



# Populism and Support for Limiting the Power of Constitutional Courts: The Case of Germany

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## Abstract

Given the rise of populism around the globe, do populist citizens support the exceptional authority of national constitutional courts to make decisions on controversial issues? Or do these individuals view constitutional courts just like any other political institution? To investigate this question, we embedded an experiment in a national survey in Germany in early 2020 that varied the institution (i.e., the federal constitutional court (FCC), the parliament and the EU) and its decision on a controversial civil liberties issue. The results clearly show that citizens with populist attitudes judge the FCC like any other political institution in terms of their willingness to restrict its authority. In contrast, individuals with non-populist attitudes endorse the exceptional status of the FCC compared to other institutions. The study suggests that the FCC may lose its venerable status as the ultimate guardian of democracy among the nontrivial portion of citizens who favor populism. Theoretically, the results support a “fusion” model that assumes populists’ support for power curbing includes the constitutional court in “the system” they disparage.

**Keywords** Populism · Constitutional courts · Federal Constitutional Court · Public opinion · Germany

## Introduction

Do populist attitudes undermine citizens’ support for the authority of democratic institutions? The core message of populist elites suggests as much, claiming, “the only legitimate democratic authority flows directly from the people,” and that

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“established power holders are deeply corrupt and self-interested, betraying public trust” (Norris & Inglehart, 2019, 66; see also Dalton, 2004; Schmitt-Beck, 2017). Surprisingly, despite populist elites’ vocal criticisms of liberal democracies, where “constitutional principles...protect the individual from the state” (Mansbridge, 2020, 18), we know little about whether citizens with populist attitudes reject the authority of liberal-democratic institutions.

To fill this gap, we study German public opinion to investigate whether individuals who endorse populist views (populist citizens for short) are as disdainful of the authority of the Federal Constitutional Court (FCC) as they are toward other political institutions. Generally, constitutional courts are exceptional compared to institutions such as national parliaments or the EU, as they have the power to constrain national political majorities through constitutional review. And while constitutional courts have tended to rely on strong popular support in the past (e.g., Bartels & Johnson, 2020; Gibson et al., 1998; Vanberg, 2015), European countries, along with the US, are experiencing growing support for populist parties and elites that rail against nearly all democratic institutions (Bonikowski & Gidron, 2016; Canovan, 1999; Dalton, 2018; Kriesi, 2014). Crucially, since “the populist art of governance...is that one must capture the judiciary first” (Müller, 2023, 8), an important question for a liberal democracy is whether populist citizens support restricting the power of judicial institutions. We thus ask: do populist citizens express as much support for curbing the decision-making authority of the FCC as the national parliament or even the EU? Or do they make an exception for the FCC in supporting its authority to make decisions on controversial issues?

Additionally, we examine whether populists’ support for curbing the Constitutional Court vis-à-vis other institutions depends on the institution’s decision on a controversial civil liberties issue (should Muslim women be allowed to wear a Burqa?). Theoretically, as Gibson (2015, 83) argues, support for the authority of an institution “becomes most relevant when citizens object to something the institution has done” or when they find themselves on the losing side of a decision. Therefore, it is important to determine whether populist citizens will continue to endorse curbing the Court’s authority even when the Court makes an *agreeable* decision. After all, much of the disdain for representative institutions among populists is presumably driven by their contempt for all manner of intermediary institutions that filter or obstruct the popular will (Urbinati, 2019). As Citrin and Stoker (2018, 63) emphasize, populism “represents a revolt of the people against the elite.... It is fundamentally *anti-institutional in nature*, seeking a direct path from popular opinion to government policy.” Thus, populists may hold such a deep “reservoir of ill will” (to rephrase Easton’s (1975) term), their resolve to curb an institution may not recede even when a constitutional court makes congenial decisions.

To examine these questions, we embedded an experiment in a national survey by Ipsos in Germany in early 2020. After measuring populist attitudes, we assigned respondents to experimental conditions in a vignette that randomly varied the institution (i.e., the German federal constitutional court, the parliament and the EU) and its decision on a controversial civil liberties issue (should Muslim women be allowed/forbidden to wear a Burqa?). We then asked whether they support curbing the authority of the institution to make such a decision. Thus, our experiment allows

us to examine how populism—an observed, long-term predisposition—moderates the impact of the experimental treatments on support for curbing an institution’s authority. Moreover, because our experiment randomly varies the direction of the decision (wearing a Burqa is ruled to be either “legal” or “illegal”), we can test whether a more congenial decision influences support for curbing, since populists on the right often oppose any decision to legalize Muslim women’s right to wear a Burqa.

We selected the Burqa issue because it has been particularly salient among populist parties and citizens in Europe and elsewhere (Ivarsflaten, 2008; Koopmans & Muis, 2009; Sniderman & Haagendorn, 2007). The rise of immigration-related issues over the past few decades is part of a larger trend illustrating that, “by the new millennium the cultural cleavage is clearly evident in Europeans’ political orientations” (Dalton, 2018, 65). Recent research also suggests that cultural issues can be a source of successful authoritarian elite appeals (e.g., Malka et al., 2022). We therefore view our experimental results as raising crucial questions for the way populist attitudes can undermine the authority for constitutional courts in the context of salient cultural controversies (we discuss the importance of studying other issues in the conclusions).

All told, we investigate three general questions in our survey study. First, do populist citizens express as much support for curbing the decision-making authority of the FCC as they do other institutions, such as the national parliament and the EU? Second, do non-populist citizens express less support for curbing the authority of institutions than populists? And third, to what extent does populist support for curbing the institution’s power hinge on whether they agree with the decision itself?

We compare citizens’ willingness to curb the FCC’s political authority to that of parliament and the EU because the presumed exceptionalism of the FCC can only be determined in comparison to other institutions. A national parliament, along with the executive, is often the primary object of populist elites’ scorn for the establishment (Akkerman et al., 2017; van Hauwaert & van Kessel, 2018), just as the European Union is often a target of populists in Europe (de Vries, 2018; de Vries & Hobolt, 2020; Otjes & Louwerse, 2013; Rooduijn & Pauwels, 2011; Schmitt-Beck, 2017). Comparing populist citizens’ support for curbing across these three institutions provides a strong indication of whether they accept the exceptional role of the constitutional court, or whether they view it with the same degree of skepticism as the national parliament and the EU.

