

# Politicized Battles: How Vacancies and Partisanship Influence Support for the Supreme Court

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## Abstract

Supreme Court vacancies are now characterized by great partisan efforts to confirm—or impede—the nomination. Amid a politicized vacancy before the 2020 election, there was cause to question the conclusion that these vacancies do not harm the judiciary in the public’s eyes. We utilize panel data collected before and after Justice Ginsburg’s death to investigate the effects of the vacancy and partisan posturing to fill it. We find that the battle over the vacancy yielded decreases in diffuse support among Democrats, particularly among those who read a story about Senate Republicans’ willingness to fill an election-year vacancy after refusing to in 2016. Support for federal judicial elections decreased across survey waves, but only among certain subsets of respondents. Finally, belief that one’s preferred 2020 candidate would nominate the next justice significantly influenced support for curbing. Elected branch politics appear capable of influencing the mass public’s level of support for the Court.

## Keywords

Supreme Court, legitimacy, Court-curbing, vacancies, confirmations

When then-Senate Majority Leader Mitch McConnell stymied President Barack Obama’s nomination of Merrick Garland to the Supreme Court in 2016, many commentators feared for the legitimacy of the institution (e.g., Millhiser, 2016). Even the Chief Justice expressed consternation over the Court as a partisan football (Greenhouse, 2017). Despite the open politicking to fill Justice Scalia’s seat, institutional legitimacy seemed to remain resolute. In fact, the changes to legitimacy appear to have been *increases* in positive evaluations of the Court, largely because legitimizing symbols of the judiciary appear to protect it from external politicization (Armaly, 2018b). While the Supreme Court emerged from the Garland–Gorsuch situation unblemished, extreme politicization of the judiciary was not isolated to the Scalia vacancy. The very next Court opening—Justice Kennedy’s retirement—was followed by the intense, controversial, and legitimacy-influencing confirmation of Brett Kavanaugh (Carrington & French, Forthcoming). And, in the midst of one of the most polarizing presidential elections in American history, Justice Ginsburg’s death in September 2020 demonstrated Senate Republicans’ eagerness to schedule hearings for her replacement, despite having suggested 4 years prior that nominations in an election year are inappropriate. In light of the politicizing of the staffing of the Court, the question of whether harm may befall the judiciary when the elected

branches politicize the Court during a vacancy is far from settled.

In this paper, we utilize panel data collected 2 weeks before and 1 week after Ginsburg’s death (though *before* Barrett’s nomination) to determine whether, and how, an extremely politicized and polarized nomination can influence mass attitudes toward the Supreme Court. We randomize exposure to information prominent in the news in the second wave of our panel study to ask whether Ginsburg’s death and the subsequent vacancy influence perceptions of Supreme Court legitimacy and support for a specific variant of broad Court-curbing (see Bartels & Johnston, 2020): Federal judicial elections (see Davis, 2005). Additionally, we consider how electoral support in the 2020 election, as well as expectations regarding the filling of the Supreme Court vacancy, bears on attitudes toward the institution.

We find that individuals reacted to the vacancy in terms of how they benefited from it, politically. Specifically, political

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maneuvering over judicial staffing seems capable of impacting the Court in the eyes of those who stand to lose on policy grounds—in this case, Democrats. Democratic respondents significantly decreased diffuse support for the judiciary; Republican respondents remain supportive. Moreover, we find that support for broad Court-curbing (i.e., for judicial elections) *decreased*, though Democrats primed to consider the Senate’s reversal on election year nominations seem more favorable toward judicial elections. Finally, we find that the belief that one’s preferred 2020 presidential candidate will be the one to name Ginsburg’s successor is associated with significantly less curbing support and greater perceived legitimacy, indicating that expectations regarding the electoral process may underlie evaluations of the judiciary. Altogether, while we do not argue that levels of support are now fundamentally different than in days past,<sup>1</sup> we find that partisan politics that bear on the Court impact views of the institution (at least in the short term).

We believe our results are important for several reasons. While, as a function of using a convenience sample, we cannot generalize our findings to the public writ large, the panel nature of our data do allow us to more accurately consider what aspects of future Court vacancies (and the political maneuvering used to fill them) will prove influential at the individual level (Clifford et al., 2021). Indeed, very few studies have utilized a two-wave panel design to examine how these important political events alter individual’s views of the Court (though see Armaly, 2018b; Gibson and Caldeira, 2009b), especially during times of heightened polarization. Thus, we argue that any data that can be brought to bear on such questions is helpful, especially when describing causal mechanisms. While we cannot say with certainty that the public will respond similarly to future vacancies, we nevertheless suspect the mechanism we uncover will be useful for vacancies to come given the increasingly contentious and politicized nature of these events (Cameron et al., 2013; Farganis & Wedeking, 2014).

Additionally, this paper examines the politicization of the Supreme Court when it is simply an innocent bystander of the politics of another branch. Ample research examines the Court’s politicization through the justices’ decision-making and actions. For instance, the increase in one vote majorities or split decisions (Kuhn, 2012), dissenting opinions (Bryan & Ringsmuth, 2016; Salamone, 2013), and ruling on controversial issues (Hoekstra & Segal, 1996; Stoutenborough et al., 2006) all play a role in public evaluations. So, too, has attention been paid to the ability of the other branches of government to politicize the Court in the eyes of the public. Some have examined the president and Members of Congress publicly criticizing the Court (Armaly, 2020b) or its specific decisions (Collins Jr & Eshbaugh-Soha, 2020). However, the circumstances we examine here lack any Court action or any specific criticism of the Court or its justices. Instead, we are investigating the effects of a (once) routine element of judicial staffing: A justice departed the bench, which resulted in a

flurry of political maneuvering and rhetoric that may have influenced attitudes toward the institution. More simply, a vacancy is an example of when the Court is not an actor. We wish to inquire about the causal mechanisms that underlie reactions to external politicization of the Supreme Court for an event—a vacancy—that will certainly occur again.

## Winners, Losers, and Public Support for the Judiciary

While once a routine political affair, nominations to the Supreme Court are now fairly contentious events (Cameron et al., 2013; Farganis & Wedeking, 2014). Nominee–senator ideological proximity has supplanted nominee qualification as the predominant predictor of a senator’s “yea” vote (Epstein et al., 2006). Margins of victory were once large and bipartisan, but now fall along party lines. The way senators interact with nominees is now predicated on partisanship (Boyd et al., 2018; Schoenherr et al., 2020). There is some evidence that recent nomination battles have weakened and polarized mass support for the judiciary (Carrington & French, Forthcoming; Krewson & Schroedel, 2020). And, as Rogowski and Stone (2019) show, political rhetoric on nominations polarizes views of the judiciary. Yet, despite the increasingly contentious staffing of the Supreme Court, the American public has remained fairly supportive of the judiciary (Nelson & Tucker, 2021). Even when there is cause to be wary of the Court because of unfavorable decisions (Christenson & Glick, 2015; Zilis, 2018), or negative statements by political figures (Armaly, 2018a; Nelson & Gibson, 2019), disapproval with the institution can dissipate (Nelson & Tucker, 2021).

