottom of each panel depict state opinion for “yes” and “no” votes, respectively. For the more controversial nominees, there is a significant relationship between voting and opinion, although there is variation across nominees. The curve is most steep and precisely estimated for the Roberts vote, while the curves for Rehnquist and Thomas are less steep and less precisely estimated. For the lopsided roll call votes, there is too little variation for any predictor to explain voting well. The bottom panel shows the estimated logit curve from pooling all nominees. The correlation is strong: as a senator’s constituents become more supportive of a nominee, he is more likely to vote affirmatively.

Can we conclude that public opinion *influences* roll call voting, rather than simply aligning with it? To answer this question, we turn to a multivariate analysis of roll call voting on Supreme Court nominees, so that we can control for other influences.

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<sup>20</sup>Roll call and explanatory data for all nominees except Alito come from (Epstein et al. 2006). We collected data for the Alito vote.

## 4.1 Data and methods

Like Shipan (2008), we build on the well-laid foundation of Epstein et al. (2006), who study voting as a function of the following predictors:

- **Lack of quality:** the degree to which a nominee is judged (according to newspaper editorials (Cameron, Cover and Segal 1990) to lack the quality necessary to join the Court. It ranges from 0 (most qualified) to 1 (least).
- **Strong president:** Coded 1 if the president was not in his 4th year of office *and* his party controlled the Senate at the time of a nomination, this variable serves as a proxy for the president’s ability to influence senators to approve his nominees.<sup>21</sup>
- **Same party:** Coded 1 if the senator is a co-partisan of the president.
- **Ideological distance:** The ideological distance between the senator and the nominee, as measured using an institutional bridging technique that combines Common Space scores (Poole 1998) and Segal-Cover scores (Segal and Cover 1989).

Figure 4 presents descriptive statistics for each predictor. All continuous predictors in the models have been standardized by centering (at zero) and dividing by two standard deviations—as a result, the coefficients for all continuous and binary predictors are comparable on roughly the same scale. A one unit change in the continuous predictors covers two standard deviations of that predictor. Because these transformation are linear, they do not affect any inferences about statistical significance; rather, they simply make it easier to interpret the relative substantive magnitude of each predictor.

Our expectation is that constituent opinion will play a strong role in driving the votes of senators. However, we still expect that the others variables noted above will continue

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<sup>21</sup>The analytical foundation for this variable is somewhat questionable; in fact, the measure seems to lack face validity for some of the nominees we study. For instance, President Bush is coded as being “strong” when he nominated John Roberts to become Chief Justice in September 2005, even though this nomination (and subsequent Senate vote) came in the immediate aftermath of Hurricane Katrina. Likewise, had Harriet Miers’ nomination proceeded to a confirmation vote, Bush would again have been coded as strong, even though it seems to have been the disapproval of Miers by members’ of *his own party* that presaged the withdrawal or her nomination. As a robustness check, in the all the models we present below, we substituted the president’s public approval rating at the time of each vote for the “strong president” measure. Results were substantively and statistically the same. In the interest of consistency, we use “strong president,” while at the same time noting that scholars might evaluate more thoroughly the dynamics of presidential persuasion on Supreme Court nominees (Johnson and Roberts 2004).

to have an independent contribution to explanatory power, as shown by Epstein et al. (2006), *inter alia*.<sup>22</sup> One reason that there might be room for other forces to operate even in the face of the electoral connection is that, though there are usually clear majorities among respondents with an opinion, only 40% of the time is there an absolute majority explicitly for or against the nominee. That is, 60% of the time there are sufficiently many respondents who do not have an opinion, meaning that a senator can cast his or her vote either way without having to face a dissatisfied majority. Finding strong responsiveness to public opinion even given this would then indicate exactly how worried senators are even about plurality opinion when casting confirmation votes.

## 5 Results

Table 1 presents four models of voting on Supreme Court nominees. We begin in Model 1 by replicating the logit model analyzed in Epstein et al. (2006) on our subset of justices.<sup>23</sup> On this set of nominees, our findings match theirs: Senators are less likely to support less qualified nominees and those ideologically distant from them, and more likely to support candidates nominated by a president of their party and a strong president.

We begin our analysis of the influence of public opinion by adding it to this basic model, with the results presented in Model 2. The coefficient on *Opinion* is statistically significant, and its magnitude is comparable to that of *Ideological distance*. In addition, the significance of the other predictors remains similar to Model 1. These results indicate that as state opinion of a nominee increases, senators are more likely to support her, even after controlling for well-known predictors of the vote.

Model 3 presents the results of a multilevel model, which recognizes that the votes

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<sup>22</sup>It is also possible that nominee quality and ideology have indirect effects that operate through public opinion. However, these are only weakly correlated with opinion (.33 and .37 respectively).

<sup>23</sup>We had no trouble successfully replicating the results reported in Epstein et al. (2006), using all the nominees in their analysis.

are grouped by nominee (just as survey respondents were grouped by state in the opinion estimation stage). It includes varying intercepts for each nominee (i.e., random effects), assumed to be drawn from a common distribution with mean zero and a variance estimated from the data. These intercept shifts capture any variation across nominees not captured by the other predictors. The results are substantively the same as in Model 2, although *Same party* and *Strong president* are not statistically different from zero. (The table also presents the estimated random effects for nominees, which we discuss below).

Finally, Model 4 assesses the degree to which the relationship between opinion and voting may be conditioned by a senator's proximity to his re-election bid. This question has been explored by Overby and his colleagues. Examining the Thomas nomination, Overby et al. (1992) found that *only* senators up for reelection in 1992 (the next election after the vote) were influenced by the percentage of blacks in their home states. However, examining the Thurgood Marshall nomination, Overby et al. (1994) found no such interactive effect between promiximity to election and black population. We take a more general approach, interacting state opinion with an indicator variable, *Reelection*, coded 1 if a vote on a nominee took place within two years of the senators' next reelection. The coefficient on *Opinion* in Model 4 gives the estimated effect of public opinion on senators who were *not* facing reelection: it is unchanged from Models 1 and 3. The coefficient on the interaction term is small and not statistically different from zero, indicating that there is no *additional effect* of opinion on senators facing reelection. Thus, as a general matter, we can conclude that the effect of opinion is more related to senators' long-term interests in maintaining constituent support, rather a more short-term focus on whether a vote contrary to such support will have immediate negative consequences.

In terms of model performance, Table 1 shows that while all the models do quite well at explaining roll call votes, model fit improves significantly when state opinion included. Akaike's information criterion (AIC) shows that the "best" model is Model 3, which in-

cludes public opinion and allows the intercepts to vary by nominee.<sup>24</sup> Adding *Opinion* reduces the error by an additional 5%, and allowing intercepts to vary another 5%. The percentage correctly classified remains high even if opinion is omitted, but a simple model of just *Opinion* and *Same party* will itself correctly classify 89% of the observations, and adding varying intercepts brings this to 91% (models not shown, but available upon request).

Adding state opinion increases the fit of the model significantly, has a strong independent effect on vote, and somewhat changes our assessment of the other predictors. If we allow intercepts to vary by nominee, the effect of *Lack of quality* and *Strong president* can no longer be estimated with sufficient precision as to reach statistical significance (even though the point prediction for the effect of *Lack of quality* is even higher than before). The other predictors, *Ideological distance* and *Same party*, remain significant in each model. Once we control for *Opinion*, the substantive impact of *Same party* doubles, and that of *Strong President* is halved. There are at least two possibilities for why the effect of *Strong President* might be overstated when *Opinion* is excluded. Either strong presidents (those earlier in their term) choose nominees who will be more popular or strong presidents also influence opinion in favor of their nominees in addition to having a direct influence on senators. Not controlling for either of these possibilities would bias the estimated effect of strong presidents upwards.

The rescaled coefficients show that the effects of *Opinion* are larger than switching the party affiliation of the senator, larger than shifting the strength of the president making the appointment from weak to strong, larger than changing the quality of the nominee, and even larger than a shift in nominee effect from the nominee with the highest random effect (Rehnquist) to the nominee with the lowest (Alito). Only the senator's ideological

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<sup>24</sup>AIC rewards goodness of fit, while penalizing based on the number of estimated parameters, thus discouraging overfitting. Lower AIC values indicate the preferred model variant, the one that best explains the data without overfitting.

distance to the nominee has a potentially greater impact (across a standardized range of that predictor) on the vote. A (two standard deviation) shift in distance has a greater effect than that of public opinion, but no other predictor comes close.