Our focus is on support for curbing institutional authority in a specific issue context because prior research suggests citizens are more willing to narrowly curb constitutional courts’ power to decide issues than to downgrade their broad role in the political system (Bartels & Johnston, 2020). Of course, in the long run, we are interested in the dynamic link between specific curbing and general support as individuals likely generalize from reactions to specific court decisions to the legitimacy of the entire institution. But before investigating populist citizens’ willingness to limit the FCC’s broad powers, it is important to first determine whether they support limiting the court’s jurisdiction on a salient, concrete issue (discussed further in the conclusion).

The German FCC constitutes an appealing case study for at least three reasons. First, it is an important and visible institution that is widely respected in Germany.

Over the postwar decades, its rulings turned the court into “the ultimate guardian of both democracy and the rule of law” in Germany (Kommers, 2006, 126). And while any institution from a single country has unique characteristics, the institutional features of the FCC have been emulated in other nations (Schwartz, 2000). From this perspective, the focus on the FCC is an appealingly conservative test because if populist citizens make no exception for *this* institution, their regard for constitutional courts may be lower in other contexts. Second, while the FCC has received extensive support in the past, its more recent rulings have been the source of heated public debate, similar to controversial rulings of the US Supreme Court, which set the stage for legitimacy-threatening reactions to the recent *Dobbs* case on abortion rights (Gibson forthcoming). For example, the FCC’s 1995 “Crucifix” decision received intensely critical media coverage (Kommers & Miller, 2012) as did its 2020 decision to declare unconstitutional the decision of the European Central Bank to prop up ailing sovereign bonds.<sup>1</sup> Third, the level of populism and skepticism about institutions found in German public opinion is typical of that in other nations, implying that our study has important implications not only for the FCC but also for constitutional courts in other democracies (see Appendix Table A5 and Figs. A4 and A5).

On balance, our results show that populists are far less willing than non-populists to make an exception for the German constitutional court in their readiness to limit its power to make certain decisions. Theoretically, the results support a “fusion” model (described below) that assumes populist citizens’ support for power curbing makes no distinction between various institutions (i.e., between the FCC, the Bundestag and the EU).

We begin by discussing the role of constitutional courts generally, as well as reasons why populist citizens may reject a constitutional court’s exceptional role in the political system. We then present the logic of our experimental vignettes, followed by the results.

## Populism and the Political Authority of Constitutional Courts

The exceptional standing of a nation’s constitutional court has been widely recognized as a pillar of liberal democracies. Constitutional courts often make decisions to resolve social and political conflicts that involve foundational issues dividing a republic. Dubbed “countermajoritarian” institutions, they have the authority to constrain national political majorities and to defend the rights of minorities through constitutional review. It is paramount for the vitality of a liberal democracy that their decisions become accepted by executives and parliaments as well as mass publics because constitutional courts have neither the power of the “purse” nor the “sword.” Their decisions therefore “require a deep reservoir of goodwill” from the public to become implemented (Gibson et al., 1998, 343; though see Driscoll & Nelson, 2023). If the Court’s independence is weakened by vacillating citizens who view

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<sup>1</sup> See the FCC press release on May 5, 2020 (<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html>).

judicial decisions as contestable, just as they view decisions reached by parliaments or the EU, then a constitutional court runs the danger of becoming just another partisan arena, sustaining—but not settling—societal conflicts.

The recognition of constitutional courts' independence is even more important in the wake of rising populist sentiments across the globe that question the exceptional role that liberal democracies assign to them. Populist parties typically hold disdain for parliaments and executives because they “are against all kinds of intermediaries between the people and the decision-makers,” (Kriesi, 2014, 363; see also Canovan, 1999; Mudde & Rovira Kaltwasser, 2017; Schedler, 1996). Populists are also quick to criticize independent institutions like constitutional courts that protect fundamental freedoms and minority rights in a liberal democracy because such unelected, countermajoritarian institutions limit the pure will of “the people.” And because judges serving on constitutional courts are often appointed by other branches of government and depend on them to enforce its decisions, populist citizens may also question the political neutrality of constitutional courts.<sup>2</sup> This skepticism has clearly entered the vernacular of the populist Alternative für Deutschland (AfD), a right-wing addition to Germany's party system, as one of its leaders, Björn Höcke, recently stated, “this also applies to the sacred FCC where—as is commonly known—ideological criteria increasingly influence the appointment of judges.”<sup>3</sup> Studies of mass attitudes suggest that populist citizens share the negative sentiments about intermediary institutions articulated by populist elites as “populist attitudes are positively related with anti-pluralism” (Heinisch & Wegscheider, 2020, 38; see also Geurking et al., 2020; Silva et al., 2020). Thus, it seems likely that some of the wide-ranging scorn that populist citizens show national parliaments and executives will also be directed at the constitutional court. A first, baseline hypothesis captures this expectation:

**H<sub>1</sub>** Support for curbing the authority of the FCC, parliament, and the EU is higher among populist than non-populist citizens.

Exactly how populists view the authority of constitutional courts relative to other institutions can vary systematically, depending on the degree to which populist and non-populist citizens endorse the exceptional role played by constitutional courts. Figure 1 captures three principal possibilities. In all three graphs, non-populists on the left-side of the x-axis embody the conventional wisdom about the public's view of constitutional courts: citizens are most likely to oppose curbing the FCC's decision-making authority, followed by the Bundestag and, in last place, the EU. This relative ranking reflects the consensus that the FCC is “traditionally regarded as one of the most revered institutions in Germany” (Vanberg, 2005, 99), whereas the EU has been quite unpopular relative to other institutions (e.g., Dalton, 2021; Polyakova

<sup>2</sup> Justices on the FCC are selected by members of the Bundestag and the Bundesrat, the second chamber of the German parliament that represents the state governments.

<sup>3</sup> The 12–5-2020 speech was reported on the public broadcast German news show, *Heute Journal*, 3–5-2021.

& Fligstein, 2015). Support for the national parliament falls between the FCC and the EU. Unlike the EU, it is an integral part of the national regime. It typically enjoys higher public acceptance than the EU but does not receive the same level of traditional admiration as the FCC (Dalton, 2004). Thus, in all three scenarios, relative to the parliament and the EU, public support for curbing the FCC should be the lowest overall among non-populist citizens.