Positivity bias is the predominant theory used to explain this maintained support (Gibson and Caldeira, 2009a, 2009b). It holds that Americans are predisposed to support the Supreme Court and that positive attitudes are frequently buttressed by judicial symbols. Most often, individuals engage with the judiciary in the presence of symbols—like robes, the dais on which the justices sit, and even legal precedent in which their decisions are couched—that remind them the Court is (at least officially) apolitical (Gibson et al., 2014). Importantly, these symbols bolster support even in the face of politicization of the Supreme Court during a nomination (Armaly, 2018b). These evaluations of the Court as legal, apolitical, and principled are important during vacancies. Individuals tend to support nominees they perceive to be “judicious” (Gibson and Caldeira, 2009b).

Yet, in terms of public image, the Supreme Court is not the same institution it was in the 20th and early-21st centuries. It is now treated much more like the elected branches by the media (Salamone, 2018; Solberg & Waltenburg, 2014; Solberg, 2017). Elite commentary on the Court reflects clear partisan content (Krewson et al., 2018). Such media and elite narratives underlie the degree of support the mass public has

for the institution (Nelson & Gibson, 2019; Ramirez, 2008). And while perceptions of judiciousness may still matter in certain contexts (Krewson & Schroedel, 2020), the “genie is out of the bottle” with respect to nominations. Court staffing offers a unique opportunity to consider public attitudes in the face of a controversy not brought on by the Court itself, and to estimate the causal influence of the nomination battles which have become commonplace.

Despite the stronghold of positivity bias (Gibson and Caldeira, 2009a), we anticipate that the behavior of the elected branches (in particular, Republicans in the Senate) in the years preceding the 2020 vacancy may have altered public attitudes toward the judiciary (see Krewson & Schroedel, 2020; Rogowski & Stone, 2019). Although, historically speaking, ideological and partisan polarization have spared the Supreme Court (Gibson, 2007), and even controversial decisions perceived to aid one political group have not left the Court bereft of support (Gibson, Caldeira and Spence, 2003b), increasing politicization creates pathways to harm the institution’s public support in the long run (e.g., Bartels & Johnston, 2020; Hasen, 2019). For instance, Armaly and Enders (forthcoming) show that affective polarization—or divergent reactions to political in- and out-groups, like parties—is associated with lower levels of diffuse support for the Court, and causally precedes specific support. The repeated controversies regarding Garland, Gorsuch, Kavanaugh, Ginsburg, and Barrett in short order may allow individuals to meaningfully connect contentious, everyday politics to the judiciary. Moreover, simply because certain evaluations were once non- or bipartisan does not guarantee that they will stay that way in perpetuity. Hetherington and Rudolph (2015) find, for example, that trust in the president was once, but is no longer, an evaluation of the man and his performance, rather than his partisanship.

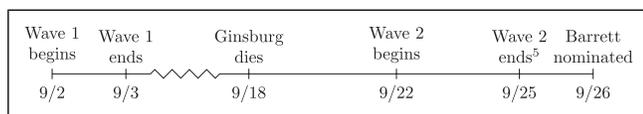
A similar phenomenon may have occurred with the Supreme Court. Consider volatile confirmation hearings (Cameron et al., 2013; Collins & Ringhand, 2016; Schoenherr et al., 2020), and media coverage that (A) increasingly treats the Court like the elected branches (Hitt & Searles, 2018; Fogarty et al., 2020) and (B) prefers to cover dissensus over collegiality (Bryan & Ringsmuth, 2016; Denison et al., 2020). Also, recall recent hearings that include the use of the so-called “nuclear option,” and McConnell’s about-face on whether nominations should occur during presidential election years.<sup>2</sup> In the eyes of the mass public, these instances may allow individuals to better connect the Court to existing predispositions and preferences regarding electoral politics (Bartels & Johnston, 2020; Haglin et al. Forthcoming). They may allow individuals to recognize that staffing the Court is less about principle and more about power and political gains. It may also allow individuals to recognize that they are “winners” or “losers” of the vacancy—as they recognize with Court decisions (Nicholson & Hansford, 2014; Zilis, 2021)—and react accordingly. Importantly, the narrative that these actions were

delegitimizing the Court was not without support in the media (e.g., Nichols, 2020; Pesca, 2020; Ziegler, 2020), suggesting many individuals were likely exposed to this information.

In light of this, we argue that the vacancy created by Justice Ginsburg’s death and the fight to fill it will influence diffuse support for the Court, as well as public support for curbing the Court (specifically, support for judicial elections) (Davis, 2005). Traditionally, diffuse support (or legitimacy) is considered one’s belief that the institution can make decisions for the country and the unwillingness to fundamentally alter it (Gibson & Nelson, 2014). Recent literature has attempted to offer more conceptual clarity to the question of Court support, and instead promotes asking about more specific, tangible instantiations of willingness to broadly curb the Court (Badas, 2019; Bartels & Johnston, 2020). This refers to support for concrete actions that reduce the Court’s power and independence in an enduring way. We consider both of these approaches to understanding support for the Supreme Court, operationalizing both diffuse support and broad Court-curbing.

In order to appropriately hypothesize about the effects of the vacancy on both forms of support, we must first recognize that political attachments influence attitudes toward the judiciary (e.g., Armaly, 2018a; Nicholson & Hansford, 2014). In particular, policy “winners” are more supportive of the institution (Zilis, 2018, 2021), even amid evidence that winner status may be ill-gotten (Armaly, 2018a). We have little reason to expect that reactions based on winner or loser status and a willingness to overlook norm violations fail to extend beyond specific decisions, and will apply to staffing the Court in a similar fashion. Indeed, individuals are willing to alter the independence of the institution when their preferred leaders propose the changes (Clark & Kastellec, 2015). Thus, we expect heterogeneity across partisanship in response to the 2020 vacancy. Specifically, we hypothesize that Republicans will remain diffusely supportive and unchanging in support for curbing upon Ginsburg’s death. Democrats, on the other hand, may alter levels of both diffuse support and support for curbing. Because we (1) consider both diffuse support and support for Court-curbing and (2) randomly expose individuals to different news stories prominent at the time of the survey, we more carefully hypothesize on expected relationships after describing our surveys, data, and variables.