We explain the substantive implications of the statistical results in detail below, when we give a wide range of predicted probabilities under different conditions and show how the impact of public opinion varies with context. For now, we note that, given the results in column 3, the upper bound of the effect of *Opinion* on vote probability is that a one point increase in the former leads to a four point increase in the latter. A two-standard-deviation swing in *Opinion* could have an effect as large as 95%. Of course, effects this large would only apply to a senator who is already wavering in his vote.<sup>25</sup>

Note that the random effects in columns 3 and 4, which capture any idiosyncracies by nominee not otherwise controlled for, do vary quite a bit.<sup>26</sup> A nominee effect of zero indicates the nominee did as well on average as one would expect from the substantive predictors. All else equal, controlling for all the predictors of vote included in the models, Rehnquist was more likely to get a yes vote than one would otherwise predict; O'Connor and Bork come close to average in this respect, and Alito was the mirror image of Rehnquist, equally less likely to get a yes vote. The standard deviation of these varying intercepts is 1.2, which would correlate to an upper bound of 30 percentage points change in the probability of a senator voting yes.

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<sup>25</sup>Dividing a logit coefficient by four yields the rough upper bound of its effect, which will be at the steepest part of the logit curve, near 50% (Gelman and Hill 2006, 119). Re-estimating Model 3 with *Opinion* on its original scale leads to an estimated coefficient of .15, with a standard error of .03.

<sup>26</sup>We tried including average opinion across states by nominee (a nominee level variable), but this was not significant, led to a higher (worse) AIC, and did not meaningfully change the random effects estimated, suggesting that these effects were not simply picking up differences in average opinion.

## 6 Discussion

To flesh out our findings, we calculate and graph predicted probabilities of a senator voting yes on the nominee for an assortment of configurations. Given that marginal probabilities effects in a logit model vary across predictor values, such displays will help us understand how the impact of public opinion varies given the values of the other predictors in the model, as well as how the impact of these other predictors varies given different levels of public opinion. We use model 3 for all predicted values in the text.<sup>27</sup> All predictions use the following baseline setup unless otherwise noted: continuous predictors are set to their mean, party is set to the opposition party, president is set to weak, and the random effect is that for an average nominee (zero, by construction). For continuous predictors, we set “low” values to be those one standard deviation below the predictor mean, and “high” values to be those one standard deviation above the mean. For discussion of specific values, we calculate probabilities using simulated draws of coefficients given their values and standard errors, thus capturing the underlying uncertainty of the coefficient estimates. We then calculate the mean probability or mean change in probability over 1,000 random draws of coefficients as applied to the scenario under discussion. Where helpful, we include parenthetical 95% confidence intervals.

We show the effects of varying state-level public opinion on the nominee, given different levels of the other predictors, in Figure 5. The graphs use point predictions from the logistic regressions, which closely resemble those calculated using simulations, but yield smoother plots. Each panel highlights a shift in a different predictor or set of predictors. Public opinion is on the x-axis in each panel, ranging from 35% to 95% support (the approximate range of the opinion data used). The light vertical lines show the range

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<sup>27</sup>Using model 3 allows us to consider the idiosyncratic justice effects but does lead to statistically insignificant differences for quality-based effects. We include such comparisons nonetheless for the sake of comparison to the magnitude of other effects.

from one standard deviation below mean opinion to one standard deviation above mean opinion. The predicted probability of voting yes is shown on the y-axis in each panel. Across curves, at a given level of opinion, we can compare the effect of changing the predictor noted in the panel description.

The solid line in the first panel (actually, in all panels in the top and bottom rows), show the predicted effects under baseline conditions. In the baseline setup, near average opinion, a one-point increase in constituent support implies a 2.2 (.7, .04) point increase in the probability of a yes vote. An opinion level of approximately 60% is needed to get the probability of a yes vote to 50%. A two-standard deviation swing centered at mean opinion implies an increase in vote probability from roughly 40% to 95%.

In this first panel, we also show the differential effects of low quality and high quality. At the baseline, shifting from low to high quality (technically, shifting from high lack of quality to low lack of quality) will increase the probability of a yes from 70% to 90%. For high-opinion nominees, quality has almost no effect, but for low opinion nominees, the difference in probability of a yes vote is roughly 30 points.

Quality levels also affect the impact of opinion. A unit shift in opinion (as always, near average opinion) has an impact of 2.9 (1.1, 4.7) points when quality is low, but only half that when quality is high, 1.4 (.3, 3.7) (this particular difference is not, however, significant). For a two-standard deviation shift in opinion, the impact is over 60 points when quality is low, and only about 40 points when quality is high. Thus we see that a high quality nominee is still vulnerable to public opinion, but somewhat less so than a low quality opinion. To put this another way, roughly 55% public support in a state gets a high quality nominee to a 50-50 chance of a yes vote from that state's senator. A low quality nominee needs roughly 65% public support to have the same chance.

The second panel (top right) shows that ideological distance between the nominee and the senator is of greater consequence than quality. A distant nominee needs 75% support to

have the same 50-50 chance as an ideologically closer nominee with 45% support—while it takes an additional 10 points of support to make up for low vs. high quality, it takes 30 points to make up for large vs. small ideological distance. Also, while low-opinion nominees are very vulnerable to ideological distance, the difference between the curves even at the right standard deviation line shows that even high-opinion nominees have to worry somewhat about ideology—over the typical range it means the difference between roughly a 74% chance of a yes vote and a near guarantee of support.

The effects of opinion over its typical range differ between near nominees and far nominees. When the senator and nominee are ideologically close (and of the opposite party, as in the baseline configuration), a swing from low opinion to high simply increases the probability of a yes vote from 83% to nearly 100%. For ideologically distant senators/nominees, the spread is from under 10% to over 70%. A unit change in opinion (at average opinion) increases the probability of a yes vote by .5 (.1, 1.4) points for low distance and by 3.1 (1.1, 4.9) points for high distance. (The difference between these effects of unit opinion change is significant.<sup>28</sup>) Thus, ideologically distant senators are very sensitive to public opinion, and average-distant senators are still sensitive, while ideologically compatible ones are effectively less so. To see a steep drop off in the probability of a yes vote from an ideologically compatible senator, a nominee has to drop below 60% support in the senator's home state, outside the typical range of opinion.

The third panel shows the predicted probabilities for same- and opposite-party senators (fixing ideological distance at the mean). Here we see that it is largely the opposition that winds up responding to public opinion—same-party senators are already largely in the bag, over the central range of opinion at least. A marginal unit of opinion (around average opinion) in the state of a same-party senator yields only a .3 (.1, 1.3) point gain in vote

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<sup>28</sup>Because of covariation one cannot simply compare the overlap in confidence intervals to assess statistical significance (Austin and Hux 2002). Rather, we specifically test the difference in differences.

probability, compared to a 2.2 (.7, 4.0) points for an opposition senator, a statistically significant difference. There is a sharp drop-off in same-party senator support only once the nominee is significantly unpopular in the state.

To put this another way, high-opinion nominees see little difference between same- and opposite-party senators (holding distance constant), but low-opinion nominees are very vulnerable (given the distance between the curves). We can also see that party has a meaningful effect by comparing the opinion level necessary for the president's fellow partisans to give him a 50-50 chance at a yes vote, roughly 45%, to that level of support necessary in an opposing senator's home state, over 60%.

The fourth panel shows that there is some (statistically insignificant) difference in the treatment of nominations by strong or weak presidents once we control for opinion on nominees, but not to the extent of partisanship or the other predictors. That said, for low opinion nominees, presidential strength would mean the difference between a predicted 40% chance of a yes vote and a predicted 60% chance, albeit with wide confidence intervals around this difference.

The fifth panel (bottom left) explores those differences in nominee outside those captured by the substantive predictors, as captured by the variance in intercept by nominee (if we were already capturing full variance across nominees, these random effects would tend towards zero).<sup>29</sup> A "good" nominee is one with a positive intercept shift, one standard deviation above zero; a "bad" nominee is one with a negative intercept shift, one standard deviation below zero. Both types would need to worry about opinion, but the slope is much steeper (in the central region) for a bad nominee. A high-opinion nominee might see little variation in vote given this (a bad nominee would still have nearly a 90% chance of a yes vote), but the difference for low-opinion nominees is much larger (20% vs. 67%).

