

The Social and  
Political  
Foundations of  
Constitutions

# The Impact of Populism on Courts: Institutional Legitimacy and the Popular Will

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Policy Brief

FLJS

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The Foundation for Law, Justice and Society

in association with **the Centre for Socio-Legal Studies**  
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## The Foundation for Law, Justice and Society

### **The Social and Political Foundations of Constitutions**

Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented. Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects.

Drawing on the research and literature of politics, economics, and sociology, the programme examines the concept and practice of representation, the legislative process and the character of modern administrative government, and the role of the judiciary in shaping constitutional instruments such as bills of rights.



# Executive Summary

- There is a general trend among recent populist movements to implement measures that interfere with the independence and proper functioning of the judiciary. These movements frame the courts in opposition to the popular will.
- The relationship between the courts and the popular will is more complicated than the populists allege. One of the key determinants of the relationship is the institutional legitimacy of the courts. A better understanding of why and how courts may try to shore up their legitimacy suggests a number of subtle ways in which populism may impact the courts in the longer term (beyond more overt attempts to remove judges, pack courts, and so on).
- As a matter of constitutional theory, courts have to be critically concerned with their institutional legitimacy. As unelected officials wielding substantial political power, courts suffer, or at least perceive themselves to suffer, from a democratic deficit. Courts are also the weakest among the three branches of government, with little ability to resist incursions by the other two. Both factors incentivize courts to shore up their institutional legitimacy by playing to the popular will.
- Empirical evidence on the Supreme Court of the United States (by far the most common subject of such studies) clearly demonstrates that the Court's decisions track the general political mood over the long term, and that the Court's reward for doing so is enhanced legitimacy among the public. The mechanism by which the Court achieves this consistency with public opinion is not well understood. A plausible hypothesis is that the Court is actively cultivating its legitimacy by hewing close to public opinion over time.
- These insights from constitutional theory and political science suggest that courts in populist regimes may try to shore up their legitimacy through appeals to the popular will. If so, the populist agenda may impact the courts even without a populist government takeover, including the adoption of instrumental approaches to legal interpretation and judicial review that seek to accommodate the populist agenda. In all events, courts are likely to reinforce rather than resist larger political trends towards populism.

# The Impact of Populism on Courts:

## Institutional Legitimacy and the Popular Will

### Introduction

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One of the most pressing challenges raised by the global rise of populist movements is their threat to the independence and proper functioning of the judiciary. Indeed, there exists a general trend among emergent populist leaders to employ a range of measures, from adverse public remarks to more extreme measures like constitutional amendments and court-packing, designed to interfere with the independence of the judiciary as a constraint on government power.

In both Turkey and Hungary, for example, populist leaders have cemented their hold on power through constitutional amendments that enlarged their respective constitutional courts, which were then promptly packed with party loyalists. The Turkish amendments also affected judicial term limits, eligibility criteria, and selection procedures; the Hungarian amendments ousted the Constitutional Court's jurisdiction to review the legality of constitutional amendments altogether. Even in consolidated democracies like the United Kingdom and the United States, populist politicians have engaged in aggressive rhetoric against judicial independence.

When populists interfere with the courts in these ways, they claim — as is standard for such movements — to be acting in the name of the popular will. In fact, the relationship between courts and the popular will, even under ordinary liberal democratic conditions, is a rather complex one, both as a matter of constitutional theory and empirical fact. A better understanding of that complex

relationship can help us make some educated guesses about the likely longer-term impact that populism will have on the courts.

This policy brief begins with a few remarks on the nature of populism and its challenge to the courts. It then discusses the concept of institutional legitimacy and its dependence on the popular will. Although we tend to think about courts as insulated from the ebb and flow of public opinion, the brief draws on constitutional theory as well as empirical evidence to show the ways in which courts are and must be critically concerned with their esteem among the citizenry. Finally, the brief explains how the judicial concern about legitimacy provides an important mechanism by which populist movements are likely to impact the courts.