Finally, some may argue that if members of the mass public diminish their level of support for the judiciary as a result of elected branch politics, any effects we uncover merely reflect “guilt by association” for the Court, and we should therefore be wary to over-interpret the causal effects of politicized vacancies. We generally agree with the guilt by association proposition, but argue that such things are at least as concerning as politicized reactions to the Court’s own actions. We believe it is more troubling for attitudes toward the Court to waiver at no fault of the institution itself, relative to the justices actually doing something to merit discontent. First and foremost, classic conceptions of institutional



**Figure 1.** Timeline of data collection and real-world events.

legitimacy suggest support should be institution-specific; a change in attitudes as a result of association runs counter to this point of view. Second, the Court does not have the mechanism to “fix” its associative guilt, meaning that any damage done in the eyes of the public may persist in the absence of corrective information. Finally, because our goal is to uncover causal mechanisms, rather than estimate public opinion, our research design is not sensitive to quick dissipation of effects that may accompany changes in attitudes by the mass public as a result of the Court’s momentary association with the elected branches (though we of course recognize that decreases in support may not persist in magnitude).

## Panel Data and Methodology

From September 2 to 3, 2020, we collected 1500 responses to a survey fielded on Amazon’s Mechanical Turk (MTurk).<sup>3</sup> Although MTurk is not a probability sample, the platform is widely used in judicial politics (Armaly, 2020b; Christenson & Glick, 2015), estimates are reliable (Berinsky et al., 2012), and convenience samples are generally considered appropriate for longitudinal designs (Druckman et al., 2012) and experimental manipulations (Horton et al., 2011).

We fielded the survey again on September 22, 2020, only four days after Justice Ginsburg died. The second wave was restricted to respondents who completed the first task. A total of 603 respondents completed both survey waves. While we suspect we could have utilized various techniques for re-contacting MTurk workers to increase our sample size, we are largely unconcerned with this attrition rate.<sup>4</sup> As Armaly (2018b) indicates, post-vacancy, pre-nomination data are not influenced by perceptions of nominee judiciousness in the same way that post-nomination evaluations are (Carrington & French, Forthcoming; Gibson and Caldeira, 2009b). In light of this, we were fearful that the window to collect data *that represent the political environment following Ginsburg’s death, but preceding Trump’s nomination—and, therefore, perceptions of Amy Coney Barrett*—was very short.<sup>5</sup> Our intuition was correct. Again, our second wave was launched only four days after Ginsburg’s death. Unbeknownst to the public at the time, Trump had already offered Judge Barrett the nomination when we launched our second wave (Schneider, 2020). Credible reports about Trump’s selection of Barrett circulated only three days later and her nomination was announced on September 26, 2020. Data collection ended before the announcement. This timeline is summarized in Figure 1 above. Thus, the opportunity to collect data about

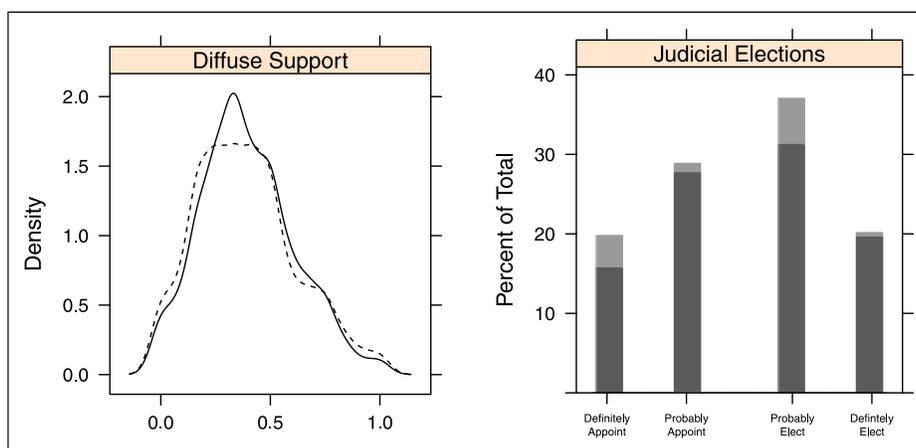
the causal mechanisms that underlie changes for support for the Supreme Court was *extremely* limited. We chose to collect the sample that allowed us to make the strongest causal claims, rather than collect more data where our causal assertions would be on weaker ground. In other words, the time of our second wave is a feature, not a bug.<sup>6</sup>

Still, we recognize that panel attrition may be of some concern. Compare our sample to the most prominent existing multiwave panel study on Supreme Court nomination politics by Gibson and Caldeira (2009a, 2009b), who assessed public attitudes regarding then-Judge Samuel Alito’s confirmation in three waves between July, 2005 and June, 2006. As Krewson (NP) points out, the nearly year-long gap between the first and last wave includes other important Court-related events, including controversial decisions, O’Connor’s retirement, Rehnquist’s death, and Roberts’ first term on the bench. Thus, the causal mechanism of changes in individuals’ attitudes toward the Court is less clear. While Gibson and Caldeira offer very important insights into the ways that perceptions of nominees influence attitudes toward the Court, we wish to make the strongest causal claims possible.

## Variable Measurement and Expectations

Because we are using panel data, we are able to estimate the average change in views of the judiciary for each subject. That is, we can implement a repeated-measures, or within-subjects, design (see Clifford et al., 2021, regarding the merits of such a design). We focus on two dependent variables. First, we asked respondents three of the items popularized by Gibson and his colleagues (e.g., Gibson, Caldeira and Spence, 2003a; Gibson, 2017). Specifically, respondents were asked their level of agreement with the Court “gets too mixed up in politics,” “ought to be made less independent,” and “favors some groups more than others” items.<sup>7</sup> We use these items to measure diffuse support by measuring the average response of the three items (Cronbach’s alpha = .69 in Wave 1, .73 in Wave 2). Our general expectation is that support for the Court as an institution will decrease from Wave 1 to Wave 2, as respondents recognize that the Supreme Court is being used as a political tool. However, because political predispositions underlie reactions to the Court and its outputs (Armaly 2018a; Zilis, 2018), we suspect this will fall along partisan lines.