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<sup>29</sup>There could include nominee gender, race, or religion effects, as well as more idiosyncratic features such as Bork's allegedly scary visage.

A good nominee might need around 55% public support in the state to get an even chance at a yes vote; a bad one would need around 70%.

The final panel compares the effects of aligning *all* predictors other than opinion in favor of the nominee (at 1 for dichotomous predictors; at one standard deviation above the mean for continuous predictors; and omitting a justice-specific intercept shift) or against the nominee (flipping these settings). This captures a nominee strongly positioned to get a yes vote from a particular senator as opposed to poorly positioned (or, to focus on the senator in question, a senator highly likely or unlikely to vote for the particular nominee). For nominees in an otherwise strong situation, opinion variance matters little. Public support in the state would have to be incredibly low to push the probability of a yes vote even as low as 90%. Otherwise disfavored nominees will need to rely on public support. Over the central range of opinion, it would mean the difference between perhaps a 5% chance of a yes vote and roughly a 65% chance of a yes vote. A high-opinion nominee sees a clear difference in the likelihood of senator support given all-low or all-high settings. For a low-opinion nominee, the difference in these situations is between a near guarantee of a no vote and a near guarantee of a yes vote.

## 6.1 Counterfactuals

One additional way to assess the importance of public opinion in real-world confirmation politics is to make counterfactual “predictions” of votes and of confirmation had the public felt differently about the nominees. We next ask three questions based on such counterfactuals.

**Should Bork blame the public?** As can be seen in Figure 1, Bork received far less public support for his confirmation than did Alito, who himself was below average in public support. What if Bork *had* received as much public support as Alito? We applied the

coefficients from Model 3 to predict votes for each of the senators who voted on Bork's confirmation, but using the state-by-state opinion estimates from Alito instead of from Bork (leaving all else the same). Bork received only 42 votes in his favor (given actual opinion on his nomination, we would have predicted 43). If he were as popular as Alito, however, with the state-by-state popularity of Alito, we predict that he would have received 57 votes and been confirmed.

Justice Alito's confirmation too seemed at risk, at least for a time. He eventually received 58 votes (we would have predicted 56), the same number of votes against Bork. We asked if Bork would have been confirmed if as popular as Alito—what about the reverse? With state-by-state opinion at Bork's levels, we would predict that Alito would still have received 53 votes. This is a smaller margin, to be sure, but still suggests that attempts by the Democrats to investigate Alito further and to shift the public's stance on his confirmation might have mattered little. Bork and Alito had similar "quality" levels and, on average, were roughly as compatible ideologically with the senators voting on their confirmations, but otherwise the situations were quite different. Alito faced a Senate with 12 fewer Democrats than did Bork and had a "strong" president on his side. Partisanship trumped the effects of opinion here—his nomination might have suffered a different fate if it had taken place after the Democrats took control of the Senate following the 2006 elections.

**Did the public confirm Justice Thomas?** Justice Thomas also faced a tough confirmation fight, eventually being confirmed with 52 votes (we would have predicted 51) after Anita Hill's allegations nearly derailed him. Thomas was more popular a nominee on average than was Bork, and a bit more popular than Alito. Did this make a difference in his confirmation vote? What if he had been as unpopular as Bork? Our prediction, applying Bork's state-by-state opinion level instead of his own, is that Thomas would have received

only 36 votes—a landslide vote against confirmation. Of course, with expected support from the public and therefore from the Senate so low, it seems likely that his nomination would have been withdrawn rather than fail by so wide a margin.

**Could Harriet Miers have won confirmation?** In October 2005, President Bush nominated Harriet Miers to replace Justice O'Connor. Three weeks later, he withdrew the nomination, after vocal opposition from members of his own party. By the time of the withdrawal, the public had already been polled on whether she should be confirmed. Using this data, we created estimates of state public opinion as we did for the nominees who went to a vote. We found that average state-level opinion was 50% in favor, among those with an opinion, ranging from a low of 42% support in Hawaii to 58% support in Nebraska. On average, she is tied with Bork, with less variation across states. Her Lack of quality score is .64, higher than any of our other nominees. Neither her quality nor opinion levels would be good omens for a successful confirmation, as compared to, say, Alito. On the other hand, because she was more ideologically moderate than Alito, her average ideological distance from senators (.14) was slightly less than the average across our nominees (.18) and clearly less than the average for Alito (.21) (it places her on par with Souter or Ruth Ginsburg for average ideological compatibility with the senators).<sup>30</sup> This factor would push in her favor in comparison to Alito (who, again, wound up with 58 votes).

We start by temporarily setting aside any idiosyncratic features of her nomination and assume she was otherwise an average nominee (nominee effect set to zero). Under this assumption, our best prediction is that she would have won 56 votes. This suggests in part that the problem with the Miers nomination was not the usual one—the inability to grab sufficient votes from the opposition party—but the unusually loud criticism among

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<sup>30</sup>Quality and ideology scores were supplied by Jeffrey Segal using the same method as for other nominees.

Republicans and conservative activists. If we take into account Miers's other weaknesses and poor performances in her dealings with the senators (e.g., Greenburg 2007, 278-281), by attributing to her the same negative nominee effect as Alito, then our best prediction would be that she would only have received 39 votes.

What part of this is due to public opinion? To assess the effect of public opinion on confirmation voting, we next predicted senator votes assuming the public had supported Miers to the same extent they did Alito (maintaining the negative nominee effect). We would then predict she would sail through confirmation with 59 votes.

We plot these three scenarios in Figure 6, with the probability of a positive vote on the vertical axes, and either opinion in the senator's state on the x-axis (left panels), or the senator's ideology score (right panels). Within the left panels, Democrats clump at the bottom and Republicans clump at the top. Within the right panels, Democrats clump at the left and Republicans clump at the right. In the first scenario, top row, assuming that Miers was otherwise an average nominee, it largely comes down to a party vote. But, the second row of panels shows that Miers idiosyncratic flaws would have killed almost any chance of getting the votes of Democratic senators and would have put the votes of at least a dozen Republicans into doubt. The third row of panels show how public support could have saved Miers yet, providing her with not only with a firm foundation among Republicans, but pulling at least a handful of Democrats in her favor as well.

These hypotheticals help to illustrate the pivotal role of public opinion in confirmation politics. Shifts in public support can mean the difference between a Justice Bork and a Justice Kennedy.

## 7 Conclusion

The public's influence over justices *after* confirmation may be in doubt, but influence over confirmation is not in doubt. This linkage ties the Court back to majority will.

Constituent opinion is a strong and robust predictor of a senator's roll call vote even after controlling for the strongest known influences on confirmation votes. This finding establishes a strong and systematic link between constituent opinion and voting on Supreme Court nominees. Even high quality nominees and those proffered by strong presidents are vulnerable to constituent influence. On the other hand, constituent opinion plays a larger role in the vote calculus of those positioned to oppose the nominee, whether for partisan or ideological reasons, than for those who will otherwise be likely to support the nominee, and for weaker nominees more generally.

Senators do respond to other forces besides opinion, most notably their own ideological preferences and partisanship. Our results thus speak to larger debates about the tradeoffs between these forces. First, we find clear evidence of party effects, consistent with partisan theories of legislative organization and behavior (Cox and McCubbins 1993, Aldrich 1995, Cox and McCubbins 2005). This suggests that senators balance party pressure with direct constituent pressure, or that the long-term electoral calculus pushes towards maintenance of the party label through confirmation or rejection of the president's nominee (for co-partisans or the opposition respectively).

Second, that personal preferences still matter suggests that senators are willing to partially "shirk" the desires of their constituents, in pursuit of their own ideological goals.<sup>31</sup> Our results speak to the empirical literature on responsiveness, dating back to Miller and Stokes (1963) and to more recent work (e.g., Jacobs and Shapiro 2000, Erikson, Mackuen and Stimson 2002, Bafumi and Herron 2007). Overall, the trend of the literature, to paint

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<sup>31</sup>Of course, Common Space scores might reflect diffuse constituent ideology at least in part as well.

broadly, is that democracy works and policy choices are responsive though imperfectly so. Whether shirking happens in any particular voting context is an empirical question. One advantage of our approach is that we were able to assess representation in a concrete set of votes, in contrast to the aggregate responsiveness which is the more common focus in the existing literature.