### The nature of populism

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Populism is usually defined by what it is against. The standard view is that populists are against elites, against constitutionalism, against democracy, and against liberalism. While this view sufficiently covers those instances of populism that have generated the most political and scholarly alarm, there are three important ways in which it must be qualified.

First, the populist rhetoric against elites is often hypocritical or insincere. Indeed, many populist leaders are themselves elites. Viktor Orbán, for example, Hungary's current prime minister and an archetypal populist leader, was educated at the University of Oxford (on a scholarship funded by George Soros, no less). Donald Trump, the US president and populist icon, is an Ivy League—

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educated, billionaire New Yorker who inherited large sums of family wealth. These populist champions are hardly men of the people. Moreover, while we tend to focus on the leaders who personify populist movements, many of the politicians and bureaucrats they bring into power with them were either already elites who profited under the pre-existing establishment now branded as 'corrupt', or quickly become new elites through the forms of crony capitalism frequently fostered by populist governments.

For these reasons, it is inaccurate to claim, as a general matter, that populist movements result in or even sincerely aim at a flattening of social and political relations. Contrary to their anti-elite rhetoric, it appears that populist movements thus far have more commonly resulted in a reshuffling of elites within a more or less pre-existing hierarchy. If that is so, then it is more accurate to claim that populists are opposed only to *certain* elites (seemingly on an instrumental basis), rather than opposed in principle to elites as such.

The second qualification to the standard view of populism concerns the extent of the populists' anti-constitutionalism. It is certainly true that populists are against constitutionalism in a thick sense of the term, referring not merely to a written document called a 'constitution' but to an efficacious body of legal and political principles that meaningfully constrain governmental power and protect civil liberties (especially for minorities), which principles are themselves embedded in a political culture committed to the rule of law.

However, populists are not necessarily against constitutionalism defined in a thin sense of the term; in the sense of governance that accords in a formal or technical sense with written rules in a constitution, including rules about what institutions there are, how they are constituted, and how they should function. Indeed, in Venezuela, Turkey, Hungary, Poland, and elsewhere, populist regimes have not only preserved the constitutional courts, but have pursued substantial parts of their policy reforms through the vehicle of constitutional amendments. While these

amendments are often intended to defeat constitutionalism in the thicker sense defined above, populists appear content (or even motivated) to work within a formal constitutional framework rather than to reject it root and branch.

From these two qualifications to the standard view follows the third, which is that populist movements appear to be pragmatic about the measures by which they seek to implement their agenda. Indeed, precisely because populism is based on what Cas Mudde calls a 'thin-centred ideology', it is capable of embracing a wide range of measures capable of achieving its narrow set of substantive ends.<sup>1</sup> This is part of what pits populism against liberalism, and why Jan-Werner Müller is right to claim that there is no such thing as an illiberal democracy.<sup>2</sup> Whereas liberalism is premised on a commitment to certain fair and democratic processes — on the idea that there are principled limits to the means by which one can pursue even the most desirable policies — populism is procedurally flexible, and will support, as Müller claims, whatever institutions, including constitutions and judges, further its narrow substantive aims.

This makes some practical sense from the populist perspective. Courts and constitutions are politically and symbolically powerful: it is better for populists to have the courts working with them than against them, and as long as the courts are working with them, they will have diminished incentives to interfere with them. A good example of this is the populist movement in the United States, which has been content to work with figures like Trump and other members of the political elite whom the populists believe will advance their agenda. Far from rejecting the US Constitution and the Supreme Court, American populists are highly committed to defending what they perceive to be the mission of those institutions.

What do these qualifications to the standard view of populism mean for the courts? Principally, that these institutions are likely to stick around. Populists seem prepared, at least presumptively, to work with elites, to work with judges and courts, and to work within

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formal constitutional frameworks, as long as — and this is the crucial point — these persons and institutions are suitably responsive to the demands of the populist movement. There are some reasons to think the courts will be attentive.

### Legitimacy in constitutional theory

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Constitutional theory supplies two significant reasons why courts have to be critically concerned with their legitimacy.