Bartels and Johnston (2020) argue there are distinct dimensions of support for the Court: (lack of) support for Court-curbing, perceptions of procedural propriety, and general trust (51). As is traditional in studies of mass attitudes toward the Supreme Court, our measure of diffuse support combines these three elements. To more directly and concretely tap the Court-curbing dimension, we ask whether “judges in federal courts should be appointed or elected,” where respondents, using a four-point scale, could choose “definitely” or “probably” appointed, or “probably” or “definitely” elected. Higher values indicate support for judicial elections. This is a



**Figure 2.** Response distributions for each variable of interest, by survey wave. In the diffuse support panel, solid line indicates Wave 1 responses and dashed line Wave 2. In the judicial elections panel, light gray bars indicate Wave 1 responses and dark gray bars Wave 2.

direct measure of the Court-curbing willingness dimension of support for the institution, and gives a more specific evaluation of influencing the Court’s autonomy than the sentiment that it “ought to be made less independent.” In particular, support for elections is a form of broad Court-curbing, as it is a general measure intended to “fix” what is systematically “broken,” rather than a specific corrective measure intended to remedy a single wrong (e.g., a piece of legislation overturning a Court ruling). We expect that Republican respondents will be happy with the appointment process—indeed, it has made them vacancy “winners” of late.

Our expectations regarding Democratic respondents are quite a bit more nuanced. While support for elections seems, at first glance, to be a reasonable reaction to dissatisfaction with the courts, we are not so certain that many members of the mass public are willing to fundamentally alter institutions. One possibility is that Democrats are willing to revamp the appointment system that has yielded a conservative majority. In this instance, Democrats would denounce the status quo and support elections. Yet, even when dissatisfied with the institution, the unique socialization to the Supreme Court is powerful (see Gibson and Caldeira, 2009a). To make fundamental changes to an institution is not something that members of the public seem to take lightly. While Democrats may be headed in the direction of supporting alterations, they have still recently celebrated some major liberal victories out of the conservative Court including salient issues like gay and transgender rights, a woman’s right to choose, and the Affordable Care Act.

Furthermore, although judicial elections may seem attractive to those who think the appointment system is broken, the threat of electoral losses may loom too large to wholesale support elections for federal judges, especially when one considers the electoral success Republicans have had in recent elections (notably, President Trump). The conservatives built their majority using the appointment system; there is the

possibility for liberals to do the same (particularly as election forecasts were projecting a Democratic sweep in the 2020 elections). Finally, there is ample evidence that average individuals have difficulty translating abstract preferences to concrete ones (e.g., McClosky & Brill, 1983, also see Badas, 2019). Thus, even if Democrats wished to stack the Court in their favor, they may prefer to use appointments to do so. In fact, many of the elite proposals for “depoliticizing” the Court dealt with adding more justices,<sup>8</sup> rather than turning to elections (but see Davis, 2005). Inasmuch as individuals support institutional changes that their preferred politicians promote (Clark & Kastellec, 2015), judicial elections may not have been sufficiently salient. So, we admit some agnosticism on the influence of the vacancy on Democrats: We are open to the possibility of either an increase in support for elections among Democrats or a decrease, but lean toward the latter (or a null effect).

In Figure 2, we show the distribution of responses for each of our variables of interest across both survey waves (variables were rescaled 0–1). Beginning with diffuse support on the left, the solid line represents Wave 1 responses and the dashed line Wave 2 responses. We first note some, albeit minor, changes are evident across survey waves (though the distributions are not statistically different, per a Kolmogorov–Smirnov test). In the right panel, light gray bars indicate Wave 1 responses to the judicial elections item and dark gray bars represent Wave 2 responses. Perhaps surprisingly, many respondents support judicial elections in both waves, though support appears to decrease across waves.

### Randomized Exposure to Vacancy News

As a consequence of having the same subjects in both survey waves, we are able to determine how a naturally occurring event influenced attitudes on each of our dependent variables. However, with a total of 24 possible days between the first

and second waves, we are wary to conclude “the world occurred” and caused changes in respondents’ views of the judiciary. Indeed, competing narratives regarding the vacancy sprung up almost immediately; McConnell announced that the Senate would proceed with filling the open seat the very night that Ginsburg’s death was reported (Segers, 2020).

Thus, to gain leverage over any potential causal mechanism contributing to perturbations in evaluations of the Court, we randomly exposed respondents to one of two stories stripped from the news. The first, which simply described Ginsburg’s death, read:

Supreme Court Justice Ruth Bader Ginsburg, the Court’s second female justice, died Friday at her home in Washington. She was 87. Ginsburg died of complications from metastatic pancreatic cancer, the Court said.

Other respondents read the exact same passage as above, but the following was printed just below the original snippet:<sup>9</sup>

Just hours after Justice Ruth Bader Ginsburg’s death on Friday, Senate Majority Leader Mitch McConnell said President Trump’s eventual nominee to replace her “will receive a vote on the floor of the United States Senate.” But four years ago, when Justice Antonin Scalia died in February of an election year, McConnell repeatedly argued against even holding a hearing for a replacement.

Again, we randomized exposure to these two stories to gain greater causal clarity on how the political goings-on regarding the vacancy may have influenced individual assessments of the judiciary. We are simply reminding respondents of two frames the media was using to assess if the partisan politicking of extra-judicial actors influences respondents’ views of the Court.

## Hypotheses

With our dependent variables and vignettes in hand, we now explicitly lay out our predictions across survey waves. Recall that we are primarily interested in effects across partisanship, rather than average treatment effects. This is because we suspect vacancy “losers”—in this case, Democrats—will react differently than vacancy “winners” (Armaly, 2020a), including in support of their preferred elected leaders meddling in Court affairs (Clark & Kastellec, 2015). We hypothesize that from Wave 1 to Wave 2:

**Hypothesis 1:** Diffuse support of the Court will decrease among Democrats and increase among Republicans.

**Hypothesis 2:** Support for judicial elections (i.e., broad Court-curbing) will increase among Democrats.

**Hypothesis 3:** Support for judicial elections (i.e., broad Court-curbing) will decrease among Democrats.

Again, we recognize that Hypothesis 3 may seem somewhat counterintuitive. However, we suspect that Democrats will view the appointment process as the way to achieve a favorable Supreme Court; elections, while a viable way to alter the Court, are risky and the current conservative majority was created with the appointment process. Thus, the same could work to build a liberal majority. Moreover, Democratic leaders were more focused on Court-packing than elections. Note that we lend additional and more direct credence to our proposition about the effect for Democrats in the Electoral Preferences and Support for the Supreme Court section below.