Future work could: (1) dig deeper into what drives public opinion on Supreme Court nominees, combining our state- or individual-level estimates with threads of the existing literature; (2) study how presidents can increase public support for their nominees and whether it works in the context of other factors (building on Johnson and Roberts (2004)); (3) study whether senators respond more to their fellow partisans or the median voter in casting their vote (see, e.g., Clinton 2006); and (4) study the interaction of the public and organized interests in pressuring the votes of senators (see Caldeira and Wright 1998).

We would also note that our analysis shows that there remains residual idiosyncratic variation across nominees. (If we truly captured all across-nominee variation, we would expect the random effects by nominee to shrink to zero.) This suggests that there remains further digging to do as to why some nominees do better or worse than captured by any current model (those of this paper or those of others). State-level public opinion explains a significant portion of this, but what else separates “good” nominees from “bad”?

Our findings are particularly timely given the close split on the Court today between liberal and conservative justices and the strong possibility that the next president will have the opportunity to name at least one justice to the the Court. What do our results suggest for future confirmation battles? We speculate as follows. If the 2008 elections lead to President Obama alongside a Democratic Senate, then we might not expect public opinion to play a large role, in that the votes of Democratic senators would largely be locked up. However, if they do not win 60 seats, and still need to worry about a filibuster, then public opinion in the home states of the Republicans needed to reach 60 votes would be crucial.

Indeed, this could force Obama to moderate his choice so as to reduce ideological distance to these needed votes.

On the other hand, if a President McCain is facing a Democratic Senate, then public opinion on the nominees would play a much larger role. He would be forced to make more moderate choices (reducing ideological differences between the needed Democratic votes and the nominee), pick among potential nominees more likely to be popular, or invest heavily in public relations to push his preferred choice through the Senate.

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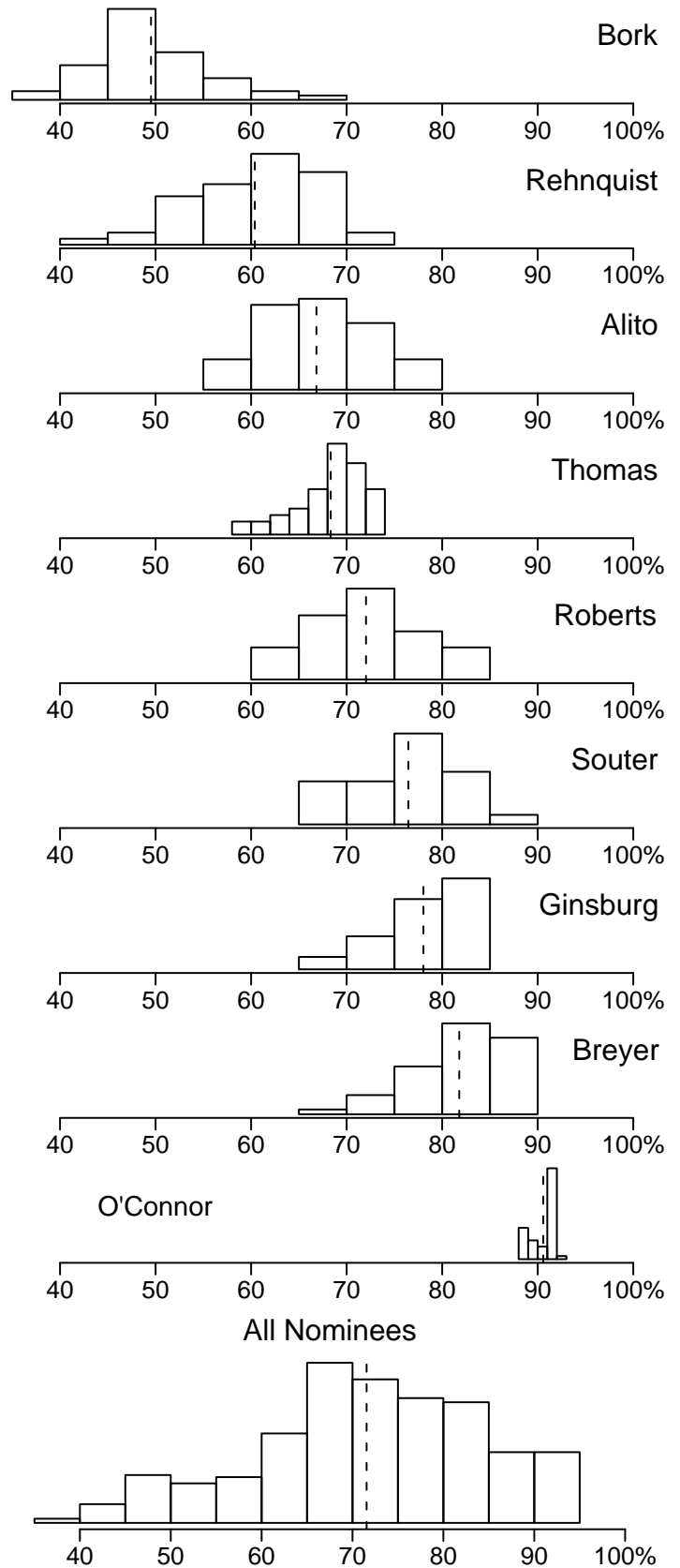


Figure 1: *The distribution of state public support, by nominee. The first nine histograms depict the distribution of state support for the given nominee, while the last histogram depicts the distribution for all nominees combined. The dashed vertical lines indicate mean levels of state support. Nominees are ordered by increasing mean support.*

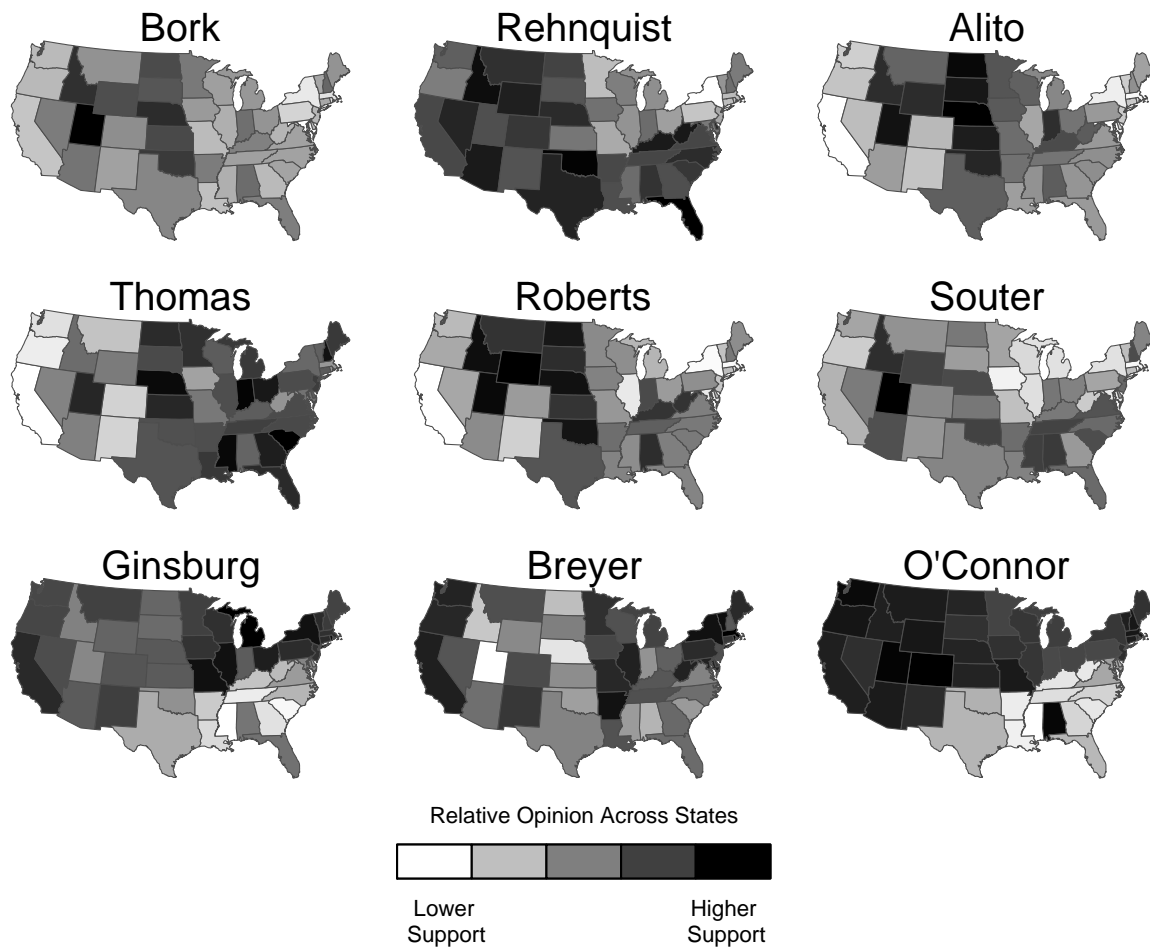


Figure 2: Map of state public support, by nominee. For each map, lighter colors depict less support, darker colors more support. The scale of opinion is defined separately for each nominee, and thus state support cannot be compared across nominees.