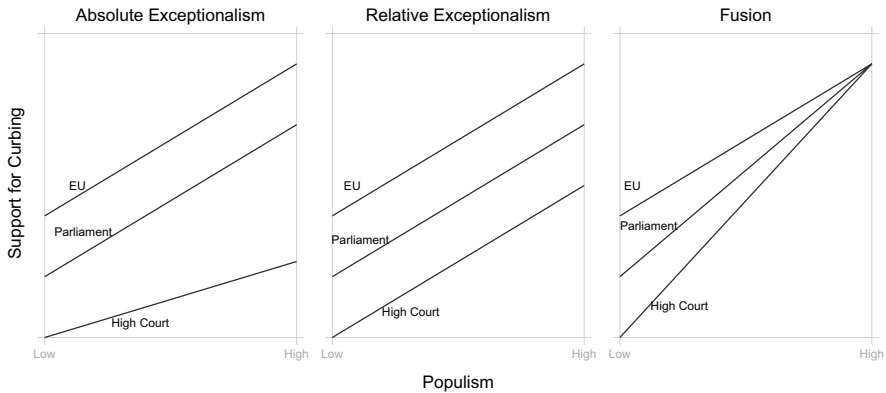
However, when citizens hold populist preferences, their willingness to limit the authority of institutions is uncertain. Figure 1 depicts three different scenarios. In the “Absolute Exceptionalism” scenario, support for limiting the authority of the constitutional court is hardly related to citizens’ populist preferences because like non-populists, populist citizens largely accept the idea that, unlike other institutions, the power of a constitutional court should not be curbed. This is indicated by a relatively a flat line for the court across the range of the populism scale. In contrast, for the other institutions, support for restricting the authority of the national parliament and the EU increases with populist beliefs because populists are widely held to be critical of representative policy-making institutions.

The second scenario, “Relative Exceptionalism,” assumes that all institutions, including the constitutional court, are viewed with greater skepticism among populist citizens. But here the FCC continues to enjoy a *relative* reputational advantage among non-populists *and* populists. Thus, the hypothetical associations between populist attitudes and support for curbing different institutions are roughly parallel. If we uncover support for this model, the implication is that even though a constitutional court is vulnerable to challenges from populists, its exceptional standing has not entirely eroded.

The third “Fusion” model depicts a scenario where the exceptional role of the constitutional court has vanished among populist citizens because they view all three institutions as part of the same corrupt system of elites, unlike non-populists. In fact, as the Hungarian and Polish examples suggest, weakening the judiciary is the starting point of populists in government to cement their position. Thus, just as recent research shows the reservoir of goodwill for the US Supreme Court is not as deep and wide as many once thought (Bartels & Johnston, 2020, 248), the fusion scenario suggests that populist citizens make no exception for the FCC, which they lump together with other institutions in their sweeping anti-institutional resentment. The fusion scenario would be consistent with a deeply skeptical assessment of populism that does not view it as redemptive for representative democracy but “as an authoritarian rendering of how democracy should be implemented” (Urbinati, 2019, 120), suggesting that “democracy itself” may be at stake (Müller, 2016, 50).<sup>4</sup> Given the lack of prior research, we offer the three scenarios as hypotheses whose empirical fit will be tested in the results section:

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<sup>4</sup> Note the fusion scenario speaks to more than the finding that evaluations of political trust are correlated across institutions since it focuses on the *difference* in support for curbing democratic institutions between populist and non-populist citizens.



**Fig. 1** Scenario of populist citizen's support for limiting decision-making authority across institutions

**H<sub>2a</sub>** The moderating effect of populist attitudes on support for power curbing will be weaker for the FCC, but stronger for the parliament and the EU (Absolute Exceptionalism).

**H<sub>2b</sub>** The moderating effect of populist attitudes on support for power curbing will be approximately the same for the FCC, parliament, and the EU (Relative Exceptionalism).

**H<sub>2c</sub>** The moderating effect of populist attitudes on support for power curbing will be greatest for the FCC, followed by parliament, and weakest for the EU (Fusion).

## Populism and Policy Decisions

Another question concerns the impact of an institution's policy decisions on populists' support for curbing its decision-making authority. Do populist citizens favor curbing the decision-making power of institutions because they dislike their decisions? Or do populist citizens support power curbing even if the institutions make congenial decisions? In fact, there are good reasons to expect both suppositions to be correct. While specific policy decisions can increase the ire of populists for democratic institutions, they may also view such institutions more critically, regardless of the decisions they make. After all, much of populists' rhetoric centers on their criticisms of political institutions per se, not just their specific decisions (Citrin & Stoker, 2018; Müller, 2016; Urbinati, 2019), constituting a "reservoir of ill will," as expressed in H1. In addition, a decision that conflicts with populist preferences should reinforce a populist's motivation to curb the institution. Thus, our third hypothesis states:

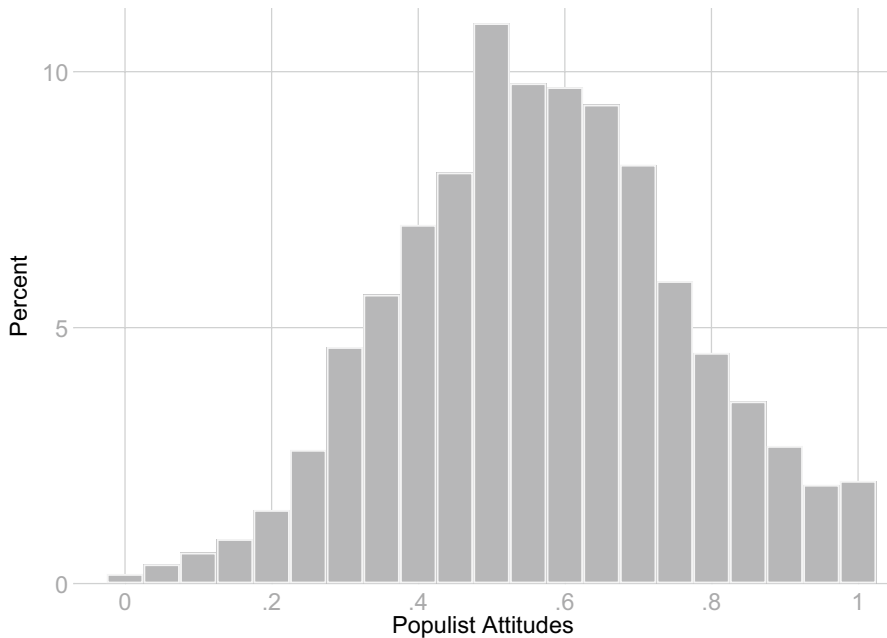
**H<sub>3</sub>** Populists' support for limiting the authority of institutions should increase if they oppose the institution's policy decisions.