One of our main premises is that the increased and consistent politicization of the Supreme Court by the elected branches may have altered public orientations to the institution. To test this, we consider exposure to the news stories described above. However, given that we hypothesize that there will be changes across waves regardless of exposure to the news story, and that winners and losers will be differentially impacted, we must consider three factors: time, treatment, and partisanship. A difference-in-means test across waves would reveal that the vacancy proved influential. A difference-in-difference test across waves and exposure to the news stories can reveal that a politicized vacancy is more influential than a vacancy alone, or a non-politicized vacancy. As such, for changes in Supreme Court legitimacy, we hypothesize the following:

**Hypothesis 4:** Democrats exposed to the McConnell story will have decreases in perceived legitimacy of the Court, relative to both Wave 1 and the Ginsburg story.

**Hypothesis 5:** Republicans exposed to the Ginsburg story will have increases in perceived legitimacy of the Court.

With regard to elections we expect:

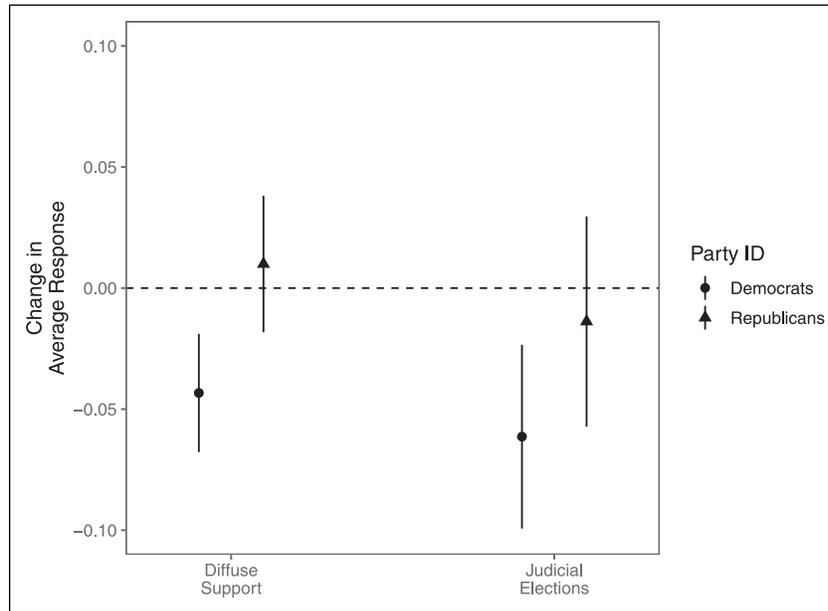
**Hypothesis 6:** Democrats exposed to the McConnell story will increase support for judicial elections, relative to the Ginsburg story.

**Hypothesis 7:** Republicans exposed to the McConnell story will decrease support for judicial elections, relative to the Ginsburg story.

While we believe support for elections will *decrease* amongst Democrats on average (for reasons discussed above, though we again note the alternative is not infeasible), those primed to consider the difference in policy for the 2016 and 2020 vacancies may be uniquely willing to curb the Court.

## Empirical Results

We begin by considering the treatment effect across waves by partisanship. Figure 3 displays the change in average



**Figure 3.** This figure displays the within-subjects changes in means across survey waves, by partisanship. Circular plotting symbols indicate Democratic responses and triangular symbols Republican responses; vertical bars are 95% confidence intervals.

response (i.e., the difference in means between Wave 1 and Wave 2) for diffuse support (left two plotting points) and support for judicial elections (right two). Beginning with diffuse support, on the left, we find support for Hypothesis 1. Democratic respondents significantly reduce diffuse support for the judiciary, relative to their pre-Ginsburg death position. Republican respondents increase such support (though not to statistically significant levels). Preliminary work focusing on the Ginsburg vacancy reaches similar conclusions (see Glick, NP; Krewson, NP).

We see similar results for support for judicial elections, displayed on the right side of the figure. Democrats are generally in favor of appointments, and there is no change among Republicans. This is consistent with Hypothesis 3, but runs counter to Hypothesis 2 (and, of course, to the null hypothesis). Rather than speculate on the cause of this decrease among Democrats here (especially when they may have had cause to increase support for elections), we further investigate this relationship in the Electoral Preferences and Support for the Supreme Court section below. In short, we find reason to believe that appointments are preferred when one believes their group will gain from the appointment process. That may have described Democrats after Ginsburg's death, when they anticipated a Joe Biden victory in 2020.

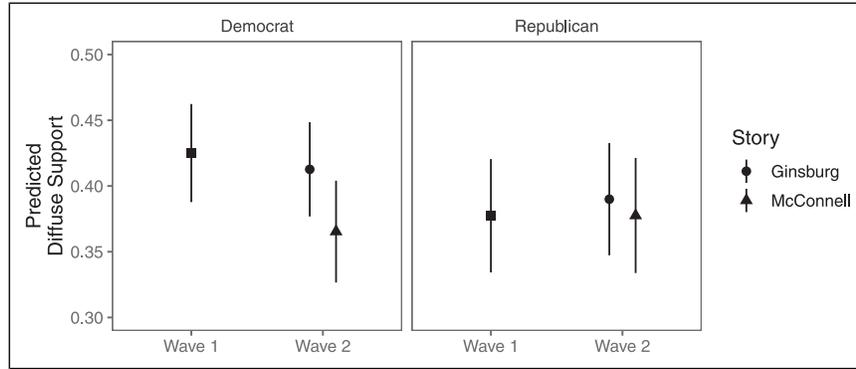
Across both outcomes of interest, we see the expected heterogeneity across partisanship. Altogether, the 2020 vacancy appears to have yielded polarized assessments of the Supreme Court's continuing autonomy. Any changes in support for the Court on instrumental grounds may give reason for pause. Certainly such reactions seem incongruent

with support that “flows from those who are sympathetic to the function of the Court” (Caldeira & Gibson, 1992, 649), though we admit it is unclear how long perturbations to support last.