The first involves what Alexander Bickel famously called the 'counter-majoritarian dilemma'.<sup>3</sup> The dilemma embraces three related claims: first, that judges are unelected, and so suffer from a democratic deficit; second, that these unelected judges often have the power to invalidate the statutes of a democratically elected legislature; and third, that courts give certain groups an unequal opportunity to influence the political process. These features make courts easy targets for populists, but the relationship between courts and democracy is more complex than the counter-majoritarian dilemma would have it.

As John Hart Ely argued, for example, courts actually underpin the democratic framework by ensuring rights of political participation for citizens in both the majority and the minority.<sup>4</sup> Furthermore, it is unclear whether the counter-majoritarian dilemma is truly a 'dilemma'; which is to say, it may not be a bug, but simply a feature, of a healthy political system. In a liberal democracy committed to protecting the rights of political minorities, it is arguably desirable for courts to be counter-majoritarian, to curb precisely the discriminatory and authoritarian excesses displayed by some populist movements.

However, and this is the crux of the matter for present purposes, it is basically true that courts suffer, or at least perceive themselves to suffer, from a democratic deficit in some non-trivial way. This means that courts have to be concerned with other means by which they can shore up their institutional legitimacy.

The second reason that courts have to be concerned with their legitimacy is their relative institutional weakness among the three branches of government. As Justice Felix Frankfurter memorably put it, courts are 'possessed of neither the purse nor the sword'.<sup>5</sup> They must rely on the goodwill of the other two branches, and ultimately on the will of the electorate, to ensure compliance with their orders.

Moreover, in systems based on the separation of powers, courts not only check the excesses of the other branches of government, but have their own excesses checked by those same branches. These checks on the courts include the role of the executive and legislature in appointing and removing judges, adjusting their jurisdiction, and passing legislation or even constitutional amendments to correct bad decisions, as when the US Congress passed the 14th Amendment to overturn the Supreme Court's notorious *Dred Scott* decision that descendants of slaves could not be American citizens, and therefore had no standing to sue in federal court,<sup>6</sup> or the 16th Amendment to reverse the Supreme Court's *Pollock* decision to block federal income tax.<sup>7</sup>

In general, these balances on judicial power are desirable, and their exercise is not only compatible with but necessary for a healthy political system. It is a good thing that constitutions can be amended, so that successive generations can remake their social compact, and undesirable interpretations of their provisions are not unduly entrenched. Large-scale constitutional overhauls to usher in a wave of political reforms can also be a welcome development, as in South Africa at the end of apartheid.

Unfortunately, these same balancing tools are now being used by populist movements to suppress judicial independence and diminish the ability of the courts to check executive power. Given their relative institutional weakness, the courts have little in their own arsenal to fight back. It is perhaps an irony of the populist moment in global politics that these checks and balances of liberal democracy seem to work best when they are needed least, and are least effective when they are needed most.

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In Poland, for example, the ruling Law & Justice Party attempted in 2018 to set a new mandatory retirement age for judges, requiring them to leave the bench at sixty-five. Mandatory retirement ages for judges are not uncommon, and judging from the American experience, generally beneficial. Yet the net impact in Poland would have required around thirty of the eighty-two judges of the Supreme Court to step down, allowing Law & Justice to pack the judiciary with party loyalists. (The plan was scrapped following a ruling from the European Court of Justice suspending application of the law.) This kind of distortion of governance reforms, common among populists who have recently risen to power, leads to what Kim Lane Scheppele calls a ‘frankenstate’, where a government adopts a series of technical reforms that outwardly resemble aspects of good constitutional design found in liberal democracies, but which serve in fact to entrench the populist regime.<sup>8</sup>

For this reason, one should not place undue weight on the claims of Ran Hirschl and others who have warned of a global trend towards judicial supremacy, or what he calls ‘juristocracy’, which Hirschl describes as the ‘transfer [of] an unprecedented amount of power from representative institutions to judiciaries.’<sup>9</sup> While Hirschl is correct to emphasize that courts are powerful political institutions, and that their power is ultimately a product of strategic interplay between political and economic elites, one might question whether courts have achieved through this interplay the kind of consolidated supremacy he describes. Leaving aside the power that individual courts have achieved in this or that legal system, it is difficult to reconcile his claim with the fragility and powerlessness we are witnessing with respect to courts dealing with strong populist movements. The fact is that courts, in general, are institutionally quite weak, and judges themselves are painfully aware of this.