**Table 1** Predicting support for curbing on the Burqa issue

Support for curbing institution				
	Model 1		Model 2	
	b	se	b	se
Populist Attitudes	0.32**	(0.03)	0.28**	(0.05)
<i>Institution treatment (FCC = 0)</i>				
Parliament	0.10**	(0.03)	0.09*	(0.04)
EU	0.15**	(0.03)	0.14**	(0.04)
<i>Institution* Populism</i>				
Parliament* Populism	− 0.14**	(0.05)	− 0.14*	(0.06)
EU* Populism	− 0.14**	(0.05)	− 0.16**	(0.06)
Decision Treatment (0 = Illegal)	0.04**	(0.01)	− 0.03	(0.04)
Decision* Populism			0.08	(0.07)
<i>Institution* Decision</i>				
Parliament* Decision			0.03	(0.05)
EU* Decision			0.04	(0.05)
<i>Institution* Decision* Populism</i>				
Parliament* Decision* Populism			− 0.01	(0.09)
EU* Decision* Populism			0.03	(0.09)
Left–Right Self-Placement	0.03	(0.02)	0.04	(0.02)
Age	− 0.04**	(0.01)	− 0.04**	(0.01)
Female (= 1)	− 0.00	(0.01)	− 0.00	(0.01)
Income	− 0.06**	(0.02)	− 0.06**	(0.02)
Education	− 0.04**	(0.01)	− 0.04**	(0.01)
West–East (West = 0)	− 0.00	(0.01)	− 0.00	(0.01)
<i>Partisanship (vs AfD)</i>				
CDU/CSU	− 0.06**	(0.01)	− 0.06**	(0.01)
SPD	− 0.03	(0.02)	− 0.02	(0.02)
Left	− 0.04	(0.02)	− 0.03	(0.02)
Greens	− 0.02	(0.02)	− 0.01	(0.02)
FDP	− 0.04*	(0.02)	− 0.04	(0.02)
Other	− 0.04*	(0.02)	− 0.04*	(0.02)
None	− 0.03	(0.01)	− 0.03	(0.01)
Constant	0.25**	(0.03)	0.25**	(0.04)
N	2639		2639	
R <sup>2</sup> -adj	0.12		0.13	

\* $p < .05$ , \*\* $p < .01$ . OLS coefficients with standard errors in parentheses. Note: Respondents were randomly assigned to one of six vignettes in the Burqa Experiment, consisting of three institutions (FCC = 0, Parliament = 1, EU = 2) and an institutional decision to make the burqa either illegal (0) or legal (1). AfD is the reference category for Partisanship.





**Fig. 2** Populist Attitudes Index. *Note* The distribution reflects values on the additive index of five populism items, where the index has been rescaled from 0 (strongly disagree with populist statements) to 1 (strongly agree). Mean = 0.56, SD = 0.19

## Data, Measures, and the Experiment

To test our hypotheses, we fielded a national online survey in Germany by Ipsos in March (18 to 30) 2020, just before the COVID-19 pandemic developed with full force (as shown in Appendix Table A4, the timing of the survey did not influence our results). Approximately 2,700 German citizens participated, with equal portions of the sample selected from residents in the former East and West Germany to assess potential East–West differences in the power of populism to predict political attitudes.<sup>5</sup> All results are weighted by age, gender, education, and region to approximate the distribution of socio-demographic characteristics in the German population (see Appendix Tables A1.A and A1.B for details of the Ipsos survey demographics and measures).<sup>6</sup>

<sup>5</sup> We did not find significant regional differences across former East and West German States in the association between populism and a range of political attitudes.

<sup>6</sup> We omitted from all analyses a small number of respondents ( $N = 146$ ; 4.9%) who demonstrated a clear indication of satisficing responses (Krosnick 1999) by “straight lining” (selecting the same response for items in a battery with opposite polarity) and “speeding” (completing the survey faster than 70% of respondents).

To measure *Populist Attitudes*, respondents were asked whether they agreed with several Likert statements on a five-point scale ranging from strongly disagree to strongly agree.<sup>7</sup> Variants of these indicators have been used to gauge mass support for populism in prior studies with data from the Netherlands (e.g., Akkerman et al., 2017; Geurkink et al., 2020), the German Longitudinal study and the Comparative Studies of Electoral Systems surveys (round 5):

1. What people call “compromise” in politics is really just selling out on one’s principles.
2. Politicians always end up agreeing when it comes to protecting their own privileges.
3. The politicians in the German Bundestag must always follow the will of the people.
4. Germany needs a strong leader who does not have to bother with parliament.
5. When it comes to making policy decisions, ordinary people should be trusted more than so-called experts.

The items tap important elements of the populism concept, including a Manichean question (item 1), two indicators measuring distrust of elites (items 3 and 5), the people-centric rhetoric of populists (2 and 5), and the direct connection between citizens and the executive (item 4). Similar to other studies based on Dutch survey data (Akkerman et al., 2017; Geurkink et al., 2020),<sup>8</sup> a confirmatory factor analysis in the Appendix (Table A2) reveals that all five items represent a single dimension, while coefficient alpha indicates a high level of consistency across the items ( $\alpha=0.75$ ). The populism index, a summative scale, along with all the other variables in the analysis, was recoded to range from 0 (low populist preferences) to 1 (high populist preferences) to enhance the interpretability of coefficients in the regression results reported below.<sup>9</sup>

<sup>7</sup> The order of items presented to respondents was randomized.

<sup>8</sup> We were guided in our selection of the five populism indicators by the German Longitudinal Election Studies (GLES) in 2017 and the Comparative Study of Electoral Systems, round 5. We examined whether our populism indicators simply constitute a different version of individual distrust in institutions (parliament, executive, the FCC, and the EU). A confirmatory factor analysis shows, however, that a two-dimensional solution, where populism and trust are correlated but kept as separate factors, fits the data much better than a one-dimensional model (for a similar finding, see Geurkink 2020, 257).

<sup>9</sup> We decided against using an alternative measurement strategy requiring populists to score in the upper range of all three populism components—anti-elitism, Manichean views, and popular sovereignty (Wuttke, Schimpf, and Schoen 2020). Our first concern is this measure effectively truncates the variance in the middle and lower ranges of the populism scale, since individuals who score below an arbitrary threshold on a single component (the 75th percentile in their study) are lumped into one “low” category (see their Table S2-I, Supplementary Information). Their measure thus ignores the continuous variation of people in the middle of the scale who are of theoretical interest because they may be susceptible to elite appeals (e.g., Lavine, et al. 2012). A second concern is their assessment essentially ignores widely accepted criteria for assessing the construct and convergent validity of a measure. In fact, their evidence shows an additive populism index consistently outperforms their measure in terms of construct validity (see, e.g., Fig. 6, where an additive scale is more negatively correlated with institutional trust for all nine countries they study).