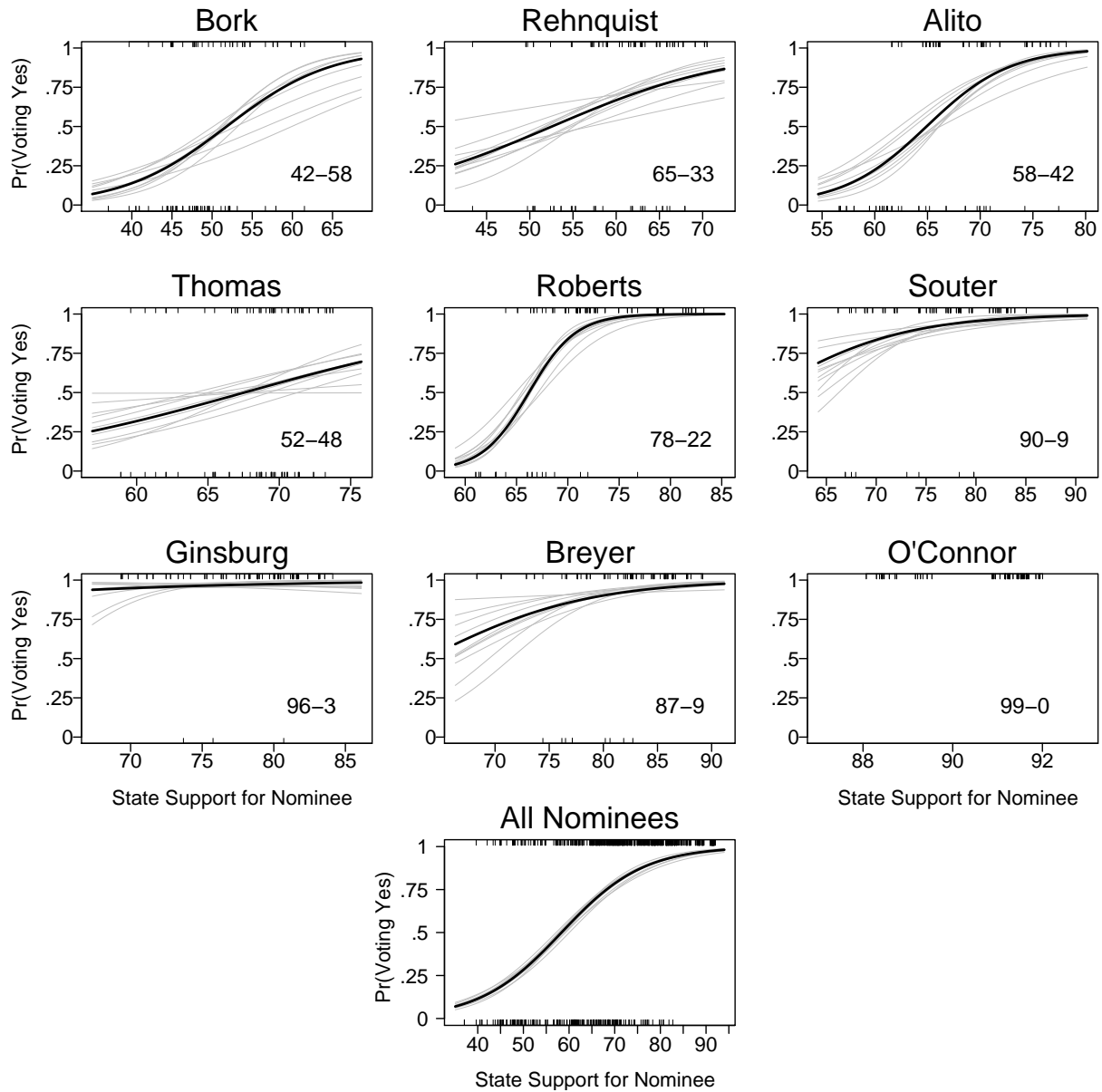


Figure 3: Correlation between state opinion and roll call voting. For each nominee, the black line depicts the estimated logit curve from regressing senators' votes on state public opinion. Light grey lines depict uncertainty in the estimates, and are derived by simulating the curve based on the parameter estimates and standard errors from each logit. Hash marks indicate votes of approval ("1") and rejection ("0") of nominees, while the numbers in the right-hand corner of each plot denote the overall vote tally by the Senate. The bottom plot pools all nominees together.