For both these reasons, concerning their democratic deficit and their relative weakness among the branches of government, courts have to be critically concerned with shoring up their institutional power by other means.

## Empirical evidence on judicial behaviour

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The available empirical evidence suggests one way that courts can, and sometimes successfully do, bolster their institutional strength; namely, by enhancing the public’s perception of their legitimacy through decisions that track the public’s prevailing political mood over time. By far the bulk of this empirical work has been done in the United States, and one ought to be cautious in generalizing its conclusions to other political communities. Courts are a very specific product of a nation’s history, culture, and political situation, and the way that they interact with the popular will certainly turns on complex local factors. Nevertheless, as long as it is kept in appropriate perspective, the dynamics described by the US data may have broader implications for how courts are likely to respond to populism.

In 1957, Robert Dahl published his well-known statistical analysis of the US Supreme Court’s decisions, concluding that the Court, over time, was typically in sync with public opinion about national policy.<sup>10</sup> Since then, a number of sophisticated studies have confirmed this claim. While the Supreme Court occasionally issues decisions that buck public opinion, empirical evidence conclusively shows that the Court, in the long run, consistently aligns itself with the prevailing political attitudes of the American public.

Multiple studies show that the liberalism of the Court’s decisions tends to move in sync with the liberalism of the public. For example, a 2010 study by Lee Epstein and Andrew Martin looked at more than 5,000 orally argued cases between 1958 and 2008, assessing whether the Court’s decisions were liberal or conservative. They then tracked those decisions against liberal or conservative shifts in the public mood. When the public mood is liberal, they found, ‘the Court is significantly more likely to issue liberal’ decisions, and vice versa.<sup>11</sup> To take another example, Gallup has regularly asked Americans since 1991 whether they view the Supreme Court as ‘too liberal,

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too conservative, or about right?’ The proportion of Americans saying that the Court is ‘too liberal’ or ‘too conservative’ has been roughly equal over the last three decades or so, indicating that the Court is successfully tacking to the political centre.<sup>12</sup>

There is another convincing set of evidence showing that the consistency with which the Court tracks the public’s political attitudes affects the public’s perception of the Court’s legitimacy. At the individual level, the more someone approves of the Court’s specific decisions, the more they support the Court overall.<sup>13</sup> And similarly, at the aggregate level, support for the Court is higher the more closely it sticks to shifts in the political mood.<sup>14</sup>

In sum, the data show that the Court’s decisions have tended to track the general political mood over the long term, and that the Court’s reward for doing so is enhanced legitimacy among the public. What remains unknown is the mechanism by which the Court achieves this consistency between its decisions and prevailing political attitudes. It may be a case of correlation: whatever factors cause public opinion to shift in one direction may be the very factors causing the Justices’ political opinions to shift in that same direction.<sup>15</sup> Another plausible explanation is the so-called ‘strategic behaviour hypothesis’, which posits that the Court is actively cultivating its legitimacy by consciously pinning its colours to the mast of public opinion over time.<sup>16</sup> The Court’s democratic deficit and relative institutional weakness certainly give it very strong incentives to do this.<sup>17</sup> Some recent studies suggest that judges are acting on just these incentives.<sup>18</sup>

Beyond the United States, there is some evidence from Eastern Europe that is at least consistent with these conclusions. In a 2002 study by Ishiyama Smithey and Ishiyama, they analysed the behaviour of constitutional courts in eight post-Communist countries during their first three years of interpreting new democratic constitutions, looking at the factors that affected whether judges would strike down legislation. They reported a ‘strong linear relationship ... between the degree of popular trust

in the courts and the degree of judicial activism’.<sup>19</sup> This is consistent with the view that judges tailor their behaviour according to their sense of the public’s support for them.