Figure 2 displays the frequency distribution of the populism index for the full sample. Populist attitudes are spread across the entire range of the 0 to 1 scale, with a mean of 0.56, a standard deviation of 0.19 and a slight skew to the high populism end of the index. On balance, these patterns indicate that a nontrivial portion of the German mass public sympathizes with populist sentiments.

## The Burqa Experiment

Are populist citizens more likely to support curbing the decision-making authority of democratic institutions than non-populist citizens (H1)? And does the moderating effect of populism depend on the institution (H2a–H2c) and the decision outcome (H3)? To test our hypotheses, we designed the *Burqa Experiment*, where respondents were randomly assigned to one of six vignettes where two critical pieces of information are varied—the institution (the **FCC**, the **national parliament**, or the **EU**) and its decision about the burqa’s legal status (i.e., whether it is always **legal** or always **illegal**). Consistent with our focus on support for curbing institutional authority in a specific decision context, the vignette focuses on the controversial issue of the right to wear a burqa, a full face and body veil, in public before asking respondents whether they support curbing the institution’s decision-making authority. This is exactly the kind of issue—the constitutionality of anti-discrimination laws—that populists are likely to exploit because it creates tensions between majority rule and minority rights (Kriesi, 2014). Some countries like Austria and France have outlawed the burqa; others like Germany continue to debate the issue, though Germany has not legally banned wearing the burqa. More generally, the integration of Muslim immigrants and their cultural adaption is a central plank of the right-wing AfD (Schmitt-Beck, 2017). The party strongly objected to the temporary opening of Germany’s border in 2015 when nearly one million migrants, primarily from Muslim countries, entered Germany.<sup>10</sup>

In the Burqa Experiment, respondents first read the same introductory sentence: “Some countries like Austria have outlawed the Burqa, a full-face veil worn by some Muslim women. Others, like Germany, allow it.” Then each survey respondent reads *just one* of the following six vignettes:

“Suppose that the:

- **Constitutional Court** decided that wearing a Burqa is always **legal** because... [justification].
- **national parliament** passed a law that wearing a Burqa is always **legal** because... [justification].
- **EU** issued a binding directive that wearing a Burqa is always **legal** because... [justification].

<sup>10</sup> As we point out below (footnote 17, Fig. A6), most Germans, especially strong populists, do not support a decision to legalize wearing a Burqa.

- **Constitutional Court** decided that wearing a Burqa is always **illegal** because ... [justification].
- **national parliament** passed a law that wearing a Burqa is always **illegal** because ... [justification].
- **EU** issued a binding directive that wearing a Burqa is always **illegal** because ... [justification].

The first three statements justify legalizing the Burqa “because a ban would limit freedom of religion and expression.” The next three conditions justify banning the Burqa “because it interferes with the integration of immigrants in Germany.”

A potential criticism of the vignette descriptions of the FCC is that they simplify a more complex reality by stating the FCC “decided” wearing a Burqa is legal or illegal, instead of adding that the FCC decided whether a law passed by the Parliament is constitutional or not. Respondents, especially populists, may therefore believe the FCC is like the other two institutions precisely because they interpret the vignette as describing an all-powerful court acting on its own on the Burqa issue, like a parliament or the EU. Thus, populists might be fusing all three institutions, not because they view the FCC like the parliament or the EU, but because our vignette inaccurately portrays it that way.

We think it is unlikely that the phrase, “the Constitutional Court decided,” carries such sinister or inflated assumptions about the power and intentions of the FCC. In fact, this phrase (in German, “Das Bundesverfassungsgericht hat entschieden...”) is ubiquitous in the FCC’s own press releases about its decisions.<sup>11</sup> We are therefore confident that our introduction provided an appropriate cue for thinking about the FCC within the confines of its judicial authority. Still, future research should examine the degree to which the wording of the vignettes influences support for the three models in Fig. 1.

After reading the vignette, individuals were asked two questions measuring their *Support for Curbing*, the dependent variable in the analysis assessing respondents’ support for reducing the institution’s authority on the burqa issue. Specifically, respondents were asked whether they agreed with two Likert statements ranging from strongly disagree (1) to strongly agree (7):

- The [parliament’s/Constitutional Court’s/EU’s] decision should not be the last word on this issue and there should be an attempt to reverse the decision.
- Everyone (including the police and government) must comply with the law passed by the [parliament/Constitutional Court/EU]. (reversed).

Both items assess support for curbing the authority of an institution to make a binding decision on the burqa issue but neither supposes that the entire institution must be fundamentally altered. Support for curbing is reflected by agreement with the first item (“Overturn”) and disagreement with the second item (“Comply”),

<sup>11</sup> See [https://www.bundesverfassungsgericht.de/DE/Homepage/homepage\\_node.html](https://www.bundesverfassungsgericht.de/DE/Homepage/homepage_node.html) for the press releases announcing FCC decisions.

which was subsequently reverse-coded. Responses to the two items were combined into an index of Support for Curbing ranging from 2 to 14 (low to high support) and recoded to a 0 to 1 scale.<sup>12</sup> We discuss the two items at greater length in Appendix Fig. A2, where we present averages for different items across institutions, and Fig. A3, where we estimate all equations separately for the two items and find the results do not differ substantively from those reported for the index.

One clear advantage of our experiment is that we can examine the extent to which different institutions and their decisions influence support for curbing among populist and non-populist citizens. Because individuals are responding to experimental vignettes instead of observational occurrences, we can be confident that the randomly manipulated variables (institutions and decisions) lead to differences in curbing support across conditions.<sup>13</sup> On the other hand, because populism is observed, not manipulated, its effects are best characterized as moderating the influence of the randomly assigned information in the vignettes.

## Controls

While our experimental design involves random assignment, Kam and Trussler (2017) note the importance of including control variables for tests of heterogeneous treatment effects like ours where the moderating variable (i.e., populism) is observed and not randomly assigned. We therefore added several control variables in the analysis that might be associated with populism or support for power curbing. For example, because respondents on the extreme right may be both more populist and more critical of democratic institutions, we control for individuals' *Left–Right Self-Placement* (0=Left, 10=Right), which gauges the general ideological views of individuals across a range of cultural and economic issue conflicts (Klingemann, 1979; van Elsas & van der Brug, 2014). And since political parties like the AfD tend to be important vehicles for promoting populist sentiments, we measured *Partisanship* by asking respondents which party they identify with (see Appendix Table A1.B for the wording of all survey measures).<sup>14</sup> Finally, we control for several demographic characteristics (age, education, income, gender, along with whether respondents reside in the East or West) also described in the Appendix. As noted, all variables are coded to range from 0 to 1 to make the unstandardized coefficients easier to compare.