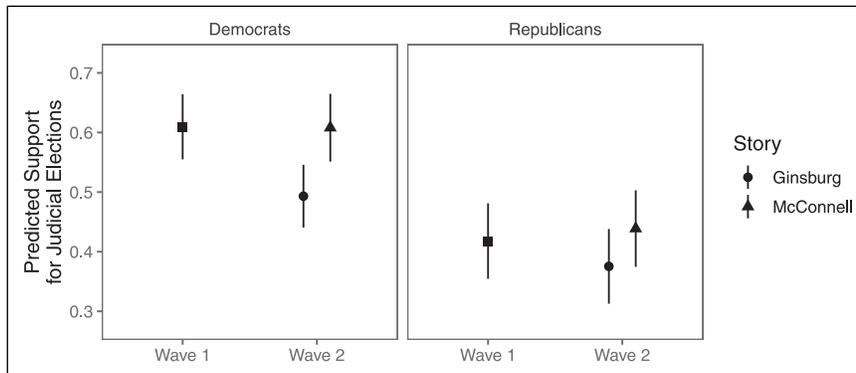
### Effects of Exposure to Vacancy News

Next, we turn to exposure to either the Ginsburg or McConnell story. Recall that we are interested in differences between Wave 1 and *each* of the two Wave 2 averages (i.e., differences-in-differences). To obtain these estimates, we structured our data into the long format and regressed each dependent variable onto an indicator for survey wave, partisanship, story exposure, and an interaction of each of these indicators. Because these models include interaction effects, we display the results graphically. Model estimates appear in Tables 2 and 3 in the Supplemental Appendix.<sup>10</sup> Figure 4 displays effects by news story for diffuse support and Figure 5 does the same for support for judicial elections. Each panel in each figure displays three pieces of information: average Wave 1 responses (square plotting symbols),<sup>11</sup> Wave 2 responses for those exposed to the Ginsburg story (circular), and Wave 2 responses for those exposed to the McConnell story (triangular).

We begin with an explanation of Figure 4. Generally speaking, if we observed significant differences between Wave 1 support (the square plotting symbol) and *both* of the Wave 2 estimates in Figure 4 (i.e., exposure to both the Ginsburg and McConnell stories, the circular and triangular plotting symbols), we would conclude that the vacancy itself negatively influenced diffuse support, but that exposure to the



**Figure 4.** This figure displays support for diffuse support by wave, exposure to news story, and partisanship. Square plotting symbols are the average response for Wave 1. Circular (triangular) plotting symbols represent exposure to the Ginsburg (McConnell) news story. Vertical bars are 95% confidence intervals.



**Figure 5.** This figure displays support for Court-curbing by wave, exposure to news story, and partisanship. Square plotting symbols are the average response for Wave 1. Circular (triangular) plotting symbols represent exposure to the Ginsburg (McConnell) news story. Vertical bars are 95% confidence intervals.

politicization of the vacancy did not matter beyond the vacancy itself. However, we hypothesize that the McConnell story will decrease legitimacy relative to both the Ginsburg story and Wave 1 for Democrats. Thus, we should see little (if any) difference between Wave 1 support and Wave 2 support among the Ginsburg group, but Wave 2 support among the McConnell group should be significantly lower than Wave 1 and the Ginsburg group. In terms of the figure itself, the estimate represented by the triangular plotting symbol should be significantly lower than both the square and circular plotting symbols.

This is precisely what we observe in [Figure 4](#), at least for Democrats (shown in the left panel). That is, we see no difference between Wave 1 support and Wave 2 support for those who read the rather benign story about Ginsburg’s passing (i.e., there is no statistical difference between the estimate represented by the square plotting symbol and the estimate represented by the circular symbol). However, we see a significant decrease across waves among those who read the story highlighting McConnell’s about-face on election-year appointments

(i.e., between the square and triangular symbols) and within Wave 2 groups (i.e., between the circular and triangular symbols). This indicates that the vacancy itself was not particularly influential with respect to diffuse support, but that the McConnell story was.

This evidence, consistent with Hypothesis 4, reveals that the politicization of the vacancy mattered above and beyond whatever influence the vacancy itself had. Vacancies, alone, do not seem to influence views of the Court; vacancies, when politicized, do. That is, even though there is an average decrease in diffuse support from Wave 1 to Wave 2 for Democrats (as shown in [Figure 3](#)), that decrease is significantly larger for those who read the McConnell story. This aids in identifying a potential mechanism for decreases among Democrats: the perceived politicizing of the Court. When it comes to Republicans, in the right panel, there are no differences across waves or news stories. Though we hypothesized Republicans who read the Ginsburg story may increase diffuse support because of excitement about gains, that there is no difference for these “winners” is still consistent with our expectations. Republicans are not

“punishing” the Court the way that we might expect among those motivated exclusively by fairness in staffing.

We move next to [Figure 5](#), which displays predicted support for judicial elections. Recall that we expect average decreases in election support for Democrats (per [Figure 3](#)), but hypothesize that those exposed to information regarding different election-year staffing protocols will be uniquely willing to curb the Court in this manner. We find support for this expectation, though we see that the average decrease is driven by those who read the Ginsburg story. Those exposed to the McConnell story *are* willing to curb the Court, relative to the Ginsburg story (consistent with Hypothesis 6). However, there is no statistical difference between Wave 1 curbing support and Wave 2 curbing support among the McConnell group.

Thus, when it comes to support for judicial elections, the Ginsburg story appears capable of compelling individuals to support the existing appointment process. Indeed, this is consistent with evidence that positive—or even neutral—exposure to the Court and its justices produces some public goodwill ([Gibson et al., 2014](#); [Krewson, 2019](#)). The McConnell story appears capable of negating such goodwill, though it does not seem to lead to demand for changes to staffing. This may be because support for elections was atypically high in Wave 1 (see [Badas, 2019](#)). We believe these results suggests that some vacancy “losers” believe the best course of action for remedying recent gains for the opposition is altering the appointment process, whereas others seem to believe the current staffing procedures may be used in their favor in the future; these differences seem dependent on the politicization of the vacancy. As for Republicans, in the right panel, we again see no difference across waves or news exposure.

Altogether, we believe we have provided evidence that some individuals conceive of Supreme Court vacancies in terms of how they politically benefit. We provide additional evidence for this proposition below. In the context of the 2020 vacancy, Democratic “losers” reduced esteem for the institution and altered their views on making fundamental alterations, particularly when primed with information on the elected branches’ behavior. Republican “winners,” on the other hand, seem perfectly content with the status quo. After all, it is precisely those procedures that are delivering a conservative Court. Of course, we cannot say how long these effects last; our data are purposely time bound, so we can only assess the effects of news prominent in the week following the vacancy.