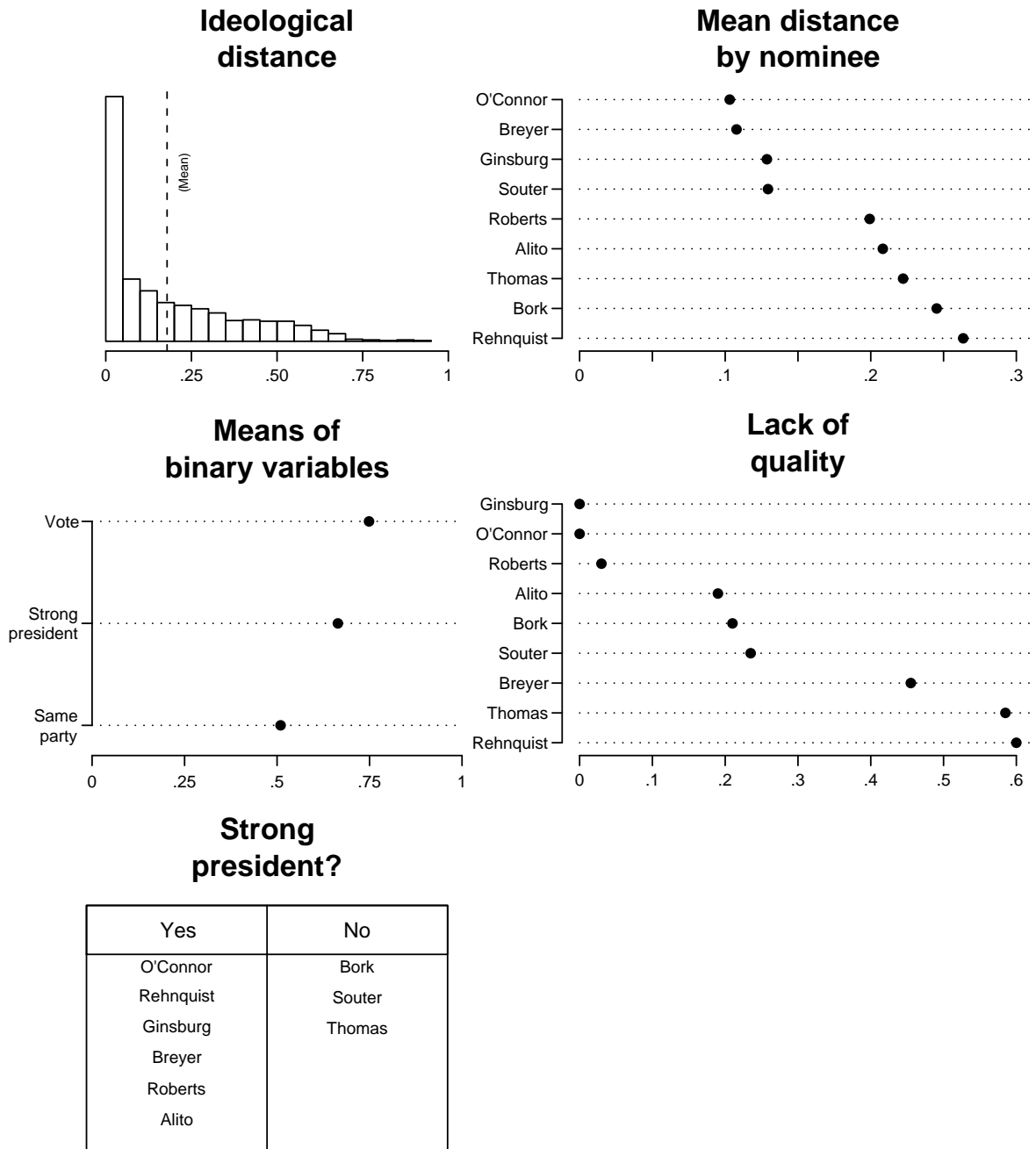


Figure 4: *Descriptive statistics*

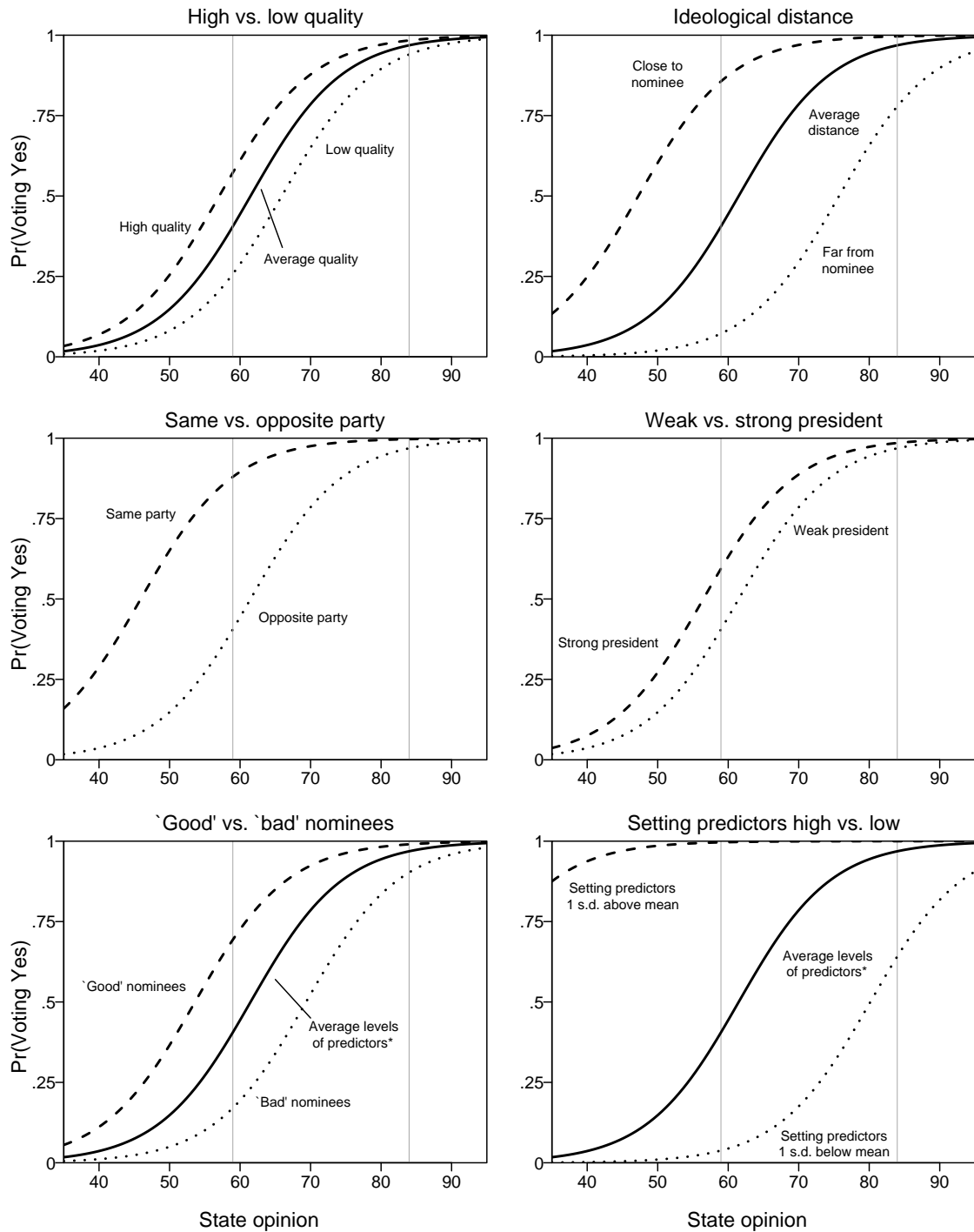
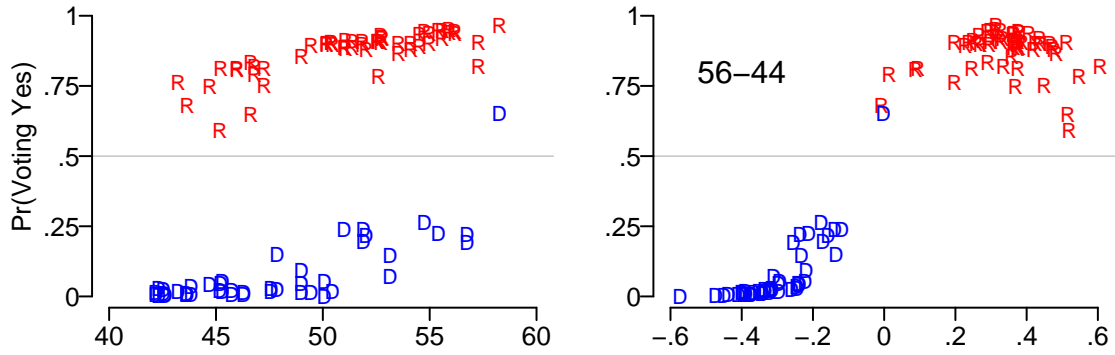
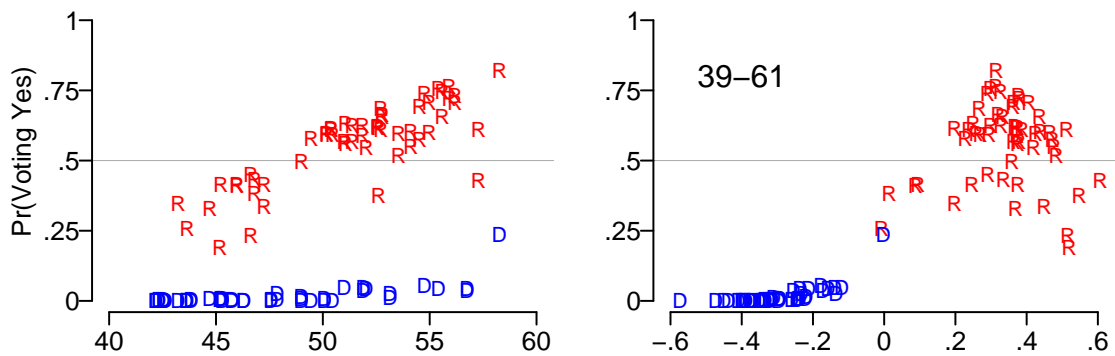


Figure 5: *The predicted effects of opinion on roll call voting.* Each panel shows the predicted probability of a senator voting yes on confirmation, across the range of state-level public opinion, for different levels of the other predictors. All predictions derived from Model 3 in Table 1. The default value of each continuous variable is its mean. “Low” values are one standard deviation below this; “high” values are one standard deviation above. We assume unless otherwise noted that the senator is of the opposite party, that the president is weak, and that the nominee is otherwise average (random effect set to zero). Vertical lines show the range of public opinion between low opinion (one standard deviation below the mean) and high opinion (one standard deviation above).