<sup>12</sup> Alpha for the index is .48, and the correlation between the two items for the pooled sample is .32, which is partially due to the fact that the items are worded in different directions, which suppresses correlations between Likert items (Paulhus 1991). See Bartels and Johnston (2020) for their use of both items.

<sup>13</sup> See also Werner's (2000) observational strategy using panel analysis to assess instrumental support for multiple referendums over time in the Netherlands.

<sup>14</sup> We decided against including evaluations of an institution's performance as a predictor because of endogeneity concerns (i.e., support for curbing an institution's authority may lead one to disapprove of its performance). Empirically, the decision not to include it in the analysis has no real impact on our results.

## Results

Table 1 displays the OLS regression results predicting support for curbing the institution's decision-making authority. Model 1 includes an interaction between populist attitudes and the institution treatment ( $FFC=0$ ,  $Parliament=1$ ,  $EU=2$ ).<sup>15</sup> To visualize these conditional relationships, we display in Fig. 3 the predicted values of support for power curbing across the range of the populism scale for the three institutions. On the left side of the figure, non-populist citizens are the least willing to curb the FCC, followed by parliament, and then the EU. Thus, respondents who do not hold populist preferences evidently consider the FCC to be an authoritative institution on the Burqa issue, followed by the parliament and the EU.

On the right-hand side of the graph, however, we see a distinctly different pattern as strong populists are more likely to endorse restricting the decision-making authority of all three institutions to a roughly *equal* degree, consistent with  $H_1$  (populists are more supportive of curbing) and  $H_{2c}$ . In other words, they do not recognize the legacy of the FCC but instead “fuse” all three institutions into one undifferentiated category (with the point of fusion between 0.6 and 0.8 on the populism scale). Consequently, owing to the differential judgments of non-populists, and the indiscriminate judgments of populist citizens, the relationship between populism and curbing is strongest for the FCC, followed by the parliament and the EU. Thus, the popularity of the FCC among non-populist individuals is key to understanding why the largest associations emerge for the FCC and the weakest for the EU. This evidence largely mirrors the pattern depicted in the fusion scenario in Fig. 1, indicating no support for the expectation ( $H_{2a}$  or  $H_{2b}$ ) that populists would recognize the (absolute or relative) exceptionalism of the FCC.

We also note that the effects of the control variables in Table 1 are much smaller than the institutional conditions on support for curbing. In particular, left–right self-placement hardly matters at all.<sup>16</sup> We also note that older, more educated, and affluent citizens are significantly less likely to support curbing institutions.

Finally, we note that these patterns are not a function of individuals' partisanship with the AfD and other parties. As can be seen in Table 1, partisan predictors are small and statistically insignificant for the most part. The only exceptions are the coefficients for the CDU/CSU ( $b=-0.06$ ), the FDP ( $b=-0.04$ ) and the Other category of partisans ( $b=-0.04$ ), indicating these groups of partisans are marginally less willing to curb institutions than the AfD (the baseline group). As noted, in Appendix Table A3, we estimate the effects of partisanship for curbing each of the three institutions separately, where we continue to find that support for curbing is

<sup>15</sup> In Appendix Table A3, we present the results of two models (with and without partisanship) for each of the three institutions to illustrate how the predictors vary in magnitude across institutions and whether the addition of partisanship significantly changes the effects of populism. Importantly, the results do not deviate from Table 1.

<sup>16</sup> The correlation ( $r=.22$ ) between populism and left–right self-placement indicates a modest tendency for conservatives to hold more populist preferences (see Appendix Fig. A1). However, including a quadratic Left–Right term to test for a curvilinear tendency of the far right and left to be more willing to curb institutions was never significant in any of the models of support for curbing.

largely unaffected by partisanship. Evidently, the sorting of voters into party constituencies does not detract from the moderating effect of populist attitudes.

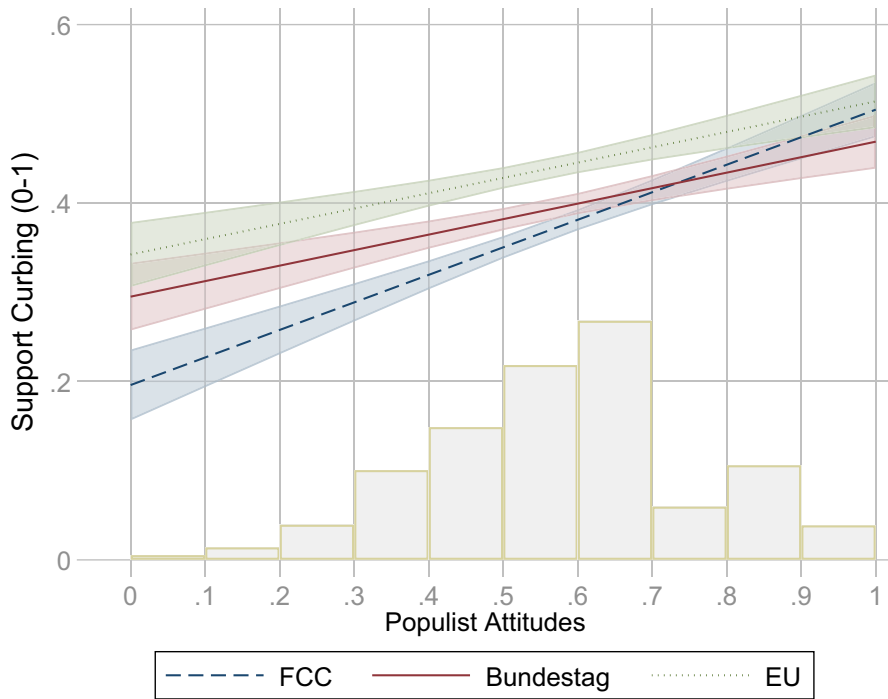
## Do the Effects of Populism Depend on the Burqa Decision?

Having shown that strong populists support curbing the decision-making power of all institutions equally, we now ask whether this pattern emerges primarily because populists disagree with the decision reached by an institution? After all, populist citizens may react to the Burqa decision instrumentally by rejecting the institution if they dislike a decision or by endorsing it when they approve of a verdict (Werner, 2020; Werner & Jacob, 2021). Or do populists tend to favor curbing democratic institutions even in the face of congenial decisions because institutions are lumped together? To test the third hypothesis, we add in Model 2 (Table 1) a 3-way interaction between *Populism*, *Institution Treatment* and *Decision Treatment* (illegal versus legal), as well as all lower-order terms. In addition, all controls from Model 1 are included. Given the difficulty of interpreting coefficients from a three-way interaction, we computed the predicted values for power curbing across different treatments and display them graphically in Fig. 4 below. Figure 4 is similar to Fig. 3, with the added twist that we present a breakdown of predicted values not only for institutional treatments but also the legality of the decision, with populism again being a moderator.