## Electoral Preferences and Support for the Supreme Court

Thus far, our narrative has suggested that both political predispositions and the behavior of the elected branches during a vacancy can have downstream consequences on the

**Table 1.** Operationalization of optimism indicator.

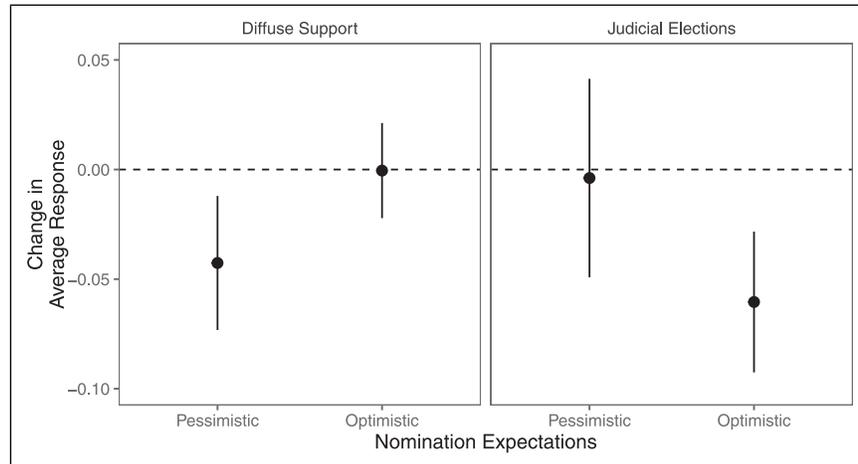
	Voting Intention		
	Biden	Trump	
Will replace RBG	Biden Trump	Optimistic (1) Pessimistic (0)	Pessimistic (0) Optimistic (1)

esteem in which the public holds the Supreme Court. If, as we argue, recent politicization of filling Supreme Court vacancies allows individuals to better connect the Court with their existing predispositions, we should see expectations regarding the future of the Court impact support for it. Historically, the mass public has respected the Court even when a majority of the justices were appointed by the opposing party. Yet, individuals increasingly understand the position of the Court through the lens of the president ([Haglin et al. Forthcoming](#)), which ultimately influences evaluations of the institution ([Bartels & Johnston, 2013](#)). Taken together, people look to the elected branches to understand the Court, as well as their position relative to it and their support for it. We argue that vacancies are a viable way for individuals to estimate the future position of the Court, and update evaluations of it accordingly.

In this final empirical section, we ask, much more directly, whether public preferences regarding how the elected branches handle a Supreme Court vacancy can impact the judiciary. We argue that support for a candidate in the 2020 election, combined with expectations about who will fill Ginsburg’s seat, have the ability to alter views of the Supreme Court. This would aid in the identification of an additional mechanism for the decreases in support we find above. That is, individuals may not be assessing the Court on its own, but rather as another stimulus evaluated conditionally upon existing partisan preferences.

We asked respondents for whom they intended to vote in the 2020 election. In the second wave, we also asked “Who do you think will choose Justice Ruth Bader Ginsburg’s replacement?” Respondents could select Joe Biden or Donald Trump. Using information from these items, we generated an “optimism” indicator, which is summarized in [Table 1](#). The variable takes on the value of 0 when the candidate a respondent supports and who they expect will nominate Ginsburg’s replacement is incongruent, and a value of 1 when it is congruent. Recall that the second wave of our survey was completed before Trump nominated Barrett.<sup>12</sup> Respondents were remarkably optimistic; nearly two thirds thought their preferred candidate would name Ginsburg’s replacement. Still, the measure is distinct from partisanship (correlation = 0.34); additionally, we control for partisanship in the models below.

Here, our outcomes of interest are changes in diffuse support and support for judicial elections. We simply subtract Wave 1 values from Wave 2 values, such that positive values



**Figure 6.** This figure displays predicted changes in diffuse support (left panel) and support for judicial elections (right panel) Court-curbing across waves, by optimism. Vertical bars represent 95% confidence intervals.

indicate an increase in support from Wave 1 to Wave 2, and negative values indicate decreases. We expect that those who are optimistic about the 2020 vacancy will be more diffusely supportive than their pessimistic counterparts, and will remain consistent in their levels of support. Conversely, those with a pessimistic view as to who will fill the vacancy on the Court will express less institutional support. As for support for judicial elections, we expect that pessimists will entertain the possibility of elections, and support them more in Wave 2 than Wave 1. Optimists are likely to go in the opposite direction, and increase support for appointments (by which they expect to achieve their preferences). To determine the influence of optimism about the electoral process producing a pleasing nominee, we estimate separate ordinary least squares models where both diffuse support and support for judicial elections are regressed onto our optimism indicator, as well as several control variables including demographic features, partisanship, ideology, and an indicator for exposure to either the Ginsburg or McConnell story. We display model-based predictions of the change in each dependent variable in Figure 6. Full model estimates can be located in Table 4 in the Supplemental Appendix.

We begin by considering diffuse support, in the left panel of Figure 6. Those who are pessimistic about the nomination—Trump supporters who think Biden will select the nominee, and vice versa—decrease diffuse support for the institution across waves. Those who are optimistic remain resolute. And while the decreases for the pessimists are not enormous, only about 5%, any perturbation to the Court’s autonomy is concerning, *especially* since it is caused by no doing of the Court itself. This finding is consistent with other work that suggests support for the Court is a function of expected policy victory (Armaly, 2020a; Nicholson and Hansford, 2014; Zilis, 2018, 2021), and the degree to which one sees the Court as similar to her predispositions (Bartels & Johnston, 2013, 2020). We believe this highlights

that confirmation battles in the modern era *can* (but may not always) influence evaluations of the judiciary, depending on how one thinks the Court is likely to change as a result of those confirmation battles.

Moving next to support for judicial elections, in the right panel, we find support for the notion that those who are optimistic about who will fill the 2020 vacancy decrease support for elections (i.e., increase support for appointments). Pessimists do not suddenly support elections, and remain resolute in their support. More succinctly, optimists decrease support for this specific variant of Court-curbing; they do not wish to make changes to staffing procedures. We think the likely explanation for this is that such individuals expect to benefit from appointments in the future. This helps us contextualize findings above, specifically decreases in support for elections among Democrats. Perhaps not all forms of curbing are seen as a viable way to build an ideologically favorable Supreme Court. Democrats (Republicans) who think Biden (Trump) will pick Ginsburg’s successor via appointment are more supportive of the appointment process; the procedure is seen as a useful way to achieve political goals.