**Were Miers otherwise an average nominee ...**



**But given her weaknesses ...**



**But if she had been as popular as Alito ...**

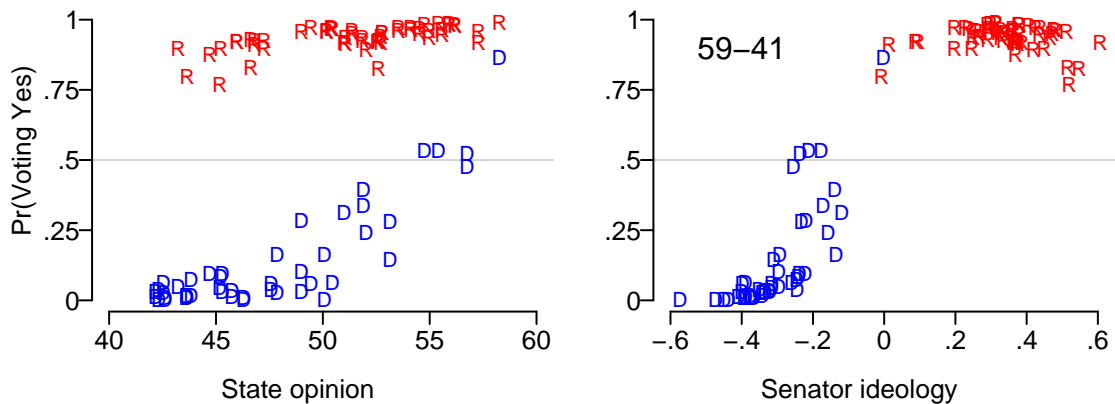


Figure 6: Miers predictions. We predict votes for each senator on the Miers nomination under three scenarios (one in each row of panels). The panels on the left show the probability of a yes vote with senators plotted by public support for Miers in their home states. The panels on the right plot them by their Common Space ideology score. Republicans and Democrats are indicated with an R or a D, respectively.

	Logit		MLM		Random Effects		
	(1)	(2)	(3)	(4)	(3)	(4)	
Opinion	–	3.2* (.4)	3.8* (.7)	3.7* (.8)	Rehnquist	1.9* (.4)	1.8* (.4)
Lack of quality	-1.1* (.3)	-.9* (.3)	-1.4 (1.0)	-1.4 (1.0)	Ginsburg	.8 (.7)	.8 (.6)
Ideological distance	-4.7* (.4)	-3.6* (.5)	-4.3* (.6)	-4.3* (.6)	Souter	.4 (.4)	.4 (.4)
Same party	1.1* (.4)	2.5* (.5)	2.4* (.6)	2.4* (.6)	Roberts	.3 (.4)	.3 (.4)
Strong president	1.5* (.3)	.9* (.3)	.8 (1.0)	.8 (1.0)	O'Connor	.1 (1.5)	.1 (1.1)
Reelection	–	–	–	.2 (.4)	Bork	-.1 (.4)	-.1 (.4)
Opinion $\times$ reelection				.3 (.8)	Thomas	-.3 (.4)	-.4 (.4)
Intercept	.8* (.2)	1.1* (.3)	1.5 (.8)	1.5 (.8)	Breyer	-1.5* (.4)	-1.5 (.4)
% Correctly classified	91	92	93	93	Alito	-1.8* (.5)	-1.8* (.5)
% Reduction in error	63	68	73	73			
AIC	419	348	319	322			

Table 1: *Explaining roll call voting. The first two models are regular logistic regressions. The third and fourth are multilevel models with varying intercepts for each nominee, the estimates of which are presented in the last two columns. The fourth model includes time-to-reelection. For all models, \* indicates  $p < .05$ . All continuous predictors in the models have been standardized by centering and dividing by two standard deviations—as a result, the coefficients for the continuous and binary predictors are comparable on roughly the same scale.*

State	O'Connor	Rehnquist	Bork	Thomas	Souter	Ginsburg	Breyer	Roberts	Alito
Alaska	92	65	54	68	84	77	74	79	70
Alabama	88	61	49	70	81	69	78	76	70
Arkansas	88	63	52	69	79	72	88	74	69
Arizona	92	68	53	67	82	79	80	71	65
California	92	63	44	60	73	82	87	61	57
Colorado	92	65	50	62	77	79	83	70	63
Connecticut	92	50	47	69	72	82	85	67	61
Delaware	89	66	45	69	76	75	84	68	60
Florida	89	71	52	71	80	78	80	72	65
Georgia	89	62	45	72	75	71	81	72	66
Hawaii	92	62	44	59	68	80	86	67	60
Iowa	91	58	49	65	67	81	83	72	71
Idaho	92	69	61	68	85	77	73	82	74
Illinois	91	55	46	69	69	83	86	63	64
Indiana	91	59	54	74	78	79	77	77	74
Kansas	91	58	58	72	78	79	78	79	76
Kentucky	88	68	52	69	78	73	82	79	72
Louisiana	88	62	44	71	77	72	82	72	65
Massachusetts	92	51	40	65	67	81	89	62	57
Maryland	90	58	37	67	68	76	86	63	57
Maine	91	57	50	71	77	80	86	71	65
Michigan	91	55	49	71	69	84	84	68	67
Minnesota	91	50	53	71	74	80	85	71	71
Missouri	92	52	45	67	72	83	86	70	69
Mississippi	88	59	46	73	84	69	77	71	66
Montana	92	65	50	63	76	80	83	79	70
North Carolina	89	66	48	70	80	74	80	73	66
North Dakota	91	63	58	71	78	78	74	81	77
Nebraska	91	66	62	73	82	79	71	82	78
New Hampshire	92	59	55	73	82	81	82	73	66
New Jersey	91	53	45	70	80	81	83	66	61
New Mexico	91	62	48	62	76	80	85	65	62
Nevada	91	67	52	66	78	80	82	69	62
New York	91	43	40	68	69	83	88	61	58
Ohio	91	54	49	72	77	82	81	70	68
Oklahoma	89	70	60	69	83	76	76	82	75
Oregon	92	57	45	61	71	80	86	69	62
Pennsylvania	91	50	42	70	74	82	86	71	65
Rhode Island	91	50	41	65	66	84	89	64	59
South Carolina	88	65	48	74	82	70	77	73	66
South Dakota	91	61	57	70	75	78	79	79	76
Tennessee	89	63	48	70	83	71	83	75	68
Texas	89	67	51	69	77	74	78	76	70
Utah	92	62	67	72	89	76	68	82	77
Virginia	89	63	48	70	82	75	78	72	65
Vermont	92	55	48	68	72	82	88	66	61
Washington	92	60	45	61	74	80	86	67	61
Wisconsin	91	57	48	69	70	81	83	71	70
West Virginia	88	68	46	66	71	73	86	79	70
Wyoming	92	67	58	67	83	78	78	83	74