We observe two important findings in Fig. 4, thus adding nuance to the patterns presented in Fig. 3. First, support for curbing increases significantly by about 0.10 on the y-axis<sup>17</sup> among populist citizens when the institution makes a less congenial decision—i.e., when it makes wearing the burqa legal (right-hand graph) versus illegal (left-hand graph). The effect of the decision is much smaller, however, than the more general tendency for populists in both figures to support curbing *regardless* of the institution and the decision it makes. Thus, populists' support for curbing the courts (and other institutions) is not just based on purely instrumental policy concerns and is unlikely to be placated by more congenial policy decisions, which is consistent with the findings of a recent Dutch study (Werner & Jacobs, 2021). This is an important result since, as we show in Fig. A6 of the Appendix, strong populists clearly prefer the decision that makes the burqa illegal.<sup>18</sup> Thus, the clear fusion pattern we see in both graphs is noteworthy because it shows that populist citizens lump institutions together regardless of whether they like or dislike the decisions institutions make, evidencing a reservoir of ill will.

<sup>17</sup> In Appendix Fig. A7, we graph the estimated *contrast effects* for the legal vs. illegal decision conditions for each institution to show that above the mean of the populism index, an uncongenial “legal” decision significantly increases support for curbing for all three institutions.

<sup>18</sup> We asked respondents immediately after reading the vignettes to rate “the extent [they] support or oppose the decision” on a 5-point scale, recoded to 0 to 1. As we show in Appendix Fig. A6, strong populists clearly prefer the illegal to the legal decision. Of course, we do not use Support for the Decision to predict support for curbing because both questions were asked *after* the experimental manipulation (e.g., Montgomery, Nyhan and Torres 2018).



**Fig. 3** Predicting support for curbing, depending on the institution and populist attitudes. *Note* Predicted values and 95% confidence intervals are based on Model 1 estimates in Table 1. Estimated populism coefficients for the FCC ( $b=0.32$ ), Parliament (0.19) and the EU (0.19) are significant at the 0.01 level. The histogram shows there are ample cases at the strong populist end of the scale

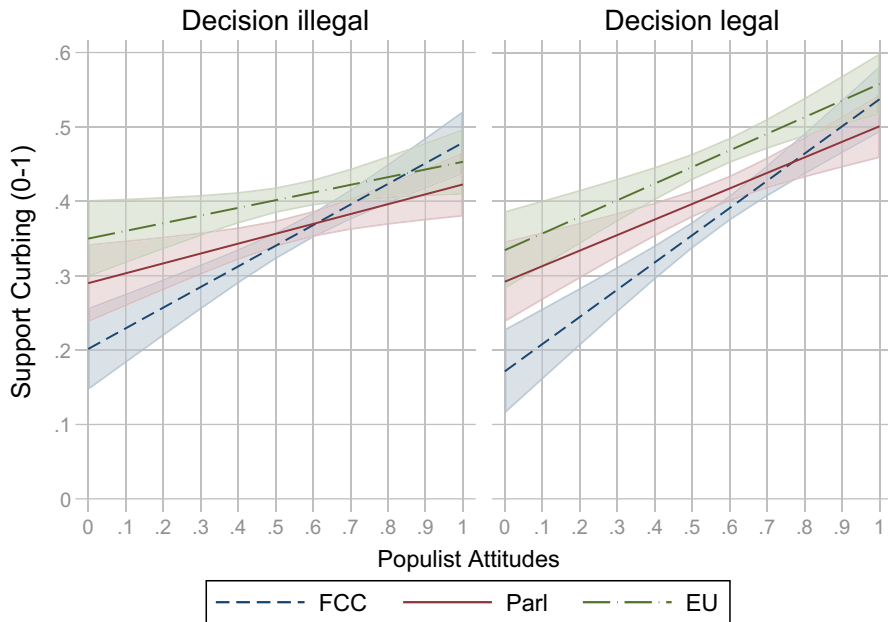
A second important finding is that, among non-populist citizens, we continue to observe the exceptionalism effect in both decision conditions, where support for curbing is lowest for the FCC, followed by the parliament and the EU, just as in Fig. 3. Thus, non-populist “losers” on policy decisions hold an important reservoir of good-will for the constitutional court’s authority, to some degree counterbalancing the ill will we observe among populist citizens.

To summarize, while our results are consistent with H3, in that populists are slightly more supportive of limiting the authority of an institution when they disagree with its decision, their support for curbing occurs even when populists support the institution’s decision.<sup>19</sup> Thus, the most important result of our analysis is that strong populist citizens support curbing the decision-making authority of all three institutions regardless of their specific verdict on a controversial issue.<sup>20</sup>

<sup>19</sup> When we re-estimate the models separately for each of the two indicators measuring support for curbing (overturn and comply with the decision), the results lead to the same conclusion (see Appendix Fig. A3).

<sup>20</sup> Our models explain a respectable portion of the variance in curbing support, considering respondents are reacting to a hypothetical scenario. A protracted and highly polarized constitutional crisis over curb-





**Fig. 4** Predicting curbing support from Populism, Institutions and Decision Direction. *Note* Predicted values and 95% confidence intervals are based on estimates from Model 2 of Table 1

## Robustness Checks

Prior to discussing the broader implications of our findings in the Conclusions, we briefly describe a series of robustness checks in the Appendix that provide confidence in our results. First, we investigate whether the tendency for populist citizens to fuse their support for curbing across institutions is due to their lower level of political involvement. It may be, for example, that populists with low levels of involvement tend to “lump” institutions together, as this reflects their lack of familiarity with and knowledge of different institutions. As we show in Fig. A9 of the Appendix, however, when we create a median split in the level of low and high political involvement in our sample, we find little support for this hypothesis. Second, the tendency for populist citizens to support curbing the FCC regardless of the policy direction of its decision appears unique to populism. As we show in Fig. A8 of the Appendix, when we estimate support for curbing the FCC across the Left–Right scale, curbing support is clearly conditional on rightists’ and leftists’ policy views. Rightists increase their support for curbing when the FCC decides the burqa is legal, while leftists’ support for curbing increases for an illegal decision. Thus, populists