## Discussion

In this paper, we capitalized on unique panel data collected before and after Justice Ginsburg’s unexpected death to understand how the sudden vacancy, and the intense politicking to fill it, influenced the esteem in which one holds the judiciary. We find that support for the Court—it its diffuse and (lack of) curbing forms—is contingent upon winner/loser status (i.e., partisanship) and reactions to elected-branch politicking to fill the seat. While it is Democrats who bore the misfortunes of unified Republican control in the White House and Senate for this particular vacancy, we suspect the mechanisms that underlie our findings will persist in future

vacancies. We also find that support for judicial elections decreases across survey waves; those who were “winning” the 2020 vacancy were more supportive of the appointment process. Finally, we show that expectations regarding who would nominate Ginsburg’s replacement influence diffuse and curbing support; those who thought their preferred candidate would name a successor were more supportive of maintaining existing judicial independence and appointment procedures. This underscores the influence the elected branches can have on evaluations of the Court.

We feel these findings are important, despite several limitations. We have been open throughout this manuscript that we cannot generalize our findings to the mass public (as a result of using a convenience sample). Nevertheless, the panel nature of our data, no matter the convenience of the sample (Druckman et al., 2012), allows us to make useful causal claims about what influences changes in support for the judiciary (at least in the short term). So, while we cannot state, for instance, that some percentage of Americans are now less supportive of the institution than before the vacancy, we can claim that partisanship is an important factor that conditions reactions to a vacancy. Likewise, we can state that exposure to the overt politicking to fill a vacancy harms views of the institution. One additional limitation is that we did not employ the full legitimacy scale. However, the items we did use tap the various dimensions of legitimacy that Bartels and Johnston (2020) identify. While using more items in a scale does reduce measurement error (Ansolabehere et al., 2008), we do note that our scales are statistically reliable (i.e., have low measurement error).

An additional limitation is whether our findings extend beyond the confluence of unique factors regarding the 2020 vacancy. Specifically, in the absence of certain factors—such as (1) a vacancy created by the most well-known justice (Hubbuck, 2020), (2) only 46 days before an election, (3) a global pandemic threatening said election, (4) an unpopular president, and (5) clear evidence that the refusal to schedule hearings for Garland were about power, not principle—can we expect similar changes to support in future Court staffings? While we cannot conclusively answer with these data, we expect that we can. We argue it is not the confluence of these *unique* factors that resulted in diminished support among some individuals. Instead, we argue it is the culmination of *common* factors such as contentious nominations of more ideologically extreme judges (Binder & Maltzman, 2009; Cameron et al., 2013), treatment of the Court as a political branch by the media and elites (Salamone, 2018), the use and elimination of Senate procedures to stymie some confirmations but expedite others, and evaluations of the Court based on the elected branches (Zilis, forthcoming). We doubt these common aspects of recent vacancies and nominations will cease in those to come.

We believe our findings help clarify how members of the mass public orient themselves to the Court. In addition to attacks and polarized rhetoric from elites (Armaly, 2018a;

Nelson & Gibson, 2019); politicized rhetoric about vacancies specifically (Rogowski & Stone, 2019); Court-curbing proposals from preferred politicians (Clark & Kastellec, 2015); disappointment with particular decisions (Christenson & Glick, 2015); Court decisions that protect the rights of disliked groups (Nicholson & Hansford, 2014; Zilis, 2018, 2021); and ideological (in)congruence (Bartels & Johnston, 2013), we can add staffing procedures to the list of evaluations that influence willingness to curb the Supreme Court. Yet, unlike many of these examples, we find that respondents’ willingness to curb the Court and decrease support for the institution are in no way a function of unprincipled actions on behalf of members of the bench. Instead, they may be due to the politicization of the Court and this constitutional process. While we do not suggest that “the sky is falling” with respect to institutional support, as the enumeration of partisan, ideological, and non-judicial influences on the Court grows, so, too, might concern about the future of the judiciary as an independent, coequal branch of government.

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### Supplemental Material

Supplemental material for this article is available online.

### Notes

1. Though recent polls indicate support is at its nadir. See <https://poll.qu.edu/poll-release?releaseid=3820>.
2. There is some question as to whether, in 2016, McConnell was referring to election-year nominations *under divided government* and was therefore *not* hypocritical in scheduling hearings for Barrett. Regardless of whether McConnell’s stance was principled, members of his own party undermined that position at several stages (e.g., Lindsay Graham; see Edmondson, 2020).
3. The original research design was meant to investigate whether the Supreme Court plays a role in vote choice and civic participation, and we did not intend for these data to be used in a panel study.
4. Compare our completion rate of 40.2% to that of the seminal multiwave panel studies on Supreme Court nominations by Gibson and Caldeira (2009a, 2009b), which bookended the nomination and confirmation of Samuel Alito. Of their original sample of 1001 American adults, only 259 of those respondents

completed wave two of their survey (28%). Even large, high quality surveys are subject to panel attrition. As Frankel and Hillygus (2014) note, both the General Social Survey and the American National Election Studies lose nearly a third of their sample by the second wave. While many studies find little in the way of significant bias due to panel attrition (e.g., Bartels, 1999), we do control for demographic variables like gender, race, age, education, party identification, and ideology in our models to account for any non-random differences between those who completed both waves of the survey. See Supplemental Appendix for more information.

5. We ended data collection on September 25 because credible reports were circulating that President Trump had selected Barrett.
6. We describe demographic characteristics for each wave in Table 1 in the Supplemental Appendix.
7. These three items nicely tap the dimensions of diffuse support that Bartels and Johnston (2020) discuss (see below). We selected these three in the interest of space on our initial survey (recall that we did not intend to employ a panel design at first). Inasmuch as the scales from each wave are statistically reliable, we are unconcerned that these items poorly measure diffuse support (i.e., measurement error is less of a concern), though we make note of any inferential concerns in the limitations section.
8. See <https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html>, where several Democratic senators are quoted in support of expansion.
9. For both stories, respondents were told they were reading an excerpt from an Associated Press story. They could not proceed with the survey until 10 seconds had elapsed for the Ginsburg story and 17 seconds for the McConnell story, ensuring that they read the story.
10. It is important to note that because we are technically interacting the constitutive components of the difference-in-difference estimator with partisanship, the model estimates do not contain a single DID estimator (i.e., we use a three-way interaction instead of the standard interaction that yields the DID estimator). Thus, we urge caution in interpreting coefficients and, especially, statistical significance.
11. Because exposure to the news stories was randomized in Wave 2, it makes little sense to show values across exposure to either story for Wave 1 (hence, the average response is displayed). As expected, there are no statistical differences across randomized news exposure for Wave 1; thus, it is theoretically and empirically appropriate to display a single value for Wave 1.
12. At the time, there were still Republican Senators calling for proceedings to be delayed until after the election (Susan Collins and Lisa Murkowski, primarily). Thus, the proposition that the winner of the 2020 election may select the next nominee was not without some merit.

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