Table 2: *Estimates of state opinion, by nominee.*

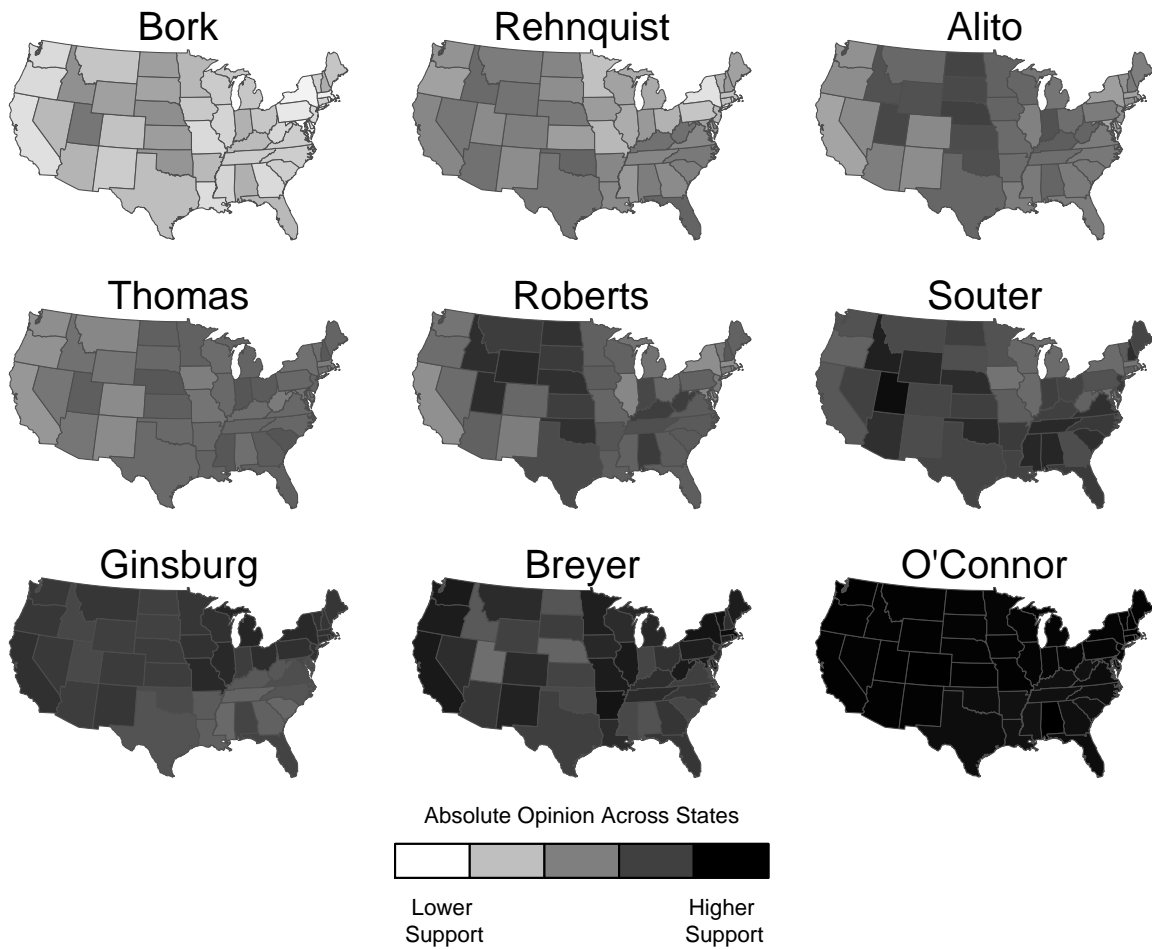


Figure A-1: Map of state public support, by nominee. In contrast to Figure 2, these maps are all on the same scale, and thus state support can be compared across nominees.

Nominee	Firm	Date	Respondents	Question
O'Connor	NBC	7/13/1981	1,599	President Reagan has nominated a woman, Sandra D. O'Connor, to fill a vacancy on the U.S. Supreme Court. Do you approve or disapprove of his choice, or don't you know enough about it to have an opinion?
Rehnquist	ABC	6/19/1986	1,505	Do you approve or disapprove of Rehnquist's nomination as chief justice or is that something you don't have an opinion on?
Rehnquist	Roper	8/16/1986	1,992	On this card there is a scale of feelings—absolutely delighted, pleased, somewhat satisfied, no real feelings one way or the other, somewhat dissatisfied, angry, and boiling mad.) Using this scale, how would you describe your feelings when you think about...the nomination of William Rehnquist as Chief Justice of The Supreme Court?
Bork	Gallup	8/24/1987	1,009	Would you like to see the Senate vote in favor of Bork serving on the U.S. Supreme Court, or not?
Bork	CBS	9/9/1987	839	Should the Senate vote to confirm Robert Bork as a justice of the U.S. Supreme Court, or vote against Bork, or can't you say?
Bork	ABC	9/17/1987	2,116	Do you approve or disapprove of Bork's nomination to the Supreme Court?
Bork	CBS	9/21/1987	836	Should the Senate vote to confirm Robert Bork as a justice of the U.S. Supreme Court, or vote against Bork, or can't you say?
Bork	ABC	10/13/1987	1,006	Do you approve or disapprove of Bork's nomination to the Supreme Court?
Souter	ABC	7/24/1990	778	Do you approve or disapprove of (David) Souter's nomination to the Supreme Court? Is that approve/disapprove strongly or not strongly?
Souter	CBS	8/16/1990	1,422	Is your opinion of Supreme Court nominee David Souter favorable, not favorable, undecided, or haven't you heard enough about David Souter yet to have an opinion?
Thomas	Time	10/10/1991	500	From what you know, do you favor or oppose Thomas's nomination to the Supreme Court?
Thomas	LA Times	10/12/1991	1,264	Do you think the U.S. (United States) Senate should vote to confirm Judge Clarence Thomas as a Supreme Court Justice or should the Senate reject Thomas' nomination to the court?
Thomas	CBS	10/13/1991	501	Should the Senate vote to confirm Clarence Thomas as a Justice of the U.S. (United States) Supreme Court, or vote against Thomas, or can't you say?
Thomas	CBS	10/14/1991	497	Should the Senate vote to confirm Clarence Thomas as a Justice of the U.S. (United States) Supreme Court, or vote against Thomas, or can't you say?
Thomas	Gallup	10/14/1991	778	Would you like to see the Senate vote in favor of Clarence Thomas serving on the Supreme Court, or not?
Ginsburg	ABC	6/18/1993	1,003	Would you like to see the Senate vote in favor of—or against—Ginsburg serving on the Supreme Court?
Ginsburg	Gallup	8/6/1993	1,216	Do you approve or disapprove of Ruth Bader Ginsburg's nomination to the Supreme Court?

Table A-1: Polls used to construct estimates of state opinion (continued on next page)

<b>Nominee</b>	<b>Firm</b>	<b>Date</b>	<b>Respondents</b>	<b>Question</b>
Breyer	ABC	5/12/1994	1,524	Do you approve or disapprove of Breyer's nomination to the Supreme Court?
Roberts	CBS	9/6/2005	725	Should the Senate vote to confirm John Roberts as Chief Justice of the U.S. (United States) Supreme Court, or vote against Roberts, or can't you say?
Roberts	Pew	9/6/2005	1,000	From what you've heard or read, do you think the U.S. (United States) Senate should or should not confirm John Roberts as the next Chief Justice of the Supreme Court?
Roberts	ABC	9/8/2005	1,201	Do you think the U.S. Senate should or should not confirm Roberts' nomination as Chief Justice?
Roberts	CNN	9/8/2005	1,005	Would you like to see the Senate vote in favor of Roberts serving as chief justice on the Supreme Court, or not?
Roberts	CNN	9/8/2005	262	Would you like to see the Senate vote in favor of Roberts serving as chief justice on the Supreme Court, or not?
Roberts	CBS	9/9/2005	1,167	Should the Senate vote to confirm John Roberts as Chief Justice of the U.S. (United States) Supreme Court, or vote against John Roberts, or can't you say?
Roberts	NBC	9/9/2005	1,013	Do you strongly support, somewhat support, somewhat oppose, or strongly oppose John Roberts' serving as the next Chief Justice of the Supreme Court, or do you not know enough about him to say?
Roberts	Gallup	9/16/2005	818	As you may know, John Roberts is a federal judge who has been nominated to serve as chief justice on the Supreme Court. Would you like to see the Senate vote in favor of Roberts serving as chief justice on the Supreme Court, or not?
Alito	Pew	1/4/2006	1,503	From what you've seen and heard so far, do you think the Senate should or should not confirm Samuel Alito to the Supreme Court?
Alito	ABC	1/5/2006	1,001	Do you think the U.S. Senate should or should not confirm Alito's nomination to the Supreme Court?
Alito	CBS	1/5/2006	1,151	Should the Senate vote to confirm Samuel Alito as a Justice of the U.S. (United States) Supreme Court, or vote against Alito, or can't you say?
Alito	Gallup	1/6/2006	1,003	Would you like to see the Senate vote in favor of Alito serving on the Supreme Court, or not?
Alito	Gallup	1/20/2006	1,006	As you may know, Samuel Alito is the federal judge nominated to serve on the Supreme Court. Would you like to see the Senate vote in favor of Alito serving on the Supreme Court, or not?
Alito	CBS	1/20/2006	1,229	Should the Senate vote to confirm Samuel Alito as a Justice of the U.S. Supreme Court, or vote against Alito, or can't you say?
Alito	NBC	1/26/2006	1,011	Do you strongly support, somewhat support, somewhat oppose, or strongly oppose Sam Alito's serving as a justice on the Supreme Court, or do you not know enough about him to say?