Footnote 20 (continued)

ing a country’s constitutional court (e.g., Israel in 2023), on the other hand, would likely activate powerful predispositions like partisanship to increase the variance explained in curbing support.

seem to harbor a reservoir of ill will toward institutions that is unique to populist attitudes since it does not emerge for ideological predispositions. As a third robustness check, in Appendix Table A4, we show that the timing of the survey, occurring early in the COVID-19 pandemic (i.e., March 18–30, 2020), did not influence our results. When we include the dates respondents completed the interview, the associated coefficients are not statistically significant and do not change the effects of other predictors. Finally, while we do not have experimental data for other countries to replicate our findings, we provide evidence (Appendix Table A5 and Figs. A4 and A5) that German citizens, in important respects, are comparable to other European mass publics on key variables –i.e., Germany is what Seawright and Gerring (2008, 299) call a “typical case.”<sup>21</sup>

## Conclusion

The findings of our study unequivocally show that populist attitudes undermine citizens’ support for the decision-making authority of the constitutional court. Our national survey found that a nontrivial portion of citizens endorse populist sentiments, and these attitudes are strongly associated with a tendency to evaluate the FCC just like other institutions, such as the national parliament and the EU. And this is true even after we consider the institution’s policy decision as a predictor and include controls for a range of variables typically found to influence individuals’ views of institutions. The results are consistent with what we term a “fusion” model that assumes populist citizens’ support for power curbing makes no distinction between the national judiciary, parliament, and the EU because all three comprise “the system” which they denounce. In contrast, non-populist citizens distinguish between the three institutions in a way that reflects the conventional wisdom about institutional support within the German system; they display much less support for curbing the jurisdiction of constitutional courts compared to parliament and especially the EU. Additionally, among populist citizens, disagreement with an institution’s decision increases support for curbing, but their curbing support remains high even when the institution issues a congenial decision. Scholars of constitutional courts would conclude this is a worrisome development because populist citizens appear to harbor a reservoir of ill will toward constitutional courts instead of the unconditional good-will that contributes to their legitimacy (Gibson & Nelson, 2016; Gibson et al., 1998).

Our study thus adds an important dimension to understanding court-curbing. Bartels and Johnston’s (2020) study of Americans’ support for curbing the US

<sup>21</sup> A confirmatory factor analysis of the populism indicators from the Comparative Study of Electoral Systems (CSES round 5, 2016–2021) shows that, with the exception of Hungary, German and European respondents structure and interpret the CSES populism indicators identically, in a statistical sense (online Appendix Table A5). Also, the average level of support for populism in Germany is similar to 16 other democracies in the CSES study (Appendix Fig. A4). Finally, in Appendix Fig. A5, we use the 2016–2020 European Values Surveys to show the contemporary German public is quite representative in its level of confidence in the Judiciary, Parliament, and the EU, compared to 11 European countries.

Supreme Court finds the public's partisan and policy concerns often override their commitments to the principles of judicial independence and liberal democracy, a development that appears to be fueled, in part, by increased political polarization in the US (see also Graham & Svobik, 2020). One might be tempted to conclude that in a country like Germany, which has a far less polarized, multiparty system, the FCC would be immune from such trends. Yet, our study suggests that in Germany and in Europe more broadly, a different trend of rising populism is likely helping to fuel another strain of public support for curbing constitutional courts. Since FCC judges care about how the mass public perceives the court (Sternberg et al., 2015), future studies should monitor how populist attitudes continue to affect citizens' evaluations of the FCC.

We would be remiss if we did not mention several caveats. One arises from the fact that Germany's civil law tradition differs significantly from common law traditions (Rosenfeld, 2006). This, along with other national characteristics, may restrict the generalizability of our findings to the German public. We proffer three reasons why our study has important implications for public support for constitutional courts more broadly. First, even if we assume that common and civil law traditions are distinct at the level of constitutional courts, Germany's civil law tradition is shared by most continental European countries (Rosenfeld, 2006). Second, despite theoretical differences in, say, the common law tradition of the US and the civil law tradition of Germany, analysts note that, in practice, when it comes to constitutional courts (i.e., the US Supreme Court and the FCC), there is "no big gap in constitutional interpretation between the two constitutional adjudicators in terms of their interpretive latitude, despite the fact that they belong to different legal systems" (Arshakyan, 2013, 1334). Third, from the perspective of mass publics, differences in legal systems are doubtless much less important when a constitutional court reaches a decision on a politically charged issue, like abortion in the US or the crucifix decision in Germany. Our current multi-country study of both civil and common law nations focusing on mass support for broadly-targeted court curbing will allow us to address this issue.

Future research should also investigate the conditions under which populist citizens in Germany and elsewhere are willing to abolish or dramatically downgrade the broad powers of constitutional courts. After all, constitutional courts often challenge populist candidates and parties, as well as the "popular will." Analysts should therefore redouble their efforts to gauge whether citizens view constitutional courts in their country as legitimate in the twenty-first century (e.g., Gibson et al., 1998), since curbing the courts in a specific decision context often is the first line of attack by right-wing populists in their attempts to erode liberal democracies (Müller, 2023). Widespread public acceptance of the legitimacy of constitutional courts doubtless serves as a bulwark against attempts at democratic backsliding by right-wing populist governments. The torrent of sustained mass protest and opposition to the proposal by Israel's far-right government to essentially neuter the Israeli Supreme Court, long a protector of minority rights, is an excellent, though still unresolved, case in point (e.g., Friedman, 2022). In turn, weaker support for the legitimacy of the courts may open the door for populist elites to mobilize citizens against constitutional courts.

Last but certainly not least, our study raises questions about whether populists' willingness to curb the decision-making power of the Constitutional Court applies to other issues beyond the controversial cultural issues at the center of populists' dissatisfaction with liberal democratic institutions. Would the same pattern emerge if the FCC reached a controversial decision in the economic realm? For example, do populists accept the recent decision by the FCC to declare unconstitutional elements of the Federal budget? If such issues as housing, pensions and unemployment do not activate a core of cultural issues, as clearly happens for issues related to immigration and national identity, would right-wing populists react as strongly as they did on the Burqa issue? These and other questions deserve further attention in future research, thus underscoring the need to merge the study of public opinion about constitutional courts with analyses of other core institutions in liberal democracies.<sup>22</sup>

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## Declarations

**Ethical Approval** The questionnaire and methodology for this study was approved by the Institutional Review Board of the University of Kansas.

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<sup>22</sup> Replication code and data are available at Dataverse <https://doi.org/10.7910/DVN/EELNIC>.

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