In one sense, this research challenges and complicates the claim that courts are counter-majoritarian institutions,<sup>20</sup> but it also potentially underscores that claim by showing that courts are responsive to the underlying concerns. Whatever the mechanism that causes courts to follow shifts in public sentiment, the available evidence tells us that they certainly do follow it.

### **Populism’s impact on courts**

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The constitutional theory and political science surveyed in this brief are rich enough to permit some cautious, high-level speculation about the impact that populist movements might have on the courts. Of course, we have already witnessed overt attempts to interfere with the judiciary, such as the removal of judges, ousters of jurisdiction, court-packing, and an increased role for the executive in day-to-day court administration. Historically, this has been standard practice for regimes with autocratic leanings seeking to consolidate their power by improper means. To achieve judicial capitulation to an executive programme, it is often unnecessary for such regimes to implement any of these strategies to their fullest possible extent — replacing just a few judges, or simply threatening to limit jurisdiction, can be enough to improve judicial compliance.

However, in light of the dynamics surveyed in this brief, the populist agenda may impact the courts in more subtle ways, especially if courts in populist regimes try to shore up their legitimacy through various appeals to the popular will. Significantly, institutional legitimacy may provide a mechanism through which populists can influence courts even without taking control of government. It may take only the threat of populist control, or even simply a significant shift in the national mood towards populist sentiments, for courts to begin implementing the populist agenda.

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There are a number of ways that courts may bend towards populism. First, they may begin to shun liberal interpretations of the law in favour of interpretations that serve populist sentiment.

Second, courts may adopt a certain instrumentalist approach to judicial review. As we have seen, populists do not seem to be against courts in principle, and they seem to be pragmatic about procedural concerns, such as judicial review. If that is correct, we may see courts adopting a similarly pragmatic approach to judicial review, in which they adopt weak-form review of reforms championed by populists, and strong-form review of measures that conflict with the populist agenda.

Third, judges might engage the public more overtly than they typically do in an attempt to educate them about what judges do and thereby shore up public support for an anti-populist judicial agenda. This may be a positive development. Interestingly, some judges in Poland have begun employing this tactic, hosting public events where citizens can interact with them and learn about their work. Their efforts are supported by sound empirical evidence, from the US and elsewhere, that public support for courts increases the more the public knows about them.<sup>21</sup>

Finally, one of the most far-reaching impacts of populism tends to be its politicization of everything, including institutions one did not previously think of in political terms. We have seen populism politicize the media, universities, and religious institutions, and we may yet see the judiciary become increasingly politicized. This is likely a mixed blessing. On the one hand, scholars have long understood that courts claim an objectivity for their decisions that they can never fully achieve. In truth, adjudication is rich with controversial, value-laden decisions about how economic, political, and social

relations ought to be structured. If there is a silver lining to the populist challenge to courts, it is that these value-based disagreements might be made more public, and therefore more accountable. On the other hand, this may well undermine rather than enhance the courts' legitimacy in the eyes of the public, which may in turn diminish their efficacy in performing the many tasks we depend on them to perform.

## Conclusion

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Some scholars have argued that courts are one of the most important defences against the rising tide of populism, and that dedicating resources to building popular support for the courts will put them in the best position to protect liberal democracy. Certainly, popular support for a liberal democratic judicial programme should be pursued by all reasonable means. In this vein, we have seen masses of people in Poland mobilizing behind the independence of the judiciary. That is obviously something to be encouraged.

However, we should not overestimate the extent to which the courts, as a general matter, will be willing or able to defend against the threats of populism. Wherever the dynamics of institutional legitimacy apply, courts will tend, as Dahl put it, to be part of whatever 'dominant national alliance' prevails at the time.<sup>22</sup> As Daniel Smilov noted some years ago with respect to Eastern Europe, the courts there 'have proven sensitive and accommodating to rising political tides', and there has been 'no systematic and committed judicial resistance to populism'.<sup>23</sup> While courts are very capable of influencing public opinion on discrete substantive issues, the empirical evidence we have suggests that, in the long term, courts will reinforce rather than lead larger political trends towards or away from liberalism.

## Notes

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- <sup>1</sup> Cas Mudde, 'The Populist Zeitgeist', *Government & Opposition* 39 (2004): 541, 543.
  - <sup>2</sup> Jan-Werner Müller, *What Is Populism?* (London: Penguin, 2016).
  - <sup>3</sup> Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962).
  - <sup>4</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980).
  - <sup>5</sup> *Baker v. Carr*, 369 U.S. 186, 267 (1962).
  - <sup>6</sup> *Dred Scott v. Sandford*, 60 US (19 How) 393 (1857).
  - <sup>7</sup> *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895).
  - <sup>8</sup> Kim Lane Scheppelle, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work', *Governance* 26 (2013): 559.
  - <sup>9</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004), 1.
  - <sup>10</sup> Robert Dahl, 'Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker', *Journal of Public Law* 6 (1957): 279.
  - <sup>11</sup> Lee Epstein and Andrew Martin, 'Does Public Opinion Influence the Supreme Court — Possibly Yes (But We're Not Sure Why)', *University of Pennsylvania Journal of Constitutional Law* 13 (2010): 263, 263.
  - <sup>12</sup> Joseph Daniel Ura and Alison Higgins Merrill, 'The Supreme Court and Public Opinion' in Lee Epstein and Stefanie A. Lindquist (eds), *The Oxford Handbook of U.S. Judicial Behavior* (Oxford: University Press, 2017), 435–7.
  - <sup>13</sup> Brandon L. Bartels, and Christopher D. Johnston, 'On the Ideological Foundations of Supreme Court Legitimacy in the American Public', *American Journal of Political Science* 57 (2013): 184.
  - <sup>14</sup> Robert H. Durr et al., 'Ideological Divergence and Public Support for the Supreme Court', *American Journal of Political Science* 44 (2002): 768.
  - <sup>15</sup> Epstein and Martin, 'Does Public Opinion Influence the Supreme Court?'
  - <sup>16</sup> Christopher J. Casillas et al., 'How Public Opinion Constrains the U.S. Supreme Court', *American Journal of Political Science* 55 (2011): 74.
  - <sup>17</sup> Tom S. Clark, *The Limits of Judicial Independence* (New York: Cambridge University Press), 21–2.
  - <sup>18</sup> Casillas et al., 'How Public Opinion Constrains the U.S. Supreme Court'; Amanda C. Bryan and Christopher D. Kromphardt, 'Public Opinion, Public Support, and Counter-Attitudinal Voting on the U.S. Supreme Court', *Justice Systems Journal* 37 (2016): 298.
  - <sup>19</sup> Shannon Ishiyama Smithey and John Ishiyama, 'Judicial Activism in Post-Communist Politics', *Law & Society Review* 36 (2002): 719, 736.
  - <sup>20</sup> Michael C. Dorf, 'The Majoritarian Difficulty and Theories of Constitutional Decision Making', *University of Pennsylvania Journal of Constitutional Law* 13 (2010): 283.
  - <sup>21</sup> James L. Gibson, 'The Legitimacy of the U.S. Supreme Court in a Polarized Polity', *Journal of Empirical Legal Studies* 4 (2007): 507; James L. Gibson and Gregory A. Caldeira, 'Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court', *Journal of Politics* 71 (2009): 429.
  - <sup>22</sup> Dahl, 'Decision-Making in a Democracy'.
  - <sup>23</sup> Daniel Smilov, 'Populism, Courts and the Rule of Law: Eastern European Perspectives', Foundation for Law, Justice and Society Policy Brief, available at: <https://www.fljs.org/content/populism-courts-and-rule-law>
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### The Foundation

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The logo for the Foundation for Law, Justice and Society (FLJS) features the letters 'FLJS' in a large, light-colored, sans-serif font. A small '+' sign is positioned between the 'J' and 'S'.

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